

The Development of International Law by ICSID Tribunals

Christoph Schreuer¹

I. ARBITRATION AND INTERNATIONAL LAW

In 1899, Russia initiated the First Hague Peace Conference with a bold proposal. Its suggestion was to introduce compulsory arbitration to replace war. The motive behind this revolutionary idea was less humanitarian than economic. The impossibility of financing a new artillery prompted Russia towards this unusual proposal. With hindsight at the events of the twentieth century, the idea of replacing war by arbitration seems unrealistic and naïve. But, at the time, arbitration instead of war was seen as a real hope or a real threat depending on from which side you looked at it. The German representatives at the Peace Conference were instructed in no uncertain terms to reject the arbitration proposals, and we all know the outcome—the Permanent Court of Arbitration (PCA) was established, but the idea of compulsory arbitration was dropped.²

Today, over a hundred years later, we have become far more modest. Nobody suggests that arbitration can revolutionize international law in one bold stroke. In fact, investment arbitration finds itself in the defensive. Public opinion (or a vociferous segment of it), far from seeing it as the saviour of peace, regards it as a problem that needs to be tackled through radical reform or even outright abolition. But we should not be too modest or too defensive. Investment arbitration is not just an arcane specialization in international economic relations. It does have a role in depoliticizing international disputes and defusing potentially disruptive or even dangerous conflicts between States. The theme of this article is even more modest than that—namely to what extent has arbitration under the International Centre for the Settlement of Investment Disputes (ICSID) contributed to the development of international law?

A preliminary question is whether tribunals apply international law. The answer may seem obvious. Of course, they do. However, a look into the drafting history of the ICSID Convention shows that the application of international law was not a

¹ Emeritus Professor of Law, University of Vienna, Austria. Email: christoph.schreuer@investmentlaw.at. This article is a slightly adapted version of a keynote address delivered on 11 March 2016 at the conference entitled 'ICSID at 50: Investment Arbitration as a Motor of General International Law?', which was held at Goethe University, Frankfurt am Main, Germany.

² Norman Rich, *Friedrich von Holstein: Politics and Diplomacy in the Era of Bismarck and Wilhelm II*, vol 2, (CUP 1965) 603ff.

foregone conclusion.³ During the drafting of what ultimately became Article 42 of the Convention, there was some debate as to whether international law should be included at all. Some representatives insisted on the application of domestic law, in particular, the host State's law.⁴ Eventually, a compromise was achieved that included international law as well as host State law.⁵ Aron Broches argued tirelessly in favour of the application of international law both during the drafting of the Convention and thereafter.⁶

Over time, there has been a marked shift towards the application of international law. Early doctrine and practice still subscribed to the theory of a mere supplemental and corrective role for international law. According to this theory, the law of the host State would be applied in the first instance. The result would then be tested against international law. This would lead to not applying domestic law where it conflicted with international law.⁷ This approach was criticized already by the second tribunal in *Amco v Indonesia* under the presidency of Judge Rosalyn Higgins. The Tribunal said that the classification of international law as only supplemental and corrective seemed a distinction without a difference.⁸

Emmanuel Gaillard and Yas Banifatemi, in an article published in 2003, pointed out that under Article 42 international law and host State law are equivalent and should be applied without any hierarchy or sequence.⁹ Tribunals have since generally accepted this view. The rise of treaty arbitration has accelerated the shift towards international law. Nowadays, the majority of investment cases are based on offers of consent to arbitration in treaties, mostly bilateral investment treaties (BITs). Therefore, we tend to perceive investment arbitration primarily as an exercise in the interpretation of the relevant treaties. The recent revised text of the Comprehensive Economic and Trade Agreement (CETA) between the European Union (EU) and Canada confirms the trend towards international law at the cost of domestic law. It states that the Tribunal is to apply the Agreement and other rules and principles of international law applicable between the parties. The host State's domestic law is to be considered only as a fact.¹⁰

II. FRAGMENTATION OR INTEGRATION

It is beyond doubt that nowadays international law is very much at the centre of the activity of ICSID tribunals. That recognition is neither remarkable nor

³ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) (ICSID Convention).

⁴ ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID 1968), vol 2, 267, 501, 513/4, 571, 801ff, 804, 984.

⁵ *ibid* 419, 421, 800–4.

⁶ See Aron Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States: Applicable Law and Default Procedure' in Pieter Sanders (ed), *International Arbitration Liber Amicorum for Martin Domke* (Martinus Nijhoff 1967) 12.

⁷ Aron Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1972-II) 136 *Rec des Cours* 331, 392.

⁸ *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No ARB/81/1, Award (5 June 1990) para 40.

⁹ Emmanuel Gaillard and Yas Banifatemi, 'The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process' (2003) 18(2) *ICSID Rev—FILJ* 375.

¹⁰ Comprehensive Economic and Trade Agreement between Canada and the European Union (final text as of 29 February 2016, not yet in force) (CETA) art 8.31.

surprising. More interesting is the question to what extent investment tribunals apply international law. Put differently, is investment law, as applied by tribunals, a specialization on the fringes of international law or is it part of the mainstream of international law? Or even more drastically, is investment law a self-contained regime that merely shares certain structural elements with general international law?

The fragmentation of international law has attracted much attention, including a detailed report of the International Law Commission (ILC).¹¹ In the context of international investment law, the phenomenon of fragmentation is reflected in the attitude of some tribunals towards human rights law.¹² A procedural order in *Pezold v Zimbabwe*,¹³ offers a good illustration of such an isolationist attitude. In response to an *amicus curiae* petition that sought to rely on human rights arguments, the Tribunal found that the BIT's reference to international law did not incorporate all of international law and that there was no basis to the assertion that international investment law and international human rights law are interdependent. Consideration of human rights was not part of the Tribunal's mandate.¹⁴

There is a widespread perception that investment arbitration is essentially a means to monitor compliance with the treaties that contain offers of arbitration. However, is it really true that because a tribunal derives its jurisdiction from a particular treaty, the legal basis for its decision on the merits is necessarily confined to that treaty's substantive standards of protection? Are ICSID tribunals restricted to their separate field or do they apply international law in general? International investment law is part of general international law, and it is the task of investment tribunals to apply all of international law. Three main factors afford the theoretical underpinnings for this proposition. They are the scope of a tribunal's jurisdiction, the applicable law,¹⁵ and the methodology of treaty interpretation.

A. Jurisdiction

The scope of the jurisdiction of tribunals, as determined by treaty clauses providing for consent to arbitration, is by no means uniform. Under many treaties, jurisdiction goes beyond the treaties' substantive standards. These BITs in their consent clauses contain phrases such as 'disputes concerning investments' or 'any legal dispute concerning an investment'.¹⁶ A tribunal operating under such a wide jurisdictional clause, which refers to investment disputes in general, is not restricted to applying the substantive protections of the respective treaty.

¹¹ ILC, *Report of a Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682 (13 April 2006) paras 410–80.

¹² *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability (27 October 1989) 95 ILR 203; *Spyridon Roussalis v Romania*, ICSID Case No ARB/06/1, Award (7 December 2011) para 312; *The Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Award (6 May 2013) paras 170, 172.

¹³ *Bernhard von Pezold and others v Republic of Zimbabwe*, ICSID Case No ARB/10/15, Procedural Order No 2 (26 June 2012).

¹⁴ *ibid* paras 57–60.

¹⁵ On the relationship between jurisdiction and applicable law, see Christoph Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (2014) 1(1) McGill J Dispute Resolution 1.

¹⁶ For comparative analysis, see Chester Brown, *Commentaries on Selected Model Investment Treaties* (OUP 2013).

Other jurisdictional clauses are narrower. Under some treaties, jurisdiction for investor–State disputes is indeed limited to disputes arising out of the interpretation and application of the treaty’s substantive standards. This is the case under some BITs.¹⁷ Under Article 1116 of the North American Free Trade Agreement (NAFTA), the scope of the consent to arbitration is limited to claims arising from alleged breaches of NAFTA itself.¹⁸ Also under Article 26(1) of the Energy Charter Treaty (ECT), the scope of the consent is limited to disputes concerning an alleged violation of the ECT.

Under wide jurisdictional treaty clauses that refer to all disputes concerning investments, a claimant is not restricted to rights arising from the treaty’s substantive standards. Apart from contract claims, the claimant may pursue claims based on sources of international law beyond the treaty that provides for jurisdiction. These may be other treaties, bilateral as well as multilateral and customary international law. Examples for pertinent treaties would be double taxation agreements or human rights treaties. Of course, the requirement remains that the dispute arises directly from an investment.

Practice confirms that under a wide jurisdictional clause tribunals are not restricted to applying the substantive protections of the treaty that offers consent to arbitration.¹⁹ The *ad hoc* Committee in *Vivendi*, in its Decision on Annulment, described the scope of a wide jurisdictional clause in the following terms:

Article 8 deals generally with disputes ‘relating to investments made under this Agreement between one Contracting Party and an investor of the other Contracting Party’. . . . Article 8 does not use a narrower formulation, requiring that the investor’s claim allege a breach of the BIT itself. Read literally, the requirements for arbitral jurisdiction in Article 8 do not necessitate that the Claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT.²⁰

B. Applicable Law

The second factor that determines what parts of international law will be applied by ICSID tribunals is the applicable law. Under Article 42(1) of the ICSID Convention, the applicable law is determined either by agreement of the disputing

¹⁷ Some treaties, especially those of former communist countries, do not even allow claimants to rely on all of the bilateral investment treaty’s (BIT) substantive standards. Rather, they restrict consent to arbitration to claims arising from expropriation.

¹⁸ North American Free Trade Agreement (opened for signature 17 December 1992, entered into force 1 January 1994) (NAFTA).

¹⁹ *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision on Jurisdiction (29 January 2004) paras 131–5; *Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction (29 April 2004) para 52, n 42; *Siemens AG v Argentine Republic*, ICSID Case No ARB/02/8, Award (6 February 2007) para 205; *Salini Costruttori SpA and Italstrade SpA v Hashemite Kingdom of Jordan*, ICSID Case No ARB02/13, Decision on Jurisdiction (29 November 2004) paras 97–101; *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction (22 April 2005) paras 57, 82, 102, 188; *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No ARB/05/8, Award (11 September 2007) paras 261–6; *MCI Power Group, LC and New Turbine, Inc v Republic of Ecuador*, ICSID Case No ARB/03/6, Decision on Annulment (19 October 2009) paras 71–2; *Alpha Projektholding GmbH v Ukraine*, ICSID Case No ARB/07/16, Award (8 November 2010) para 243; *SGS Société Générale de Surveillance SA v Republic of Paraguay*, ICSID Case No ARB/07/29, Decision on Jurisdiction (12 February 2010) paras 129, 183; *Metal-Tech Ltd v Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award (4 October 2013) para 378. For a contrary view, see *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision on Jurisdiction (6 August 2003) para 161.

²⁰ *Compañía de Aguas del Aconquija, SA & Compagnie Générale des Eaux v Argentine Republic*, ICSID Case No ARB/07/3, Decision on Annulment (3 July 2002) para 55.

parties or by a combination of host State law and international law.²¹ Some BITs contain their own provisions on applicable law, typically combining host State law and international law.²² By accepting an offer of arbitration under the BIT, an investor accepts its clause on applicable law. In this way, the BIT's provision on applicable law becomes part of the agreement between the parties to the dispute. Practically, all of these provisions on applicable law include general references to rules or principles of international law.

Where jurisdiction is based on a BIT that does not contain a provision on governing law, some tribunals have found a choice of law in the parties' pleadings. Invocation of the BIT is seen as a choice of law. Already in the first BIT arbitration, *AAPL v Sri Lanka*, the Tribunal found that the BIT was not a self-contained closed legal system but, rather, had to be seen in a wider legal context, which integrated other sources of international law.²³ Other ICSID tribunals have also reached the conclusion that the choice of a BIT as the applicable law implies a choice of international law in general.²⁴

Therefore, the acceptance of the theory that by pleading on the basis of the BIT the parties have made an implicit choice of law in favour of the BIT leads to the conclusion that all relevant parts of international law are applicable. This decision leads to the question: what are the relevant parts of international law? The relevant parts of international law clearly include certain core areas of international law. These core areas consist of rules that are of systemic importance to international law. They are the law of treaties (especially the rules on treaty interpretation), the law of state responsibility and the international law of dispute settlement. However, do the relevant rules of international law also include substantive rules beyond the narrow confines of the treaty that is primarily applicable?

The need to apply standards beyond the treaty that establishes jurisdiction is particularly evident in cases involving inter-temporal questions. A treaty may provide for jurisdiction over disputes arising from events that took place before its entry into force. In such a situation, in accordance with Article 13 of the ILC's Articles on State Responsibility,²⁵ the law in force at the time of the relevant events and not the treaty that establishes jurisdiction must be applied to the merits

²¹ ICSID Convention (n 3) art 42(1).

²² See eg Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Argentine Republic (signed 20 October 1992, entered into force 1 October 1994) art 10(7): 'The arbitration tribunal addressed in accordance with paragraph (5) of this Article shall decide on the basis of the law of the Contracting Party which is a party to the dispute (including its rules on the conflict of law), the provisions of the present Agreement, special Agreements concluded in relation to the investment concerned as well as such rules of international law as may be applicable.'

²³ *Asian Agricultural Products Limited v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/87/3, Award (27 June 1990) paras 20, 21.

²⁴ *Wena Hotels Limited v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award (8 December 2000) paras 78, 79; *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*, ICSID Case No ARB/01/7, Award (25 May 2004) para 87; Decision on Annulment (21 March 2007) paras 61–2; *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*, ICSID Case No ARB/03/16, Award (2 October 2006) paras 288–91; *Saipem SpA v People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Award (30 June 2009) para 99; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award (27 August 2009) paras 109–10; *Ulysseas, Inc v The Republic of Ecuador*, UNCITRAL, Final Award (12 June 2012) para 111; *Emmis International Holding, BV v Emnis Radio Operating, BV, MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft v The Republic of Hungary*, ICSID Case No ARB/12/2, Decision on Respondent's Objection under ICSID Arbitration Rule 41(5) (11 March 2013) para 78.

²⁵ International Law Commission (ILC), Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001) (Articles on State Responsibility).

of the case. The tribunal may have to apply the substantive provisions of an earlier treaty that has since been replaced or the rules of customary international law.²⁶

The importation of extraneous international standards of protection also takes place through so-called ‘preservation of rights’ clauses in treaties. Under these clauses, any better treatment granted by other treaties shall be preserved. What about multilateral treaties of general application? Investment tribunals apply some of these as a matter of course without any debate. This would be the case for the ICSID Convention and for the Vienna Convention on the Law of Treaties (VCLT).²⁷ Another treaty frequently applied by tribunals is the New York Convention.²⁸ The relevance of these treaties is beyond doubt either because they belong to the core areas of international law mentioned earlier or because they are specific to investment law.

However, investment tribunals have also relied on a number of other multilateral treaties of general application and on decisions of bodies created by these treaties.²⁹ In a considerable number of cases, investment tribunals have applied law under the General Agreement on Tariffs and Trade and the World Trade Organization (WTO).³⁰ Numerous tribunals have relied on the respective treaties and on WTO decisions including those of the Appellate Body.³¹ In a number of cases, investment tribunals have treated European Community (EC) law and decisions of the Court of Justice of the European Union as part of the applicable law.³²

Tribunals have also relied on multilateral treaties for the protection of human rights. The relevant treaties include the International Covenant on Civil and Political Rights³³ and, in particular, the European Convention on Human Rights

²⁶ *Island of Palmas (The United States of America v The Netherlands)*, 2 RIAA 829, 845 (1949); *Tradex Hellas SA v Republic of Albania*, ICSID Case No ARB/94/2, Decision on Jurisdiction (24 December 1996); *SGS v Philippines*, (n 19) para 166; *Impregilo v Pakistan* (n 19) paras 309, 311; *Salini v Jordan* (n 19) paras 176, 177; *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania*, ICSID Case No ARB 05/20, Decision on Jurisdiction and Admissibility (24 September 2008) para 157; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award (6 November 2008) paras 132–4.

²⁷ Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) (VCLT).

²⁸ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (opened for signature 10 June 1958, entered into force 7 June 1959). See eg *World Duty Free Company Limited v Republic of Kenya*, ICSID Case No ARB/00/7, Award (4 October 2006) para 138; *Saipem v Bangladesh* (n 24) paras 141–2.

²⁹ See Moshe Hirsch, ‘Interactions between Investment and Non-Investment Obligations’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 154–81.

³⁰ General Agreement on Tariffs and Trade (opened for signature 15 April 1994, entry into force 1 January 1995). Generally see Friedl Weiss, ‘Trade and Investment’ in Muchlinski, Ortino and Schreuer (n 29) 182.

³¹ *SD Myers, Inc v Government of Canada*, UNCITRAL, First Partial Award (13 November 2000) paras 244–6, 291–3, 298; *Occidental Exploration and Production Company v The Republic of Ecuador*, LCIA Case No UN3467, Award (1 July 2004) paras 93, 153, 174–6; *International Thunderbird Gaming Corporation v The United Mexican States*, UNCITRAL, Award (26 January 2006) (Dissenting Opinion of Thomas Wälde) paras 29, 37; *Canfor Corporation v United States of America*, UNCITRAL, Decision on Preliminary Questions (6 June 2006) paras 183, 187, 327, 333; *United Parcel Service of America Inc v Government of Canada*, UNCITRAL, Award (24 May 2007) para 61; *Corn Products International, Inc v United Mexican States*, ICSID Case No ARB(AF)/04/1, Decision on Responsibility (15 January 2008) paras 110–11, 121–3, 156–7, 160; *Continental Casualty Company v Argentine Republic*, ICSID Case No ARB/03/9, Award (5 September 2008) paras 192–5; *Phoenix Action Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009) para 77; *Cargill, Incorporated v United Mexican States*, ICSID Case No ARB(AF)05/2, Award (18 September 2009) para 194; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegas Company v The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability (28 April 2011) para 315.

³² *Emilio Agustin Maffezini v Kingdom of Spain*, ICSID Case No ARB 97/7, Award (13 November 2000) paras 67–71. For a more reserved approach, see *AES Summit Generation Limited and AES-Tisza Erömű Kft v Hungary*, ICSID Case No ARB/07/22, Award (23 September 2010) paras 7.6.3–7.6.12.

³³ *Toto Costruzioni Generali SpA v Republic of Lebanon*, ICSID Case No ARB/07/12, Decision on Jurisdiction (11 September 2009) paras 157–60. See also the non-ICSID case *Hesham Talaat M Al-Warraq v Indonesia*, UNCITRAL,

(ECHR), including the case law of the European Court of Human Rights (ECtHR).³⁴ Other multilateral treaties of general application relied upon by investment tribunals have dealt with protected cultural heritage,³⁵ with the control of hazardous waste,³⁶ and with corruption.³⁷

These examples illustrate that the inclusion of international law in the governing law, whether through a party agreement or by virtue of the default rule of Article 42(1) of the ICSID Convention, may lead to the applicability of the entire universe of international law. There is no convincing reason why the applicable rules of international law should be restricted to a particular treaty or even to rules dealing with the subject matter of international investment law.

A word of caution may be appropriate at this point. Not every invocation of a rule of law amounts to its application. In some cases, tribunals' reliance on these 'extraneous rules' is not for the purpose of their application in the strict sense but, rather, as inspiration or authority for the interpretation of provisions in investment-related treaties, such as the ICSID Convention or a BIT. A good example is the reliance by some ICSID tribunals on the case law of the ECtHR in cases against States that are not parties to the ECHR.³⁸

C. Treaty Interpretation

Article 31(3)(c) of the VCLT directs that, in the interpretation of a treaty, together with the context, 'any relevant rules of international law applicable in the relations between the parties' are to be taken into account.³⁹ The ILC in its *Report on Fragmentation* has discussed Article 31(3)(c) of the VCLT extensively.⁴⁰ It has

Final Award (15 December 2014) paras 556–621. International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976).

³⁴ *ADC v Hungary* (n 24) para 497; *The Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Decision on the Participation of a Counsel (14 January 2010) para 20; *Tulip Real Estate and Development Netherlands BV v Republic of Turkey*, ICSID Case No ARB/11/28, Decision on Annulment (30 December 2015) paras 146, 152. Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 11 April 1950, entered into force 9 March 1953) (ECHR).

³⁵ The Convention Concerning the Protection of the World Cultural and Natural Heritage (open for signature 23 November 1972, entered into force 15 December 1975) was applied in *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No ARB/84/3, Award (20 May 1992) paras 75–8 and in *Parkerings v Lithuania* (n 19) paras 382–3, 385, 389, 392, 394.

³⁶ Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal (opened for signature 22 March 1989, entered into force 5 May 1992). See *SD Myers* (n 31) paras 105–7, 210–15.

³⁷ The Convention against Corruption (opened for signature 9 December 2003, entered into force 14 December 2005) was applied in *World Duty Free v Kenya* (n 28) para 145.

³⁸ *Mondev International Ltd v United States of America*, ICSID Case No ARB(AF)/99/2, Award (11 October 2002) para 143; *Técnicas Medioambientales Tecmed, SA v United Mexican States*, ICSID Case No ARB(AF)/00/2, Award (29 May 2003) para 122; *Saipem SpA v People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction (21 March 2007) 130, 132; *Azurix Corp v Argentine Republic*, ICSID Case No ARB/01/12, Award (14 July 2006) para 311; *International Thunderbird v Mexico* (n 31) (Dissenting Opinion of Thomas Wälde) para 27; *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, SA v The Dominican Republic*, LCIA Case No UN7927, Award on Jurisdiction (19 September 2008) para 93; *Perenco Ecuador Limited v Republic of Ecuador*, ICSID Case No ARB/08/6, Decision on Provisional Measures (8 May 2009) para 70; *Total SA v Argentine Republic*, ICSID Case No ARB/04/01, Decision on Liability (27 December 2010) paras 129–130; *El Paso Energy International Company v Argentine Republic*, ICSID Case No ARB/03/15, Award (31 October 2011) para 598. In *Fireman's Fund Insurance Company v United Mexican States*, ICSID Case No ARB(AF)/02/1, Award (17 July 2006), the Tribunal questioned whether the case law under the ECHR (n 34) is a viable source to interpreting art 1110 of NAFTA (n 18). See also reference to case law of the Court of Justice of the European Union in cases involving non-Member States: *International Thunderbird v Mexico* (n 31) (Dissenting Opinion of Thomas Wälde) para 27.

³⁹ For detailed treatment, see Campbell McLachlan, 'The Principle of Systemic Integration and Art 31(3)(c) of the Vienna Convention' (2005) 54 *Intl & Comp LQ* 279; Richard Gardiner, *Treaty Interpretation* (OUP 2008) 250–91.

⁴⁰ ILC, *Report of a Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (n 11) paras 410–80.

described the function of this provision: '[I]f it is indeed the point of international law to coordinate the relations between States, then it follows that specific norms must be read against other norms bearing upon those same facts as the treaty under interpretation.'⁴¹ The ILC's study group has rejected any suggestion that tribunals should restrict themselves to the treaty upon which their jurisdiction is based. In the words of the ILC:

[A]lthough a tribunal may only have jurisdiction in regard to a particular instrument, it must always *interpret* and *apply* that instrument in its relationship to its normative environment—that is to say 'other' international law. This is the principle of systemic integration to which article 31(3)(c) VCLT gives expression.⁴²

Bruno Simma and Theodore Kill have explained how investment tribunals may make use of the rules on the protection of human rights through an interpretation in accordance with Article 31(3)(c) of the VCLT.⁴³ Their methodology is valid also for other parts of international law. Article 31(3)(c) of the VCLT contains three conditions for its application:

- the extraneous material must amount to 'rules of international law';
- the rules in question must be 'relevant' and
- the relevant rules must be 'applicable in the relations between the parties'.

Clearly, the reference in Article 31(3)(c) of the VCLT to 'relevant rules of international law' includes customary international law as well as other treaties.⁴⁴ International courts and tribunals, when interpreting the provisions of a particular treaty, have relied on the terms of other treaties that contain relevant rules applicable in the relations between the parties.⁴⁵ The requirement that the rules must be 'relevant' means that they must be related to the dispute as well as to the subject matter of the treaty provision that is to be interpreted. How close this relationship must be is subject to some discussion. The relevant rules must also be 'applicable in the relations between the parties.' This means that the rules must be in force at the time of the interpretation between the parties of the treaty to be interpreted. This may create difficulties if the treaty to be interpreted is multilateral, unless all of its parties are also parties to the treaty that is to serve as background for the interpretation. If the treaty to be interpreted is bilateral, this is less likely to create a problem.

A complication arises from the fact that in investment arbitration one of the parties to the dispute is a private investor who cannot be a party to either of the treaties. The most sensible solution to this problem is to look at the States parties

⁴¹ *ibid* para 416.

⁴² *ibid* para 423 (footnotes omitted; emphasis in original).

⁴³ Bruno Simma and Theodore Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps towards a Methodology' in Christina Binder and others (eds), *International Investment Law for the 21st Century* (OUP 2009) 678.

⁴⁴ See also McLachlan (n 39) 290; Simma and Kill (n 43) 695; Gardiner (n 39) 260–3, with references to the VCLT's preparatory work as well as to subsequent practice.

⁴⁵ *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (Merits), Judgment [2003] ICJ Rep 161, paras 41, 42; *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment [2008] ICJ Rep 177, para 112; *Southern Bluefin Tuna Cases (Australia and New Zealand v Japan)*, ITLOS Case Nos 3 & 4, Award on Jurisdiction and Admissibility (4 August 2000), reprinted 39 ILM (2000) 1359, para 52. For additional pertinent practice of the Permanent Court of International Justice and the International Court of Justice, see Simma and Kill (n 43) 682–91. See also Zachary Douglas, *The International Law of Investment Claims* (2009) 86.

to the treaty in question and not at the parties to the dispute. In other words, if both States parties to a BIT are also parties to the treaty that is to serve as interpretive authority, Article 31(3)(c) applies.⁴⁶ The Decision on Annulment in *Tulip v Turkey* offers an example for the systemic integration of international law through the application of Article 31(3)(c). The *ad hoc* Committee interpreted the concept of a fundamental rule of procedure in Article 52(1)(d) of the ICSID Convention in light of provisions in human rights instruments dealing with the right to a fair trial as well as judicial practice thereto.⁴⁷

III. DEVELOPMENT OF INTERNATIONAL LAW

It follows from the above discussion that investment tribunals should and actually do apply all, or major parts of, international law and not just a specialized segment. However, do these tribunals, in addition to applying it, also develop international law? Article 38(1)(d) of the Statute of the International Court of Justice (ICJ Statute) refers to judicial decisions not as sources of international law but, rather, as subsidiary means for the determination of rules of law.⁴⁸ In the words of Judge Gilbert Guillaume, '[a] judicial decision, even issued by the International Court of Justice, is not, as such, a source of international law'.⁴⁹

An easy way out would be to downplay the difference between the sources and evidences of international law, reflected in Article 38(1) of the ICJ Statute, and to argue that every application of the law necessarily leads to its development. Sir Hersch Lauterpacht was not overly impressed by the distinction between application and development of the law. In his famous book *The Development of International Law by the International Court*, he wrote:

The distinction between the evidence and the source of many a rule of law is more speculative and less rigid than is commonly supposed. ... the legal profession is not unduly troubled by the phenomenon of the mysterious birth of an authoritative source [of] law out of what is supposed to be no more than evidence of the existing law.⁵⁰

Judicial legislation, so long as it does not assume the form of deliberate disregard of the existing law, is a phenomenon both healthy and unavoidable.⁵¹

This might lead to the somewhat fatalistic conclusion that, in the face of judicial practice, development of the law is inevitable. However, it is possible to take the discussion further and to add a few theoretical and empirical observations on the development of international law through the activities of investment tribunals. One theoretical approach would regard the practice of tribunals as delegated State practice. Under this theory, by endowing tribunals with the authority to decide on the application of the respective treaties, States have delegated to them the power

⁴⁶ Simma and Kill (n 43) 698–700.

⁴⁷ *Tulip v Turkey* (n 34) paras 86–92, 146, 152.

⁴⁸ Statute of the International Court of Justice (opened for signature 26 July 1945, entered into force 24 October 1945).

⁴⁹ Gilbert Guillaume, 'Can Arbitral Awards Constitute a Source of International law under Article 38 of the Statute of the International Court of Justice?' in Yas Banifatemi (ed), *Precedent in International Arbitration* (Juris 2008) 105.

⁵⁰ Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (CUP 1982) 21.

⁵¹ *ibid* 156.

to develop relevant practice.⁵² Anthea Roberts has described this approach in the following terms:

In theory, states and states alone make international law while decisions of international courts and tribunals are merely subsidiary means of determining international law rather than sources of international law *per se*. In practice, when states delegate power to international courts and tribunals to resolve disputes under treaties and/or to interpret and apply those treaties, they impliedly delegate some law-making functions to those judicial bodies. Those judicial decisions are then routinely cited as evidence of what the law is, even when these decisions clearly develop rather than merely apply the law.⁵³

A more traditional approach would view the pleadings of States before investment tribunals as part of State practice or as expression of *opinio juris*. The problem with such a theory is that these pleadings are made in adversarial situations as part of a litigation strategy. Therefore, they do not necessarily reflect the considered position of the State concerned. Moreover, where a law firm hired to fend off a claim represents the State, it is even less obvious that a particular argument corresponds to the State's genuine position. Investment tribunals have taken conflicting positions on the legal value of arguments made by States and their representatives in the course of previous proceedings.⁵⁴

In fact, the practice of investment tribunals affects the evolution of international law in a number of ways. Here, it may be more appropriate to speak of the influence of tribunal practice on international law rather than of its development by tribunals. One area is the drafting of treaties. The more recent treaties in the field of investment protection display a number of features that are clearly in reaction to tribunal practice. This influence of judicial practice on the development of treaty law is actually quite complex. On some points, the treaty drafters take guidance from tribunal practice. On other points, they try to settle questions left open by conflicting decisions. In yet other contexts, they attempt to counteract tendencies in judicial practice that seem undesirable.

The Consolidated CETA text for an agreement between the EU and Canada contains a number of provisions that are obviously in response to the practice of investment tribunals.⁵⁵ These provisions offer examples for all three of the categories just mentioned. The definition of fair and equitable treatment in the CETA draft mostly reproduces practice by summarizing concepts developed by tribunals.⁵⁶ On the other hand, the provision on most-favored nation (MFN) treatment seeks to settle a contentious question. It gives an unmistakably negative answer to the question whether MFN clauses apply to dispute settlement.⁵⁷ Similarly, the CETA text takes a clear position in the debate on the meaning of full protection and security—it only relates to physical, and not to legal, security.⁵⁸

⁵² State practice has a dual function in the development of international law: first, as one of the essential elements in the creation of customary international law and. Second, as an element in the interpretation of treaties under art 31(3)(b) of the VCLT (n 27).

⁵³ Anthea Roberts, 'Subsequent Agreements and Practice: The Battle over Interpretive Power' in Georg Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 95.

⁵⁴ *The Canadian Cattlemen for Fair Trade v United States of America*, UNCITRAL, Award on Jurisdiction (28 January 2008) paras 171–89; *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic*, ICSID Case No ARB/07/26, Decision on Jurisdiction (19 December 2012) para 51.

⁵⁵ CETA (n 10).

⁵⁶ *ibid* art 8.10, para 2.

⁵⁷ *ibid*, art 8.7, para 4.

⁵⁸ *ibid*, art 8.10, para 5.

An attempt to 'correct' tribunal practice addresses the ostensible incursions by investment tribunals into the host States' regulatory space. A separate provision reaffirms the host State's right to regulate to achieve legitimate policy objectives.⁵⁹

The practice of investment tribunals can also influence the development of customary international law. The discussion about the relationship of the fair and equitable treatment standard to the international minimum standard is a good example. Tribunals have suggested that the much debated difference between fair and equitable treatment and the customary law minimum standard is more apparent than real.⁶⁰ This has led some tribunals and academic observers⁶¹ to the conclusion that nowadays the driving force in the development of the customary international law minimum standard is the practice of tribunals on fair and equitable treatment.⁶²

The impact of the activities of investment tribunals on legal developments can also be more indirect and subtle. Stephan Schill and Katrine Tvede have described how the case law of investment tribunals is beginning to influence the practice of other international courts and tribunals.⁶³ Similarly, the ILC has relied on and cited decisions of investment tribunals in its work on state responsibility⁶⁴ as well as on MFN clauses.⁶⁵ It is not entirely clear to what extent ICSID tribunals perceive themselves as agents of the development of international law. A number of tribunals have called for consistency of practice in the interest of developing international investment law. The Tribunal in *Saipem v Bangladesh* has coined a formula that other tribunals have since repeated:⁶⁶

[The Tribunal] believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to

⁵⁹ *ibid*, art 8.9, para 1.

⁶⁰ *Saluka Investments BV v The Czech Republic*, Partial Award (17 March 2006) para 291. See also *Azurix v Argentina* (n 38) paras 361, 364; *Occidental Exploration and Production* (n 31) para 190; *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8, Award (12 May 2005) paras 282–4; *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No ARB/05/22, Award (24 July 2008) para 592; *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award (29 July 2008) para 611; *Duke Energy Electroquil Partners and Electroquil SA v Republic of Ecuador*, ICSID Case No ARB/04/19, Award (18 August 2008) paras 332–7; *Impregilo SpA v Argentine Republic*, ICSID Case No ARB/07/17, Award (21 June 2011) paras 287–9; *El Paso v Argentina* (n 38) para 335.

⁶¹ Rudolf Dolzer and André von Walter, 'Fair and Equitable Treatment and Customary Law: Lines of Jurisprudence' in Federico Ortino and others (eds), *Investment Treaty Law: Current Issues II* (BIICL 2007) 99; Ioana Tudor, *The Fair and Equitable Treatment Standard in International Law of Foreign Investment* (OUP 2008) 83–5.

⁶² *International Thunderbird v Mexico* (n 31) para 194; *Azurix v Argentina* (n 38) paras 365–72; *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3, Award (20 August 2007) n 325; *Chemtura Corporation v Government of Canada*, UNCITRAL, Award (2 August 2010) paras 121, 236.

⁶³ Stephan W Schill and Katrine R Tvede, 'Mainstreaming Investment Treaty Jurisprudence' (2015) 14 *Law & Practice Intl Courts & Tribunals* 94, 106.

⁶⁴ Articles on State Responsibility (n 25) Commentaries on art 36 <http://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/9_6_2001.pdf&lang=EF> accessed 15 May 2016.

⁶⁵ ILC, *Final Report of the Study Group on the Most-Favoured-Nation Clause*, Doc A/CN.4/L.852 (29 May 2015) <<http://legal.un.org/docs/?symbol=A/CN.4/L.852>> accessed 4 April 2016.

⁶⁶ *Noble Energy Inc and MachalaPower Cia Ltd v Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No ARB/05/12, Decision on Jurisdiction (5 March 2008) para 50; *Duke Energy v Ecuador* (n 60) para 117; *Bayindir v Pakistan* (n 24) para 145; *Austrian Airlines v The Slovak Republic*, UNCITRAL, Final Award (9 October 2009) para 84; *Jan Oostergetel and Theodora Laurentius v The Slovak Republic*, UNCITRAL, Decision on Jurisdiction (30 April 2010) para 62; *Saba Fakes v Republic of Turkey*, ICSID Case No ARB/07/20, Award (14 July 2010) para 96; *Chemtura v Canada* (n 62) para 109; *Bosh International, Inc and B&P LTD Foreign Investments Enterprise v Ukraine*, ICSID Case No ARB/08/11, Award (25 October 2012) para 211; *Burlington Resources, Inc v Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Liability (14 December 2012) para 187; *Metal-Tech v Uzbekistan* (n 19) para 116; *KT Asia Investment Group BV v Republic of Kazakhstan*, ICSID Case No ARB/09/8, Award (17 October 2013) para 83; *Renée Rose Levy and Gremcitel SA v Republic of Peru*, ICSID Case No ARB/11/17, Award (9 January 2015) para 76.

seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.⁶⁷

Academic analysis may support this process of harmonious development. Systematic description and appraisal of tribunal practice may lead to generalized conclusions, which, in turn, may affect the subsequent activity of tribunals.

Ultimately, it is not any legislative power, but, rather, their intellectual persuasiveness, that will determine the influence of investment tribunals on the development of international law. To quote once more Sir Hersch Lauterpacht, '[i]t is in their intrinsic power, and not in the fourth subparagraph of Article 38(1) of the Statute . . . that lies the source of the authority of the Court's pronouncements and the explanation of their actual influence'.⁶⁸ The authority or intrinsic power of an investment tribunal and its influence on the development of international law depends on a number of factors.

- It will depend on the persuasiveness and cogency of a decision's reasoning (variations in quality are the consequence not only of the composition of tribunals but also of the parties' pleadings and the need to find a compromise within a tribunal).
- It will add to a tribunal's authority if all of its members are perceived as being genuinely impartial.
- Unanimity within a tribunal is not necessarily a decisive factor (a powerful majority decision or even a convincing dissenting opinion may leave an important mark).
- Over time, a consistent line of decisions by different tribunals may build up compelling authority on a point of international law.

IV. CONCLUSION

The domain of ICSID tribunals is not just an exotic sub-discipline of international law. Their activity lies in the mainstream of international law and touches upon many of its central questions. Through their rich practice, investment tribunals have made an important impact on the development of international law.

⁶⁷ *Saipem v Bangladesh* (n 38) para 67 (footnotes omitted).

⁶⁸ Lauterpacht (n 50) 22.