

2013 LALIVE LECTURE

The Case Law of the ICJ in Investment Arbitration

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The topic of this Lalive Lecture is austere. But it has the merit of opening wider perspectives than it seems at first glance. Through the prism that I have chosen, we can, I think, address interesting doctrinal issues which are not devoid of practical consequences: what is the nature of the ‘ICSID system’? A legal order? A ‘sub-system’ of general international law? A ‘*sui generis*’ Unidentified Juridical Object (UJO)—the refuge of doctrinal *non possumus*...? And how, and to what extent, in this ‘system’ (a word to which I do not give any precise theoretical sense yet), does one use tools of general international law? Should we think in terms of relations between legal orders or legal systems? Or in terms of normative interactions? Although I do not pretend to give definitive answers to these broad questions, I will keep them in mind when trying to describe the areas in which ICSID tribunals resort to the jurisprudence of the World Court—a term which I take to include the International Court of Justice (ICJ) and its predecessor, the Permanent Court—and the way they do it.

First, a preliminary question: why not ‘the ICSID jurisprudence in the decisions of the International Court of Justice’?

The answer could simply be that it is not the topic of tonight’s conference. But there are also good reasons. First, there may be some doubt about the existence of ‘ICSID jurisprudence’; I do not get into the discussion of this vast issue, about which much has already been written.² Let’s just say that I think

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² See eg Klaus Peter Berger, ‘The International Arbitrators’ Application of Precedents’ (2008) 5(3) TDM; Andrea K Bjorklund, ‘The Emerging Civilization of Investment Arbitration’ in Thomas E Carbonneau and Angelica M Sinopole (eds), *Building the Civilization of Arbitration* (Simmonds & Hill 2010) 247–78; Charles N Brower, Michael Ottolenghi and Peter Prows, ‘The Saga of CMS: *Res Judicata*, Precedent and the Legitimacy of ICSID Arbitration’ in Christina Binder et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 843–64; Chester Brown, ‘The Use of Precedents of other International Courts and Tribunals in Investment Treaty Arbitration’ (2008) 5(3) TDM; Tai-Heng Cheng, ‘Precedent and Control in Investment Treaty Arbitration’ (2006) 30 Fordham Intl LJ 1014; JP Commission, ‘Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence’ (2007) 24 J Intl Arb 129; Domenico di Pietro, ‘The Use of Precedents in ICSID Arbitration: Regularity or Certainty?’ (2007) 3 Intl ALR 92; Zachary Douglas, ‘Can a Doctrine of Precedent be Justified in Investment Treaty Arbitration?’ (2010) 25 ICSID Rev—FILJ 104; Ole Kristian Fauchald, ‘The Legal Reasoning of ICSID Tribunals—An Empirical Analysis’ (2008) 19 EJIL 301; Judith Gill, ‘Is There a

there exists ‘some’ *jurisprudences constantes* on a limited number of points [some of which, it is true, are important (such as recognition of the *ius standi* of shareholders or the binding force of provisional measures—two areas in which the Court has played a role)] and an unfortunate jurisprudential mess on many others—eg with regard to the definition of an ‘investment’,³ the consequences of most favored nation (MFN) clauses⁴ or umbrella

Special Role for Precedent in Investment Arbitration?’ (2010) 25 ICSID Rev—FILJ 87; Gilbert Guillaume, ‘The Use of Precedent by International Judges and Arbitrators’ (2011) 2 JIDS 5; Marc Jacob, ‘Precedents: Lawmaking Through International Adjudication’ (2011) 12 German LJ 1005; Gabrielle Kaufmann-Kohler, ‘Arbitral Precedent: Dream, Necessity or Excuse?—Freshfields Arbitration Lecture 2006’ (2007) 23 Arb Intl 357; Catherine Kessedjian, ‘To Give or Not to Give Precedential Value to Investment Arbitration’ in Roger P Alford and Catherine A Rogers (eds), *The Future of Investment Arbitration* (OUP 2009) 43; Nathan Miller, ‘An International Jurisprudence?: The Operation of “Precedent” across International Tribunals’ (2002) 15 LJIL 483; Jan Paulsson, ‘The Role of Precedent in Investment Arbitration’ in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (OUP 2010) 699; Lucy Reed, ‘The *De Facto* Precedent Regime in Investment Arbitration: A Case for Proactive Case Management’ (2010) 25 ICSID Rev—FILJ 95; W Michael Reisman, ‘“Case Specific Mandates” versus “Systemic Implications”: How Should Investment Tribunals Decide?—Freshfields Arbitration Lecture 2012’ (2013) 2 Arb Intl 131; Andrés Rigo Sureda, ‘Precedent in Investment Treaty Arbitration’ in Christina Binder et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 830; Giorgio Sacerdoti, ‘Precedent in the Settlement of International Economic Disputes: The WTO and Investment Arbitration Models’ (2011) *Contemporary Issues in International Arbitration and Mediation: the Fordham Papers 2010* 225; Stephan W Schill, ‘System-building in Investment Treaty Arbitration and Lawmaking’ (2011) 12 German L J 1083; Christoph Schreuer and Matthew Weiniger, ‘A Doctrine of Precedent?’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 1188; Mounir Snoussi, ‘La cohérence de la jurisprudence du CIRDI’ in Ferhat Horchani (ed), *Où va le droit international de l’investissement?: désordre normatif et recherche d’équilibre: actes du colloque organisé à Tunis les 3 et 4 mars 2006* (Pedone 2007) 259; Valentina S Vadi, ‘Towards Arbitral Path Coherence & Judicial Borrowing: Persuasive Precedent in Investment Arbitration’ (2008) 5(3) TDM; W Mark C Weidemaier, ‘Toward a Theory of Precedent in Arbitration’ (2010) 51 William & Mary L Rev 1895; J Romesh Weeramantry, ‘The Future Role of Past Awards in Investment Arbitration’ (2010) 25 ICSID Rev—FILJ 111 and Georgios I Zekos, ‘Precedent and *Stare Decisis* by Arbitrations and Courts in Globalization’ (2009) 10 J World Inv and Trade 475.

³ See eg *Fedax NV v Republic of Venezuela*, ICSID Case No ARB/96/3, Decision on Jurisdiction (11 July 1997); *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction (31 July 2001); *Consortium Groupement LESI—DIPENTA v People’s Democratic Republic of Algeria*, ICSID Case No ARB/03/8, Award (10 January 2005); *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005); *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Decision on Jurisdiction (16 June 2006); *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*, ICSID Case No ARB/03/16, Decision on Jurisdiction (2 October 2006); *Helnan International Hotels A/S v Arab Republic of Egypt*, ICSID Case No ARB/05/19, Decision on Jurisdiction (17 October 2006); *Patrick Mitchell v Democratic Republic of the Congo*, ICSID Case No ARB/99/7, Decision on Annulment (1 November 2006); *Saipem SpA v People’s Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007); *Malaysian Historical Salvors, SDN, BHD v Malaysia*, ICSID Case No ARB/05/10, Award (17 May 2007) and Decision on Annulment (16 April 2009); *Ioannis Kardassopoulos v Georgia*, ICSID Case No ARB/05/18, Decision on Jurisdiction (6 July 2007); *MCI Power Group LC and New Turbine, Inc v Republic of Ecuador*, ICSID Case No ARB/03/6, Award (31 July 2007); *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No ARB/05/8, Award (11 September 2007); *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2, Award (8 May 2008); *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No ARB/05/22, Award (24 July 2008); *Phoenix Action, Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009); *Alpha Projektholding GmbH v Ukraine*, ICSID Case No ARB/07/16, Award (8 November 2010); *Malicorp Limited v Arab Republic of Egypt*, ICSID Case No ARB/08/18, Award (7 February 2011); *Abaclat and others v Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011); and *Ambiente Ufficio SpA and others v Argentine Republic*, ICSID Case No ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013).

⁴ See eg *Emilio Agustín Maffezini v Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction (25 January 2000); *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005); *Gas Natural SDG, SA v Argentine Republic*, ICSID Case No ARB/03/10, Decision on Jurisdiction (17 June 2005); *Suez, Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales del Agua SA v Argentine Republic*, ICSID Case No ARB/03/17, Decision on Jurisdiction (16 May 2006); *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/03/19, Decision on Jurisdiction (3 August 2006); *Telenor Mobile Communications AS v Republic of Hungary*, ICSID Case No ARB/04/15, Award (13 September 2006); *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/04/14, Award (8 December 2008); *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic*, ICSID Case No ARB/03/23, Award (11 June 2012); *ICS Inspection and Control Services Limited (United Kingdom) v The Republic of Argentina*, UNCITRAL, PCA Case No 2010-9, Award on Jurisdiction (10 February 2012) and *Daimler Financial Services AG v Argentine Republic*, ICSID Case No ARB/05/1, Award (22 August 2012). For a

clauses⁵—but speaking of ‘the’ ICSID jurisprudence would be very audacious.⁶ Secondly and most importantly, the ICJ simply does not refer to ICSID decisions or awards. The Court—mindful of its prestige—seems to ignore the case law of other international courts and tribunals and, as Maurice Mendelson put it, it ‘regards itself, as the supreme public international law tribunal, and as such would not wish to be seen to rely too heavily on the jurisprudence of other bodies’.⁷ Globally, this indifference is, in fact, less pronounced than it appears,⁸ but it is complete as far as ICSID is concerned; and, while it is true that the cases which are put before the Court do not lend themselves to references to specific ICSID jurisprudence, it should be noted that investment tribunals implement general principles, the scope of which goes far beyond investment law alone. The *Diallo* case could have been an opportunity for the Court to focus more directly on ICSID arbitration; not only has the Court not referred to it, but the judgment of 24 May 2007 on preliminary objections shows the great caution, to say the least, of the World Court *vis-à-vis* the ICSID system.

After having noted that, ‘in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments’, such as bilateral investment treaties (BITs) or the ICSID Convention, ‘and also by contracts between States and foreign investors’,⁹ the Court, ‘having carefully examined State practice and decisions of international courts and tribunals in respect of diplomatic protection of *associés* and shareholders, is of the opinion that these do not reveal—at least at

recent overview, see Julie A Maupin, ‘MFN-based Jurisdiction in Investor–State Arbitration: Is There Any Hope for a Consistent Approach?’ (2011) 14 JIEL 157.

⁵ See eg *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision on Jurisdiction (6 August 2003); *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision on Jurisdiction (29 January 2004); *Joy Mining Machinery Limited v Arab Republic of Egypt*, ICSID Case No ARB/03/11, Decision on Jurisdiction (6 August 2004); *Salini Costruttori SpA and Italstrade SpA v Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction (29 November 2004); *Sempra Energy International v Argentine Republic*, ICSID Case No ARB/02/16, Decision on Jurisdiction (11 May 2005); *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8, Award (12 May 2005) and Decision on Annulment (25 September 2007); *Eureko BV v Republic of Poland*, *ad hoc* Arbitration, Partial Award (19 August 2005); *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award (12 October 2005); *El Paso Energy International Company v Argentine Republic*, ICSID Case No ARB/03/15, Decision on Jurisdiction (27 April 2006) and Award (31 October 2011); *BP America Production Company and others v Argentine Republic*, ICSID Case No ARB/04/8, Decision on Preliminary Objections (27 July 2006); *Duke Energy Electroquil Partners and Electroquil SA v Republic of Ecuador*, ICSID Case No ARB/04/19, Award (18 August 2008); *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Award (27 August 2008); *Continental Casualty Company v Argentine Republic*, ICSID Case No ARB/03/9, Award (5 September 2008); *SGS Société Générale de Surveillance SA v Republic of Paraguay*, ICSID Case No ARB/07/29, Decision on Jurisdiction (12 February 2010) and Award (10 February 2012); *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Jurisdiction (2 June 2010); *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*, ICSID Case No ARB/07/14, Award (22 June 2010); *ibid EDF; Bosh International, Inc and B&F Ltd Foreign Investments Enterprise v Ukraine*, ICSID Case No ARB/08/11, Award (25 October 2012); and *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/09/2, Award (31 October 2012).

⁶ However, some ICSID tribunals do refer to the ‘ICSID Jurisprudence’. For a recent example, see *Mr Franck Charles Arif v Republic of Moldova*, ICSID Case No ARB/11/23, Award (8 April 2013) paras 383, 630.

⁷ Maurice Mendelson, ‘The International Court of Justice and the Sources of International Law’ in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (CUP 1996) 83.

⁸ Alain Pellet, ‘Article 38’ in Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, OUP 2012) 858–859, para 317.

⁹ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Preliminary Objections: Judgment) [2007] ICJ Rep 614, para 88.

the present time—an exception in customary international law allowing for protection by substitution, such as is relied on by Guinea'.¹⁰ And regardless of the fact that

various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal regimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, [this] is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary.¹¹

This is tenable in the abstract; it is nevertheless quite cavalier for the thousands of BITs and contracts and the hundreds of sentences that form the contemporary investment law but are, nevertheless, reduced to the rank of 'specific regimes'. In any event, it is evident that 'there is no obstacle in international law to the expression of the will of States through treaties being at the same time an expression of practice and of the *opinio juris* necessary for the birth of a customary rule if the conditions for it are met';¹² and, one day, it will have to be admitted that the critical mass has been reached. In *Mondev*, the Tribunal expressed the view that 'such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law'.¹³ Whatever the ICJ may think, it seems to me that the threshold has been reached, even though it is difficult for me to take this criticism any further: I developed this argument on behalf of Guinea¹⁴ and... I have obviously failed to convince the Court, and cursing one's judges is unseemly (even if they are wrong!).

Nevertheless, if the ICJ is not more responsive to the deep changes in investment law—and, more broadly, in international law—it may find itself locked in an ivory tower, which could again empty its docket and take it back to its drowsiness of the 1970s. As the CMS Tribunal noted in its Decision on Jurisdiction of 17 July 2003, 'the fact is that *lex specialis* in this respect is so prevalent that it can now be considered the general rule, certainly in respect of foreign investments and increasingly in respect of other matters'.¹⁵

In any event, as seen from The Hague, the relations between the two jurisprudences do not lend themselves to long developments although we may still draw two conclusions from the rare pronouncements of the Court on that matter: First, it seems that the Court does not accept the existence of an 'ICSID system' but only of a series of special rules applicable on a case-by-case. Secondly, these special rules are rooted in international law that the ICJ is to apply pursuant to its function.

Now, what is the situation from the ICSID perspective? (The term 'ICSID' covers both the 'soft' institutional mechanism set up by the 1965 Washington

¹⁰ *ibid* 615, para 89.

¹¹ *ibid* 615, para 90.

¹² *Sempra Energy* (n 5) para 156.

¹³ *Mondev International Ltd v United State of America*, ICSID Case No ARB(AF)/99/2, Award (11 October 2002) para 117.

¹⁴ *Diallo* (n 9) Pleading of 28 November 2006 (morning), CR 2006/51, 37–50, and in particular 41–3, paras 10–12 and Pleading of 1 December 2006 (morning), CR 2006/53, 33–42, and in particular 37–8, paras 11–12.

¹⁵ *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8, Decision on Jurisdiction (17 July 2003) para 48.

Convention, starting with the arbitral tribunals and *ad hoc* committees, as well as awards and decisions of these bodies, and the ‘ICSID system’ considered empirically).

It is well known that, just as the ICJ, ICSID tribunals are not bound by the rule of *stare decisis*. From a bird’s eye view, ICSID tribunals use case law, as does any other international court or tribunal. Like the ICJ,¹⁶ the International Tribunal for the Law of the Sea,¹⁷ the panels and the Dispute Settlement Body (DSB) of the WTO,¹⁸ the regional courts of human rights,¹⁹ criminal courts or tribunals,²⁰ ICSID tribunals and investment tribunals in general refer to ‘judicial decisions’ as ‘subsidiary means for the determination of rules of law’ according to the famous formula of Article 38(1)(d) of the Statute of the International Court of Justice to which Article 42(1) of the ICSID Convention²¹ implicitly refers.²²

As the Tribunal in *AWG v Argentina* put it:

Although this tribunal is not bound by such prior decisions, they do constitute ‘a subsidiary means for the determination of the rules of [international] law’. Moreover, considerations of basic justice would lead tribunals to be guided by the basic judicial principle that ‘like cases should be decided alike’, unless a strong reason exists to distinguish the current case from previous ones. In addition, a recognized goal of international investment law is to establish a predictable, stable legal framework for investments, a factor that justifies tribunals in giving due regard to previous decisions on similar issues. Thus, absent compelling reasons to the contrary, a tribunal should always consider heavily solutions established in a series of consistent cases.²³

As close as it may seem to that of the ICJ and the other bodies that I just mentioned, this practice of ICSID tribunals nevertheless presents some distinctive features that reflect the special characteristics of ICSID, which inevitably influences the use of precedents by arbitral tribunals and *ad hoc* committees. Resulting from a not always harmonious marriage between public international law and commercial arbitration,²⁴ ICSID, first, remains rooted in public

¹⁶ *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (Judgment) General List No 75 [1992] ICJ Rep 589–601, paras 386–404. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 131–4, paras 214–223 and 209, para 403; and *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, (Merits: Judgment) [2010] ICJ Rep 663–4, paras 64–8.

¹⁷ *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment, 14 March 2012) ITLOS Case No 16, para 184.

¹⁸ *US—Stainless Steel (Mexico)*, Appellate Body Report 30 April 2008 (adopted on 20 May 2008) WT/DS344/AB/R, 65–8, paras 154–62.

¹⁹ *Cossey v The United Kingdom*, ECtHR App No 10843/84 (1990) Series A, Vol 184, para 35.

²⁰ *Prosecutor v Kupreškić*, ICTY, Case No IT-95-16-T, Judgment (14 January 2000) para 540. See also *Prosecutor v Zlatko Aleksovski*, ICTY, Case No IT-95-14/1-A, Appeal Chamber, Judgment (24 March 2000) paras 89–114 (see also paras 122–36 and 137–46).

²¹ See *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (18 March 1965) para 40. ‘The term “international law” as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes.’

²² In an Award of 22 June 2010, an ICSID Tribunal noted that: ‘While Article 38.1.d. of the Statute of the International Court of Justice expressly mandates the Court to also take into account “judicial decisions”, there is no such express rule either in the ECT, the ICSID Convention or other applicable part of international law as to whether, and if so to what extent, arbitral awards are of relevance to the Tribunal’s task’. See *Liman Caspian Oil* (n 5) para 172.

²³ *AWG Group Ltd v The Argentine Republic*, UNCITRAL, Decision on Liability (30 July 2010) para 189. In some cases, ICSID tribunals have referred to ‘the role of judicial decisions as a source of international law in Art 38(1) of the Statute of the International Court of Justice’. See *Camuzzi International SA v Argentine Republic*, ICSID Case No ARB/03/2, Decision on Jurisdiction (11 May 2005) para 135; see also *Sempra Energy* (n 5) para 147; such formulations are misleading.

²⁴ Bjorklund (n 2) 272.

international law. It was created by treaty, it comes under what Charles Leben named a '*logique internationaliste*' (public international law logic),²⁵ and as I just mentioned, absent an agreement between the parties to the contrary, ICSID tribunals are required to apply 'such rules of international law as may be applicable'—a formula which is much more meaningful in French: '*les principes du droit international en la matière*'.²⁶

Secondly, as the World Court, but unlike the DSB or the regional courts of human rights, 'the Centre and ICSID tribunals appointed by the Centre, do not have general jurisdiction over States—they are tribunals of limited powers; and no presumption in favour of their jurisdiction can be made';²⁷ therefore, their decisions are 'case-specific'.

Unlike a standing adjudicative body which addresses multiple disputes (for example, the Iran-United States Claims Tribunal . . .), an arbitral panel that is focused on a particular dispute is not confronted with the possibility that it will need to apply an earlier decision in a later proceeding. Likewise, an arbitral tribunal is not confronted with the task of reconciling its later decisions with its earlier ones.²⁸

Thirdly, more than commercial arbitration mechanisms, ICSID is semi-institutionalized: a developed Secretariat with solid traditions; rules of procedures reasonably well established; an almost systematic publication of awards; and an annulment procedure. But as debatable as the formula may be, each tribunal claims to be 'sovereign',²⁹ and the intervention of *ad hoc* committees [also constituted on a case-by-case basis (unfortunately in my opinion)] contributes only marginally to the standardization of the jurisprudence: 'The annulment mechanism is not designed to bring about consistency in the interpretation and application of international investment law.'³⁰

Fourthly, the applicable law before ICSID tribunals is often vague and uncertain and is swarmed with what Lucy Reed has called 'elastic legal concepts':³¹ 'fair and equitable treatment', 'most favoured nation', 'umbrella clause', not to mention the concept of 'creeping expropriation' or the definition of the word 'investment'. Consequently, '[t]he core legal concepts of international investment law . . . only assume a more concretized meaning over time because of the interpretations investment treaty tribunals give to them in their decisions.'³²

In its elucidating function, case law plays an important—if not decisive—role: it appears as a substitute for deficient treaty law in what Luigi Condorelli has called the '*fonction de suppléance législative*' (alternative legislative function).³³ In the absence of any treaty rules, or of clear treaty rules, international courts and

²⁵ Charles Leben, 'La responsabilité internationale de l'État sur le fondement des traités de promotion et de protection des investissements' (2004) 50 AFDI 708.

²⁶ The translation is anything but thorough.

²⁷ *Wintershall* (n 4) para 69.

²⁸ *Glamis Gold, Ltd v United States of America*, UNCITRAL, Award (8 June 2009) para 3. For a detailed analysis of this Award, see Reisman (n 2).

²⁹ *AES Corporation v Argentine Republic*, ICSID Case No ARB/02/17, Decision on Jurisdiction (26 April 2005) para 30.

³⁰ *MCI Power Group LV and New Turbine, Inc v Republic of Ecuador*, ICSID Case No ARB/03/6, Decision on Annulment (19 October 2009) para 24. See also *Continental Casualty Company v Argentine Republic*, ICSID Case No ARB/03/9, Decision on Annulment (16 September 2011) para 83.

³¹ Reed (n 2) 96–7.

³² Schill (n 2) 1092.

³³ See Luigi Condorelli, 'Conclusions générales' in Mauro Politi and Giuseppe Nesi (eds), *The International Criminal Court and the Crime of Aggression* (Pedone 2004).

tribunals resort to case law—an easy and reassuring argument of authority—thus avoiding the need to face the mysteries of the formation and evidence of customary international law.

ICSID tribunals do refer to precedents as elucidating tools—even though, with all due respect, I think that there is no rule of precedent either *de jure* or *de facto*.³⁴ The tribunals discuss the jurisprudence—*constante* or not—and use it extensively in order to justify their decisions in a manner similar to that of other international courts or tribunals:

- (a) they refer to precedents—sometimes abundantly;³⁵
- (b) they apply the art of *distinguishing*, typical of courts of common law countries;³⁶ but
- (c) they allow themselves to overturn a jurisprudence—even *constante*;
- (d) they call, with an apparently sincere conviction, for the consistency and the continuity of case law and for ‘the harmonious development of investment law’;³⁷
- (e) they regularly put this ‘harmonious development’ constantly at risk—at least in some matters—by claiming their alleged ‘sovereignty’³⁸ and the lack of hierarchy in the ICSID system;³⁹ and
- (f) they rely on future tribunals to ensure the stability called for while they themselves jeopardize it.⁴⁰

This is very well illustrated and summarized in *SGS v Philippines* (an award for which I have a limited sympathy⁴¹):

[A]lthough different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State. Moreover there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision. There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals. It must be initially for the control mechanisms provided for under the BIT and the ICSID Convention, and in the longer term for the development of a common legal opinion or *jurisprudence constante*, to resolve the difficult

³⁴ See eg Reed (n 2). See also di Pietro (n 2); Schreuer and Weiniger (n 2); Thomas Wälde, ‘The Specific Nature of Investment Arbitration’ in Philippe Khan and Thomas Wälde (eds), *Les aspects nouveaux du droit des investissements internationaux/New aspects of international investment law* (Nijhoff 2007) 42–120; and Weeramantry (n 2).

³⁵ *Pey Casado* (n 3) para 119. See also *Ambiente Ufficio* (n 3).

³⁶ *Mytilineos Holdings SA v The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, Decision on Jurisdiction (8 September 2006) paras 143–6. See also *Ioan Micula, Viorel Micula, SV European Food SA SV Starmill SRL and SV Multipack SRL v Romania*, ICSID Case No ARB/05/20, Decision on Jurisdiction (24 September 2008) para 67; and *Electrabel SA v Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) para 4.12.

³⁷ *Pey Casado* (n 3) para 119. See also *Saipem SpA v Bangladesh*, ICSID Case No ARB/05/07, Award (30 June 2009) para 90; *Austrian Airlines v The Slovak Republic*, UNCITRAL, Final Award (9 October 2009) para 84; *EDF International* (n 4) para 897; and *Quiborax SA Non-Metallic Minerals SA v Plurinational State of Bolivia*, ICSID Case No ARB/06/2, Decision on Jurisdiction (27 September 2012) para 46.

³⁸ See *AES* (n 29).

³⁹ *SGS v Philippines* (n 5) para 97. See also *Saipem* (n 37) para 90 and *Austrian Airlines* (n 37).

⁴⁰ *AWG v Argentina* (n 23).

⁴¹ See Alain Pellet, ‘Adieu Philippines : Remarques sur la distinction entre les réclamations conventionnelles et contractuelles dans le droit de l’investissement international’ in Jean-Marc Sorel (ed), *Le droit international économique à l’aube du XXIème siècle—Mélanges offerts à Dominique Carreau et Patrick Juillard* (Pedone 2009) 97–110.

legal questions discussed by the *SGS v Pakistan* Tribunal and also in the present decision.⁴²

In general, ICSID tribunals give priority to the case law of their peers or other investment tribunals. This is quite natural—if only because, statistically, they are obviously the ones to have dealt most with identical issues. However, ICSID tribunals are probably less hesitant than the World Court to invoke what may be called ‘exogenous’ or ‘external’ case law—that is to say, decisions of courts or tribunals outside the ICSID system or international investment law. ICSID Tribunals are even more justified to resort to international case law given that the ICSID system is only ‘semi-exogenous’ since it is rooted in international law and is internationally oriented. This is also true for the case law of courts and tribunals acting in other international ‘sub-systems’ such as that of the WTO,⁴³ those stemming from regional conventions on human rights,⁴⁴ that of the European Union,⁴⁵ and that of international criminal courts and tribunals.⁴⁶ It is also true of the case law of courts and tribunals acting under general international law,⁴⁷ of which the World Court has defined itself as being the ‘organ’.⁴⁸

And we finally reach the heart of the matter!

Not only do ICSID tribunals (and other investment tribunals) refer to the jurisprudence of the World Court, but they show a particular deference to it:

The Tribunal [in *Azurix*] is required to consider the ordinary meaning of the terms used in the BIT under Article 31 of the Vienna Convention. The findings of other tribunals, and in particular of the ICJ, should be helpful to the Tribunal in its interpretative task.⁴⁹

However, this deference quickly meets its limits as the Tribunal in *Tulip Real Estate* has aptly explained in its Decision on Bifurcation of 5 March 2013.

⁴² *SGS v Philippines* (n 5) para 97.

⁴³ See eg *SD Myers, Inc v Government of Canada*, UNCITRAL, Partial Award (13 November 2000) paras 244 and 291–93; *Pope & Talbot Inc v The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2 (10 April 2001) paras 46–63 and 68; *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No ARB(AF)/99/1, Award (16 December 2002) para 177; *United Parcel Service of America Inc v Canada*, UNCITRAL, Award on Jurisdiction (22 November 2002) para 40; and *Continental Casualty* (n 5) para 195.

⁴⁴ See eg *Ronald S Lauder v The Czech Republic*, UNCITRAL, Final Award (3 September 2001) para 200 (ECHR); *Mondev* (n 13) paras 137–8 and 143–4 (ECHR); *Técnicas Medioambientales Tecmed, SA v United Mexican States*, ICSID Case No ARB(AF)/00/2, Award (29 May 2003) para 116 (ECHR and IACHR); *The Loewen Group, Inc and Raymond L Loewen v United States of America*, ICSID Case No ARB(AF)/98/3, Award (26 June 2003) para 165 (ECHR); *Azurix Corp v Argentine Republic*, ICSID Case No ARB/01/12, Award (14 July 2006) paras 311–12 (ECHR); *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*, ICSID Case No ARB/03/16, Award (2 October 2006) para 497 (ECHR); *Saipem* (n 3) para 130 (ECHR); *Toto Costruzioni Generali SpA v Republic of Lebanon*, ICSID Case No ARB/07/12, Decision on Jurisdiction (11 September 2009) paras 158–60 (ICCP); *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/03/25, Decision on Annulment (23 December 2010) (ECHR); *Total SA v Argentine Republic*, ICSID Case No ARB/04/1, Decision on Liability (27 December 2010) para 129 (ECHR); and *El Paso*, Award (n 5) para 598 fn 554 (ECHR).

⁴⁵ See eg *Eastern Sugar BV (Netherlands) v The Czech Republic*, SCC Case No 088/2004, Partial Award (27 March 2007) paras 133–35; *Eureko BV v Slovakia*, PCA Case No 2008-13, Award on Jurisdiction, Arbitrability and Suspension (26 October 2010) paras 274, 276 and 282 fn 201; *Swisston DOO Skopje v Former Yugoslav Republic of Macedonia*, ICSID Case No ARB/09/16 Award (6 July 2012) para 261 and *Electrabel* (n 36) paras 4.122, 4.136, 4.150, 4.152–4.155, 4.181 and 4.184–4.185.

⁴⁶ *Hrvatska Elektroprivreda, dd v Republic of Slovenia*, ICSID Case No ARB/05/24, Decision on Participation of Counsel (David Mildon QC) (6 May 2008) para 33 fn 17 (ICTY).

⁴⁷ Including the case law of the ITLOS—see *CME Czech Republic BV v The Czech Republic*, UNCITRAL, Final Award (14 March 2003) para 433, referring to *The MOX Plant Case (Ireland v United Kingdom)* (Request for Provisional Measures: Order, 3 December 2001) ITLOS Case No 10, para 51.

⁴⁸ *Certain German Interests in Polish Upper Silesia* (Merits: Judgment) [1926] PCIJ Rep Series A, No 7, 19. See also *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v Albania)* (Merits: Judgment) [1949] ICJ Rep 35.

⁴⁹ *Azurix* (n 44) para 391 (emphasis added).

Questioning the relevance of previous decisions of ICSID tribunals and of the ICJ invoked by the Parties with regard to treaty interpretation, the Tribunal stated that '[a]lthough not bound by such citations, . . . it should have regard to earlier decisions of courts [particularly the ICJ (this is the deference—limited . . .)] and of other international dispute tribunals engaged in the interpretation of the terms of a BIT.'⁵⁰ But, notwithstanding the (divergent) views of the Parties, it immediately dismissed any idea of hierarchy, adding that:

In this regard, the Tribunal does not find it necessary to engage in an hierarchical analysis of precedent. On one hand, the Tribunal accords deference to relevant statements by the ICJ of general principles as to the construction of the terms of a treaty as those principles may apply to the construction of the BIT. On the other hand, as there is no precedential order in regard to previous decisions on the construction of bilateral investment treaties, the relevant enquiry remains for the Tribunal to interpret and apply the terms of the BIT itself. Prior decisions may inform that enquiry, but it is for this Tribunal to make its own interpretation of Article 8(2), informed by the rigor and persuasiveness of relevant analysis and statements by decisions of earlier tribunals.⁵¹

This is a rather convincing view: the ICJ case law may guide ICSID tribunals when they apply general principles of treaty interpretation, as in the 5 March 2013 decision in *Tulip Real Estate*. However, when one turns to the legal framework for foreign investment, only investment jurisprudence will be used—and, regardless of any theoretical position, there is a good reason for that: the Court has rarely been called upon to deal with investment issues, even less to apply BITs—and when, exceptionally, it has dealt with such issues, one may find its positions (hesitant and probably little adapted to contemporary needs in this area) unattractive.

With regard to the general principles of the law of treaties and of treaty interpretation in particular,⁵² (and more generally, with respect to the sources of international law, notably as regards the existence of a rule of customary international law),⁵³ the content and limits of competences of the State,⁵⁴ the jurisdiction of international courts and tribunals,⁵⁵ procedural issues before these jurisdictions such

⁵⁰ *Tulip Real Estate and Development Netherlands BV v Republic of Turkey*, ICSID Case No ARB/11/28, Decision on Bifurcation (5 March 2013) para 45.

⁵¹ *ibid* para 47.

⁵² See *Asian Agricultural Products Ltd v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/87/3, Award (27 June 1990) para 40 (Rule E) (*effet utile*); *Mondev* (n 13) para 111 fn 41 (*travaux préparatoires*); *Methanex Corporation v United State of America*, UNCITRAL, Final Award (3 August 2005) paras 19–20 (subsequent agreements); *Noble Ventures* (n 5) para 55 (strict interpretation); *Wintershall* (n 4) paras 79–84 (ordinary meaning) and *Ambiente Ufficio* (n 3) para 600 fn 317 (other relevant rules of international law). See also *Kilit Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v Turkmenistan*, ICSID Case No ARB/10/1, Decision on Article VII.2 of the Turkey–Turkmenistan Bilateral Investment Treaty (7 May 2012) para 6.4 fn 34 (customary nature of Articles 31–33 of the 1969 Vienna Convention on the Law of Treaties).

⁵³ *UPS v Canada* (n 43) para 84.

⁵⁴ *Pey Casado* (n 3) para 255 fn 200 and para 258 (rules on nationality).

⁵⁵ See eg *Československa Obchodní Banka, AS v Slovak Republic*, ICSID Case No ARB/97/4, Decision on Jurisdiction (1 December 2000) para 31; *Wintershall* (n 4) paras 65–7; *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador*, UNCITRAL, PCA Case No 2009-23, Third Decision on Jurisdiction (27 February 2012) paras 4.60–4.71 (*Monetary Gold* principle) and *Tulip Real Estate* (n 50) paras 61–3 (consent-based jurisdiction); *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No ARB/84/3, Decision on Jurisdiction (27 November 1985) para 63; *Wintershall* (n 4) paras 68–69 (no presumption in favour of jurisdiction); *HOCHTIEF Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/07/31, Decision on Jurisdiction (24 October 2011) paras 90–6; *ICS Inspection* (n 4) paras 252–62 (distinction between jurisdiction and admissibility); *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Jurisdiction (14 November 2005) paras 61–2 (critical date to assess jurisdiction); *Maffezini* (n 4) para 94;

as the junction of the preliminary objections to the merits,⁵⁶ the legal consequences of incidental proceedings like interim measures,⁵⁷ the burden of proof,⁵⁸ *in absentia* proceedings,⁵⁹ or the interpretation⁶⁰ or annulment⁶¹ of awards, the case law of the ICJ is accepted as having vested a rather high degree of authority in ICSID awards. The same is true for the general principles of law of State responsibility but with a *caveat*.

All categories together, when a tribunal examines the existence of a state of necessity, the *Factory at Chorzów*⁶² case is certainly the most cited case in this field, closely followed by *Elsi*⁶³ and *Barcelona Traction*⁶⁴ (if one includes issues of *ius standi* of the victim and the protection of shareholders), not to mention *Gabčíkovo-Nagymaros*. However, it is worth noting that, with respect to the law of State responsibility, the ICSID tribunals rely much more on the 2001 International Law

Tokios Tokelés v Ukraine, ICSID Case No ARB/02/18, Decision on Jurisdiction (29 April 2004) para 106; *El Paso*, Decision on Jurisdiction (n 5) para 61 and *Ténver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentine Republic*, ICSID Case No ARB/09/1, Decision on Jurisdiction (21 December 2012) para 119 (existence of a dispute).

⁵⁶ *Pey Casado* (n 3) paras 83–107.

⁵⁷ *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2, Decision on Provisional Measures (25 September 2001) para 10 (*prima facie* jurisdiction) and *City Oriente Limited v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/06/21, Decision on Revocation of Provisional Measures (13 May 2008) para 84 (irreparable harm).

⁵⁸ *Salini Costruttori SpA and Italstrade SpA v Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Award (31 January 2006) paras 72 and 74 and *Ambiente Ufficio* (n 3) paras 310–11 (*actori incumbit onus probandi*).

⁵⁹ *Antoine Goetz and others v Republic of Burundi*, ICSID Case No ARB/95/3, Award (10 February 1999) paras 53–7.

⁶⁰ *Wena Hotels Limited v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Decision on Interpretation (31 October 2005) para 81 fn 61 and paras 82–83 (existence of a dispute) and 103, 105 and 130 (a request for interpretation is not an appeal).

⁶¹ *Duke Energy International Peru Investments No 1 Ltd v Republic of Peru*, ICSID Case No ARB/03/28, Decision on Annulment (1 March 2011) para 99 fn 133 (manifest excess of powers).

⁶² See eg *CME Czech Republic BV v The Czech Republic*, UNCITRAL, Partial Award (13 September 2001) paras 616–18; *Petrobart Limited v The Kyrgyz Republic*, SCC Case No 126/2003, Arbitral Award (29 March 2005) 30–1; *CMS*, Award (n 5) para 400; *ADC* (n 44) paras 480, 485–6 and 497; *Siemens AG v Argentine Republic*, ICSID Case No ARB/02/8, Award (6 February 2007) paras 351–3; *Sempra Energy International v Argentine Republic*, ICSID Case No ARB/02/16, Award (28 September 2007) para 400; *Saipem* (n 37) para 201; *Ioannis Kardassopoulos v Georgia*, ICSID Case No ARB/05/18, Award (3 March 2010) paras 503–4 and 510; *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan*, ICSID Case No ARB/05/16, Decision on Annulment (25 March 2010) para 141; *Merrill & Ring Forestry LP v The Government of Canada*, UNCITRAL, Award (31 March 2010) para 141; *ATA Construction, Industrial and Trading Company v Hashemite Kingdom of Jordan*, ICSID Case No ARB/08/2, Award (18 May 2010) para 129; *Joseph Charles Lemire v Ukraine*, ICSID Case No ARB/06/18, Award (28 March 2011) para 149; *Impregilo SpA v Argentine Republic*, ICSID Case No ARB/07/17, Award (21 June 2011) para 361; *El Paso*, Award (n 5) para 700; *Marion Unglaube and Reinhard Unglaube v Republic of Costa Rica*, ICSID Case No ARB/09/20, Award (16 May 2012) paras 306–7; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No ARB/06/11, Award (5 October 2012) para 792; and *Franck Charles Arif* (n 6) para 559.

⁶³ See eg *Goetz* (n 59) para 99; *ADF Group Inc v United States of America*, ICSID Case No ARB(AF)/00/1, Award (9 January 2003); *Técnicas* (n 44) paras 119–20 fn 137; *CMS* (n 15) para 43 fn 24; *SGS v Pakistan* (n 5) para 97; *Azurix Corp v Argentine Republic*, ICSID Case No ARB/01/12, Decision on Jurisdiction (8 December 2003) paras 70–3; *Camuzzi* (n 23) paras 138–42; *Sempra Energy* (n 5) paras 151–2; *Continental Casualty Company v Argentine Republic*, ICSID Case No ARB/03/9, Decision on Jurisdiction (22 February 2006) para 82 fn 16; *Suez, Sociedad General de Aguas ARB/03/17* (n 4) para 88; *Continental Casualty* (n 5) para 281 fn 409; *Azurix Corp v Argentine Republic*, ICSID Case No ARB/01/12, Decision on Annulment (1 September 2009) paras 144–5; *El Paso*, Award (n 5) para 206 and *Ambiente Ufficio* (n 3) para 599 fn 314.

⁶⁴ See eg *CMS* (n 15) para 43 fn 23; *ibid Azurix*, Decision on Jurisdiction, paras 70–3; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, LP v Argentine Republic*, ICSID Case No ARB/01/3, Decision on Jurisdiction (14 January 2004) para 38 fn 6; *Tokios Tokelés* (n 55) paras 54, 56 and 70 fns 44–6; *LG&E Energy Corp, LG&E Capital Corp, and LG&E International Inc v Argentine Republic*, ICSID Case No ARB/02/1, Decision on Jurisdiction (30 April 2004) para 52; *Camuzzi* (n 23) paras 138–42; *ibid Continental Casualty*, Decision on Jurisdiction, para 82 fn 16; *Suez, Sociedad General de Aguas ARB/03/17* (n 4) para 50; *BP America* (n 5) paras 216–17; *The Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Decision on Jurisdiction and Admissibility (18 April 2008) paras 89–91; *ibid Azurix*, Decision on Annulment, para 87; *El Paso*, Award (n 5) para 206 and *Daimler* (n 4) paras 89–91.

Commission (ILC) Articles than on the case law of the Court, which is less systematic by necessity.

Before trying to draw some more general conclusions from this, it is worth considering how ICSID tribunals resort to the case law of the ICJ, the place they give to it and the method, or methods, they use to establish or strengthen their reasoning.

The first observation, which leads to a more detailed examination in this regard, is the extreme diversity in the intensity with which ICSID tribunals refer to the Court's case law and in the methods applied by these tribunals—they range from polite indifference to compelling authority.

First, an example of polite indifference—or rather what can be called 'respectful irrelevance': awards pay lip service to the case law of the World Court but do not take it into consideration the pretext of its alleged irrelevance. This is striking with regard to the protection of shareholders. Professor Zachary Douglas, who deplors this indifference, notes humorously:

Consider the *jurisprudence constante* in relation to the issue of shareholder claims. There are now between 15 and 20 decisions all saying the same thing. They say that there is no limit to the types of claims shareholders can bring in relation to a loss suffered by the company. I would submit that this consensus has been achieved without any real argument about principle.⁶⁵

And he then explains that:

You find a great number of awards saying in one sentence that they can safely ignore *Barcelona Traction* because it has nothing to do with investment treaty arbitration. The International Court in *Barcelona Traction* got a number of things wrong, and to the extent that it propounded rules of diplomatic protection it is irrelevant. But one point the International Court and several individual judges addressed is how to approach the concept of a shareholding on the international plane. That is relevant to investment treaty arbitration, for tribunals are required to confront precisely the same question.⁶⁶

However, Professor Douglas regrets that ICSID tribunals superbly ignore these relevant questions and stick to their *jurisprudence constante*.⁶⁷

The Award of 17 July 2003 in the *CMS* case is a first example of this dismissive attitude. The Tribunal states as a principle that: '*Barcelona Traction* is therefore not directly relevant to the present dispute, although it marks the beginning of a fundamental change of the applicable concepts under international law and State practice.'⁶⁸ Then, while making a noticeable mistake with respect to the ILC's majority position, as it then was, on the nature of the diplomatic protection,⁶⁹ the *CMS* Tribunal takes the radical position on the matter, according to which, under the *lex specialis* '*investissmentorum*', any shareholder deserves protection, regardless of the issues raised by the Court and by the Judges in their respective individual opinions in *Barcelona Traction*.⁷⁰

⁶⁵ Douglas (n 2) 108.

⁶⁶ *ibid.*

⁶⁷ *ibid* 108–9.

⁶⁸ *CMS* (n 15) para 42.

⁶⁹ *ibid* para 45.

⁷⁰ *ibid* para 48.

In many subsequent awards, without any further reflection, ICSID tribunals, neutralizing *Elsi* and *Barcelona Traction*—defined as ‘the seminal case, in this regard’ by the majority in *Tokios Tokelès*⁷¹—almost ritually explain that:

whatever may have been the merits of *Barcelona Traction*, that case was concerned solely with the diplomatic protection of nationals by their State, while the case here disputed concerns the contemporary concept of direct access for investors to dispute resolution by means of arbitration between investors and the State.⁷²

The same iterative approach can be found in *LG&E* (jurisdiction),⁷³ *Gami* (merits),⁷⁴ *Sempra* (jurisdiction),⁷⁵ *Suez, Sociedad General de Aguas* (jurisdiction),⁷⁶ *BP America* (jurisdiction)⁷⁷—each new decision adding a reference to the previous one. The Decisions on Annulment in *CMS*⁷⁸ and *Azurix*⁷⁹ proceed the same way, the reasoning being enriched only by a reference to the *Diallo* case.⁸⁰

Thus, with regard to the protection of shareholders, ICSID tribunals unanimously greet the jurisprudence of the ICJ, which reflects customary rules of general international law, but they then hide behind the *lex specialis* dogma to faithfully follow the jurisprudence, *constante* on this point, of investment tribunals.

Still in the field of state responsibility, one would expect frequent references to the Court’s case law with regard to attribution issues, for which, as some tribunals noted, neither the Washington Convention nor generally BITs are of any help.⁸¹ This is only partially—or indirectly—true: on these particular issues, ICSID tribunals use much more readily and systematically the 2001 ILC Articles than the jurisprudence of the Court. The 2001 ILC Articles, together with their commentaries,⁸² often constitute sufficient evidence of the applicable law on that matter, the case law (including but not exclusively) of the ICJ appearing only as a secondary argument to support the reasoning.⁸³ Here, it is not polite

⁷¹ *Tokios Tokelès* (n 55) para 54. In its dissenting opinion, P Weil, President of the Tribunal, considers that the question is ‘beside the point’ (para 21).

⁷² *Camuzzi* (n 23) paras 141–2.

⁷³ *LG&E* (n 64) para 53 fn 3.

⁷⁴ *Gami Investments, Inc v The Government of the United Mexican States*, UNCITRAL, Final Award (15 November 2004) para 31.

⁷⁵ *Sempra Energy* (n 5) paras 151, 153.

⁷⁶ *Suez, Sociedad General de Aguas ARB/03/17* (n 4) para 51 fn 33.

⁷⁷ *BP America* (n 5) para 218.

⁷⁸ *CMS*, Decision on Annulment (n 5) para 69 and fn 56.

⁷⁹ *Azurix*, Decision on Annulment (n 63) paras 87–88 or *Teinver* (n 55) paras 215–21.

⁸⁰ *CMS*, Decision on Annulment (n 5) para 69 fn 56. See also *Azurix*, Decision on Annulment (n 63) paras 87–88.

⁸¹ See *Maffezini* (n 4) para 76. See, however, *United Parcel Service of America Inc v Government of Canada*, UNCITRAL, Award (24 May 2007) paras 58–62 (NAFTA). For an example of discussion concerning the silence of a BIT in respect to compensation, and the application of ‘the default standard contained in customary international law’, largely based on the *Chorzów Factory* case, see *ADC* (n 3) paras 481 ff.

⁸² *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment (3 July 2002) para 16 fn 17 and para 17 fn 18; *ADF* (n 63) para 166 and fn 161; *Técnicas* (n 44) para 151 fn 187; *Enron* (n 64) para 32 fn 5; *Waste Management, Inc v United Mexican States*, ICSID Case No ARB(AF)/00/3, Award (30 April 2004) para 75; *Eureko* (n 5) para 127; *Grand River Enterprises Six Nations, Ltd, and others v United States of America*, UNCITRAL, Decision on Jurisdiction (20 July 2006) para 1 fn 1; *ibid UPS v Canada*, paras 58–62; *Plama* (n 5) paras 297–8; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award (6 November 2008) paras 155–74; *Bayindir Insaat Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award (27 August 2009) paras 119–30; *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Award (8 October 2009) paras 188–213; *Gustav FW Hamster GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award (18 June 2010) paras 171–256; *Alpha Projektholding* (n 3) paras 401–3; *Bosh International* (n 5) paras 163–84 and *Electrabel* (n 36) para 6.74.

⁸³ *ibid Jan de Nul*, para 173. See also *ADF* (n 63) para 166 and fn 161; *Generation Ukraine Inc v Ukraine*, ICSID Case No ARB/00/9, Award (16 September 2003) para 10.3 and *ibid Hamster*, para 179.

indifference but rather ‘eclipsed jurisprudence’—eclipsed by a soft law instrument considered to be law.

ICSID tribunals have followed the same approach with respect to the state of necessity—an exceptional and useless circumstance precluding wrongfulness, which has been very much invoked in international investment law in the context of the Argentina crisis. Although one ICJ Judgment, that in the *Gabčíkovo-Nagymaros* case in 1997, is frequently invoked,⁸⁴ Article 25 of the 2001 ILC Articles has eclipsed the Court’s case law in many awards. In this regard, the formula used in paragraph 330 of the 2005 Award in the *CMS* case is symptomatic:

There is yet another important element which the Tribunal must take into account. The International Court of Justice has in the *Gabčíkovo-Nagymaros* case convincingly referred to the International Law Commission’s view that all the conditions governing necessity must be ‘cumulatively’ satisfied.⁸⁵

It is worth noting that, in the 2007 Decision on Annulment, the *ad hoc* Committee has only examined the 2001 ILC Articles and, of course, the relevant provisions of the BIT.

When looking beyond the law of international responsibility, curiously, the record is rather less meagre. This is so when one looks at the meaning and scope of the MFN clause—or, more accurately, clauses, since it is impossible to reduce those very diverse provisions to one. And the recourse of ICSID tribunals to the jurisprudence of the Hague Court in this respect attests to the fact that they too have become masters in the art of distinguishing. In almost every case in which an MFN clause has been invoked, the tribunals have discussed three judgments of the ICJ rendered respectively in the *Anglo-Iranian* case⁸⁶—which was described by the Tribunal in *Wintershall* as of ‘seminal theoretical significance’;⁸⁷ in the *Case concerning Rights of Nationals of the United States of America in Morocco*,⁸⁸ and in *Ambatielos*,⁸⁹ and, with regard to the latter, together with the 1956 Arbitral Award which settled the case.⁹⁰

Here, the leading (and controversial) case is *Maffezini*, which served as a reference for almost all subsequent awards dealing with the issue which took position either in favour or against it. In its Award of 25 January 2000, the *Maffezini* Tribunal, for the first time to my knowledge, referred to the case law I have just mentioned. The Tribunal presents the Judgments of the Court as the context—the ‘background’—in the framework of which ‘the operation of the most

⁸⁴ See eg *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, LP v Argentine Republic*, ICSID Case No ARB/01/3, Award (22 May 2007) para 313; *CMS*, Decision on Annulment (n 5) para 133; *Sempra Energy* (n 62) paras 355, 383; *Continental Casualty* (n 5) para 165, fn 238; *Impregilo* (n 62) para 347 and fn 93; *El Paso*, Award (n 5) para 618 and *SAUR International SA v Argentine Republic*, ICSID Case No ARB/04/4, Decision on Jurisdiction and Liability (6 June 2012) para 459.

⁸⁵ *CMS*, Award (n 5) para 330. The Tribunal refers to: *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [25 September 1997] ICJ Rep 40–1 1997, paras 51–2.

⁸⁶ *Anglo-Iranian Oil (United Kingdom v Iran)* (Judgment) [22 July 1952] ICJ Rep 93.

⁸⁷ *Wintershall* (n 4) para 96.

⁸⁸ *Case concerning rights of nationals of the United States of America in Morocco (France v United States of America)* (Judgment) [27 August 1952] ICJ Rep 176.

⁸⁹ *Ambatielos Case (Greece v United Kingdom)* (Merits: Obligation to arbitrate) [19 May 1953] ICJ Rep 10.

⁹⁰ *The Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland) An Ad Hoc Arbitration*, Award (6 March 1956) XII UNRIAA 83.

favoured nation clause in bilateral investment treaties must . . . be considered'.⁹¹ It then cited the ICSID case law and the Award in *AAPL* in particular.⁹²

The 2004 Award in *Siemens v Argentina* proceeds (more clearly) in the same manner, by relying on the same ICJ precedents to reach the same conclusion, reinforced by a mention of *Maffezini*.⁹³ On the contrary, the *Salini v Jordan* Tribunal also mentions the same three judgments of the Court (and the *Ambatielos* Award), but, this time, to deny their relevance: 'The first two judgments mentioned [*Anglo-Iranian Oil Co* and *Rights of Nationals of the United States of America in Morocco*] do not address the issue thus posed. In the third case [*Ambatielos*], . . . the Court did not decide on the merits' of the line of argument developed by Greece and based on the MFN clause. But at the same time, the Tribunal mentioned the positions of 'judges dissenting from the solution adopted [who] took positions on the submissions of Greece based on the most-favoured-nation clause as incorporated in the 1886 Treaty. Their view was that the clause "cannot be extended to matters other than those in respect of which it has been stipulated"'. They added that 'having regard to its terms', this clause 'promises most-favoured-nation treatment only in matters of commerce and navigation' and that, consequently, it cannot be applied to 'the administration of justice'⁹⁴—an interesting example of recourse to dissident opinions to interpret the Court's jurisprudence. And the Tribunal in *Salini v Jordan* concluded: 'The Tribunal observes that the circumstances of this case are different.'⁹⁵ In *Plama*, the Tribunal followed the same approach:

In *Maffezini* the tribunal relied on *Case Concerning Rights of Nationals of America in Morocco*, *Anglo-Iranian Oil Co. Case*, and *Ambatielos Claim*. However, the foregoing review of those decisions shows that they do not provide a conclusive answer to the question.⁹⁶

More recently, in an Award dated 10 February 2012, the Tribunal in *ICS Inspection* apparently adopted (I do not find the Award crystal clear) the same position but by paying lip service to the importance of the ICJ case law. According to the Tribunal:

These cases [*Anglo-Iranian Oil Company* and *Ambatielos*] must therefore be taken into account not only as legal authorities on the proper interpretation of MFN clauses, but also as precedent that informed subsequent treaty drafting.⁹⁷

To conclude on MFN clauses: lip service, discussion, distinction and—even though this is not relevant to tonight's topic—inconsistency of investment arbitration case law, or to quote the harsh but justified statement of the *Wintershall* Tribunal 'a welter of inconsistent and confusing dicta';⁹⁸ a 'mess' essentially resulting from an inconsistent analysis of the ICJ case law by investment tribunals.

⁹¹ *Maffezini* (n 4) para 51. See also *National Grid plc v The Argentine Republic*, UNCITRAL, Decision on Jurisdiction (20 June 2006) paras 86–92.

⁹² *ibid* citing *Asian Agricultural Products* (n 52) para 51.

⁹³ *Siemens AG v Argentine Republic*, ICSID Case No ARB/02/8, Decision on Jurisdiction (3 August 2004) paras 96, 99 and 101–3.

⁹⁴ *Ambatielos* (n 9) 34.

⁹⁵ *Salini v Jordan* (n 5) paras 106, 112 and 117–18.

⁹⁶ *Plama* (n 4) paras 210, 217; see also *Wintershall* (n 4) paras 172–89.

⁹⁷ *ICS Inspection* (n 4) paras 291–93.

⁹⁸ *Wintershall* (n 4) para 189.

What is more intriguing (but less regrettable) is the use made by ICSID tribunals of a separate opinion appended to an ICJ judgment regarding the conditions to which the jurisdiction of international courts and tribunals is subjected. This saga shows ‘cross-fertilization’ which may exist between the two systems and is far from being uninteresting. It can be broken down into five acts.⁹⁹

Act 1: in a separate opinion appended to the ICJ Judgment of 1996 rendered in the *Oil Platforms* case, at the stage of preliminary exceptions, Judge Higgins explicitly and clearly put forward a condition to the jurisdiction of the Court dealt with rather allusively in the Judgment itself. According to Dame Rosalyn:¹⁰⁰

The only way in which, in the present case, it can be determined whether the claims of Iran are sufficiently plausibly based upon the 1955 Treaty is to accept *pro tem* the facts as alleged by Iran to be true and in that light to interpret Articles I, IV and X for jurisdictional purposes—that is to say, to see if on the basis of Iran’s claims of fact there could occur a violation of one or more of them.¹⁰¹

It is worth noting in passing that there had been a prologue to this first Act. In 1983, in the *Amco v Indonesia* case, the ICSID Tribunal, chaired by Berthold Goldman, had put forward a similar test.¹⁰² However, this Award is almost never referred to in subsequent awards.¹⁰³ Preference for the Court or, sacrilegious hypothesis—which I only evoke *horresco referens!*—ignorance of Arbitrators and / or Counsel?

Act 2: an UNCITRAL Tribunal, in *Methanex*, seizes the Judgment in the *Oil Platforms* case to present it as ‘a recent and important decision as to how contested issues of fact and legal interpretation can be treated in jurisdictional challenges’¹⁰⁴ and interprets it in light of Judge Higgins’ opinion¹⁰⁵ (and, by the way, commits an error in its analysis of the Court’s position regarding its *prima facie* jurisdiction in relation to provisional measures¹⁰⁶).

Act 3: this is the consolidation phase—consolidation by the Court itself on the one hand, which, in its Orders of 2 June 1999 on provisional measures in the cases concerning the *Legality of Use of Force*, refers to its position in the *Oil Platforms* case but as interpreted by Dame Rosalyn (without expressly referring to her opinion, of course).¹⁰⁷ On the other hand, ICSID tribunals follow what they seem to consider to be more the ‘Higgins/*Methanex* jurisprudence’ rather than the Courts’.¹⁰⁸

⁹⁹ On this saga, see also Mathias Forteau, ‘La contribution au développement du droit international général de la jurisprudence arbitrale relative aux investissements étrangers’ (2009) 4 Brazilian YB Intl L 16–17.

¹⁰⁰ *Oil Platforms (Islamic Republic of Iran v United States of America)* (Preliminary Objection: Judgment) [12 December 1996] ICJ Rep 809–10, para 16.

¹⁰¹ *ibid* Dissenting Opinion of Judge Higgins, 856, para 32 and 857–58, para 34.

¹⁰² *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No ARB/81/1, Decision on Jurisdiction (25 September 1983) 1 ICSID Rep 406.

¹⁰³ See, however, *BP America* (n 5) para 46 and *Micula* (n 36) para 66 fn 1.

¹⁰⁴ *Methanex Corporation v United States of America*, UNCITRAL, Partial Award (7 August 2002) paras 116–19.

¹⁰⁵ See *ibid* para 118.

¹⁰⁶ *ibid*. Judge Abraham has argued in great detail a very similar point in the *Pulp Mills* case at the stage of interim measures. See *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Provisional Measures: Order) Separate opinion of Judge Abraham [13 July 2006] ICJ Rep 137–41.

¹⁰⁷ *Legality of Use of Force (Yugoslavia v Belgium)* (Provisional Measures: Order) [2 June 1999] ICJ Rep 137, para 38.

¹⁰⁸ cf *Plama* (n 4) para 119. See also *UPS v Canada* (n 43) paras 35–6; *SGS v Philippines* (n 5) para 26; *EnCana Corporation v Republic of Ecuador*, LCIA Case No UN3481, UNCITRAL, Partial Award on Jurisdiction (27 February 2004) para 25; *Salini v Jordan* (n 5) paras 137–40; *Impregilo SpA v Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction (22 April 2005) paras 237–47; *Continental Casualty* (n 63) para 63 fns 4–5; *El Paso*, Decision on

Act 4: The peremptory statement of the principle, as in the Decision on Annulment in *Duke Energy*:

It has become common-place in ICSID jurisprudence for tribunals to invoke a so-called ‘*prima facie* standard’ as applicable to jurisdictional challenges, and to support their analysis by reference to the decisions of other international tribunals, including the International Court of Justice

with the understanding that

a tribunal whose jurisdiction is contested strikes the balance between avoiding pre-judging the merits, on the one hand, and objectively determining the question of jurisdiction on the other.¹⁰⁹

Act 5: the refinement phase which, in particular, the 2007 Decision on Annulment in the *Lucchetti* case¹¹⁰ together with Sir Frank Berman’s dissenting opinion,¹¹¹ followed in 2008 by the *Chevron v Ecuador* case,¹¹² or in 2012 with *SGS v Paraguay*,¹¹³ which all specify (with reference more to Dame Rosalyn’s opinion than to the ICJ case law strictly speaking) the limits within which it is possible to *prima facie* accept the facts as presented by the claimant.

Regardless of the somewhat anecdotal aspect of the ‘primacy’ given to the separate opinion over the Judgment itself, this is an interesting and convincing example of ‘cross-fertilization’¹¹⁴ between the two jurisprudences: the World Court and investment tribunals.

As much as the case law applying the ‘Higgins test’ shows a clever use of the Court’s jurisprudence by ICSID tribunals, the use of The Hague jurisprudence on the binding force of interim measures by ICSID tribunals equally shows a blind adherence open to criticism.

In its 27 June 2001 Judgment, the ICJ, in its wisdom (a relative notion), decided that the provisional measures it indicates are binding.¹¹⁵ Had I been on the bench, I probably would not have voted with the majority, but this praetorian invention is now firmly established in positive law. And, unfortunately, ICSID tribunals have followed this questionable path.

What I consider a rather unfortunate trend began with the Award in *Pey Casado* rendered a few months after the *LaGrand* Judgment. The Tribunal considered that the issue of the interpretation of Article 47 of the ICSID Convention ‘*peut être considérée aujourd’hui comme résolue, à la lumière notamment de la jurisprudence* (the

Jurisdiction (n 5) paras 40–6; *Telefónica SA v Argentine Republic*, ICSID Case No ARB/03/20, Decision on Jurisdiction (25 May 2006) para 56 fns 21–2; *Canfor Corporation v United States of America*; *Terminal Forest Products Ltd v United States of America*, UNCITRAL, Decision on Jurisdiction (6 June 2006) paras 167–73; *Jan de Nul* (n 3) para 70; *BP America* (n 5) paras 43–51 and *Total SA v Argentine Republic*, ICSID Case No ARB/04/1, Decision on Jurisdiction (25 August 2006) para 55.

¹⁰⁹ *Duke Energy* (n 61) paras 117–18.

¹¹⁰ *Industria Nacional de Alimentos, SA and Indalsa Perú, SA (formerly Empresas Lucchetti, SA and Lucchetti Perú, SA) v Republic of Peru*, ICSID Case No ARB/03/4, Decision on Annulment (5 September 2007) paras 117–19.

¹¹¹ *ibid* Dissenting Opinion of Sir Frank Berman, para 17. See also *Chevron* (n 55) para 4.10.

¹¹² *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador*, UNCITRAL, PCA Case No 34877, Interim Award (1 December 2008) paras 103, 105 and 109–10.

¹¹³ *SGS v Paraguay*, Award (n 5) paras 47–8 and 50–3.

¹¹⁴ *Brown* (n 2).

¹¹⁵ *LaGrand (Germany v United States of America)* (Judgment) [27 June 2001] ICJ Rep 502–3, para 102.

Tribunal later cites the *Maffezini* Order and that of the Iran-US Tribunal) *et ... d'un récent arrêt de la Cour Internationale de Justice*¹¹⁶ (the Judgment of 27 June 2001 in the *LaGrand* case), the solution of which '*paraît manifestement pouvoir s'appliquer par analogie à l'article 47 de la Convention CIRDI*'.¹¹⁷ ('can be considered resolved today, in the light of the case law and ... of a recent judgement of the International Court of Justice'). It is true that, without being able to draw on the sleight of hand of the ICJ—which equates 'indicate' with 'decide'—the *Maffezini* Tribunal had done worse two years earlier by identifying 'recommend' with 'order'—with, it is true, the excuse of the Spanish text of Article 47 of the ICSID Convention, in which 'recommendation' is oddly translated by '*dictación*'.¹¹⁸ Again, we can note a 'preference for the Court' because it seems that even though they do not completely ignore this precedent, subsequent ICSID tribunals have relied more systematically on *LaGrand* than on *Maffezini* in this regard.

Of course, in accordance with the unfortunate habit of jurisprudential accumulation, they mention the *LaGrand* case and the Award in *Pey Casado* and add a reference to each new precedent following the same approach, the solution being now presented as part of positive law, but without even bothering to refer to Article 47 of the Convention—which might be a worthwhile precaution since the judge-made rule is so clearly incompatible with the text of this provision.¹¹⁹ The only exception appears to be the (perhaps) courageous decision on provisional measures rendered in the *Caratube International Oil Company v Kazakhstan* case, but it is isolated and not very clear to a Cartesian mind.¹²⁰ In any event, I would not take the risk of challenging that, even though I do not approve of it, the solution of the 2001 Judgment in the *LaGrand* case is fully integrated into ICSID positive law. And this shows that judicial or arbitral bodies hardly resist the temptation when they see a possibility to extend their power—if not their legitimacy; and ICSID tribunals have been only too happy to shelter their appetite for competence under the fig leaf offered by the World Court's position.

It is now time to conclude. The empirical approach I have chosen does not lead to obvious conclusions—other than disappointing platitudes that I will deliver, shamelessly, in five propositions.

First, ICSID tribunals refer to the ICJ case law in a pragmatic manner, without resorting to predetermined methods; it is never a mere 'application' of the Court's jurisprudence, but it constitutes a subsidiary means for determination of rules of law, to use the formula in Article 38(1)(d) of the Statute of the ICJ.

Secondly, they do systematically refer to the Court's jurisprudence, but they are more likely to do so when resolving procedural issues (*lato sensu*) or questions of

¹¹⁶ *Pey Casado* (n 57) para 17.

¹¹⁷ *ibid* para 20.

¹¹⁸ *Emilio Agustín Maffezini v Kingdom of Spain*, ICSID Case No ARB/97/7, Procedural Order No 2 (28 October 1999) para 9.

¹¹⁹ See eg *City Oriente Limited v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/06/21, Decision on Provisional Measures (19 November 2007) para 92; *Perenco Ecuador Limited v Republic of Ecuador*, ICSID Case No ARB/08/6, Decision on Provisional Measures (8 May 2009) paras 75–6 or *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No ARB/12/1, Decision on Provisional Measures (13 December 2012) para 120.

¹²⁰ *Caratube International Oil Company LLP v Republic of Kazakhstan*, ICSID Case No ARB/08/12, Decision on Provisional Measures (31 July 2009) para 67.

general international law rather than when dealing with investment protection standards.

Thirdly, even though it had little opportunity to venture into the field of investment law, the Court still has a significant influence on investment tribunals (as much as on other international courts and tribunals), an influence which likely goes beyond their mere search for an enhanced legitimacy. In this respect, it would certainly be interesting to study more carefully the hypotheses of ‘*mimétisme*’ (mimetism),¹²¹ ‘judicial borrowing’,¹²² or ‘cross-fertilisation’,¹²³ put forward by certain authors.

Fourthly, the relative porosity of ICSID arbitration with the World Court’s case law confirms, if confirmation were needed, that international investment law has its roots in general international law, despite its undeniable specificity.

Fifthly, as was noted by the ICSID Tribunal in *AAPL* as early as June 1990:

it should be noted that the Bilateral Investment Treaty [and this is more generally true for the whole ICSID system] is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.¹²⁴

According to the formula of the Court of Justice of the European Communities used in its Judgment of 5 February 1963 in the *Van Gend en Loos* case (unfortunately modified a year later in the dire Judgment in *Costa v ENEL*¹²⁵), the ICSID system appears as ‘a new legal order of international law’¹²⁶—it neither constitutes a *self-contained regime* living in ‘clinical isolation’, nor can it be reduced to general international law even if it is guided, for example, by the World Court’s jurisprudence.

¹²¹ Kessedjian (n 2) 61.

¹²² Vadi (n 2).

¹²³ Brown (n 2).

¹²⁴ *Asian Agricultural Products* (n 52) para 21. See also *El Paso*, Award (n 5) para 131 and *Bosh International* (n 5) para 113.

¹²⁵ Case 6/64 *Costa v ENEL* [1964] ECR X-1161. In this case, the Court omitted the reference to international law. For a criticism of this unfortunate evolution, see Alain Pellet, ‘Les fondements juridiques internationaux du droit communautaire’ in Academy of European Law (ed), *Collected Courses of the Academy of European Law, Vol V, Book 2* (Kluwer 1997) 193–271, and in particular, 205–7.

¹²⁶ Case 26/62 *Van Gend & Loos* [1963] ECR I-3.