

SOURCES OF LAW AND ARBITRAL INTERPRETATIONS OF *PARI MATERIA*
INVESTMENT PROTECTION RULES

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I. INTRODUCTION

Reliance by investment treaty arbitration tribunals on the case law of their predecessors is an empirically well-documented process in contemporary law.¹ This practice has given rise to different attempts of conceptualisation both in the case law itself and in legal writings.² It may be useful to put the discussion in

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¹ JP Commission, 'Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence' (2007) 24 *Journal of International Arbitration* 129; OK Fauchald, 'The Legal Reasoning of ICSID Tribunals: An Empirical Analysis' (2008) 19 *European Journal of International Law* 301, 333-343.

² The spectrum is broad: some authorities suggest a duty to follow consistent case law, G Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' (2007) 23 *Arbitration International* 357, 377; *Saipem S.p.A. v Bangladesh*, ICSID Case no ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, March 21, 2007, para 67; *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case no ARB/98/2, Award, May 8, 2008, para 119; others call for a *jurisprudence constante*, *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, ICSID Cases no ARB/02/6 and ARB/04/08, Decision of the Tribunal on Objections to Jurisdiction, January 29, 2004, para 97; AK Björklund, 'Investment Treaty Arbitral Decisions as *Jurisprudence Constante*' in CB Picker et al (eds) *International Economic Law: State and Future of the Discipline* (Oxford, Hart Publishing, 2008) 265; yet others deny any normative or other relevance of earlier cases on the issue, *RosInvestCo*

perspective. Sir Gerald Fitzmaurice famously observed in his contribution to *Symbolae Verzijl* that despite the theoretical limitation of international judgments to the particular dispute between particular parties '[i]n practice, it is obvious that neither the United Kingdom nor any other country could now successfully contest the general *principle* of straight base-lines [identified by the International Court of Justice (ICJ) in the *Fisheries* case]'.³ However, the normative influence of the judgment is limited by reference to the particular rule that it authoritatively explains. As Fitzmaurice added in an important footnote, 'decisions turning on the *interpretation* of treaties or other instruments would not always readily lend themselves to this process'.⁴ The commentators of the Iran-US Claims Tribunal's case law clearly appreciated this point, agreeing that cases explaining customary law in principle had general legal relevance while those elaborating the particular treaty in principle did not.⁵ In other words, even if the content of a rule is taken from the award, the award still relates to the particular rule. Its broader relevance has to be derived not from its existence but from the relationship to the underlying rules and sources.

This chapter does not address the contribution of case law to the development of international law in general⁶ or international investment law in particular.⁷

UK Ltd. v Federation of Russia, SCC V 079/2005, Award on Jurisdiction, November 2008, paras 49, 136-137; *Wintershall Aktiengesellschaft v Argentina*, ICSID Case no ARB/04/14, Award, December 8, 2008, paras 178-184, 194.

³ G Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law' in *Symbolae Verzijl* (The Hague, Martinus Nijhoff, 1958) 170 (emphasis in the original). It is now known that after the *Fisheries* case UK carried out a general re-examination of its territorial sea claims, *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puten, Middle Rocks and South Ledge (Malaysia / Singapore)* [2008] ICJ Rep <http://www.icj-cij.org/docket/files/130/14492.pdf>, para 225.

⁴ Fitzmaurice *ibid* 171 fn 1 (emphasis in the original).

⁵ Even if disagreeing whether particular propositions turned on custom or treaty, G Abi-Saab, 'Permanent Sovereignty over Natural Resources and Economic Activities' in M Bedjaoui (ed) *International Law: Achievements and Prospects* (Paris, UNESCO, 1991) 613; D Magraw, 'The Iran-US Claims Tribunal: Its Contributions to International Law and Practice: Remarks' in *Contemporary International Law Issues: Opportunities at a Time of Momentous Change* (Dordrecht, Martinus Nijhoff Publishers, 1994) 2-3; J Crook *ibid* 6; D Caron *ibid* 6-9; M Pellonpää *ibid* 13-14; A Mouri *ibid* 19-20; CN Brower and JD Bruesckhe, *The Iran-United States Claims Tribunal* (The Hague, Martinus Nijhoff, 1998) 645-648.

⁶ CJ Tams and A Tzanakopoulos, 'Barcelona Traction: the ICJ as an Agent of Legal Development' (2010) 23 *Leiden Journal of International Law* forthcoming, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1626163.

⁷ CH Schreuer and M Weiniger, 'Conversations Across Cases - Is There a Doctrine of Precedent in Investment Arbitration?' in P Muchlinski, F Ortino and CH Schreuer (eds) *The Oxford Handbook of International Investment Law* (Oxford, Oxford University Press, 2008) 1188; J Paulsson, 'Awards -

The present analysis instead considers the logically anterior question in the context of investment arbitration, namely whether and how arbitral elaborations in earlier cases of *pari materia* rules from other treaties are legally relevant for interpreting a particular treaty rule. There may be different reasons for an investment tribunal to refer to earlier case law by other tribunals.⁸ An earlier award may have explained the application of general concepts in a particular context. For example, the *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v Argentina* annulment decision is often the starting point of discussing the cause and object in investment treaty claims raising contractual issues.⁹ The *CMS Gas Transmission Company v Argentina* annulment decision formulates the framework for discussing primary and secondary rules in investment treaty law.¹⁰ Different views of applicable law, privity, cause and scope of umbrella clauses naturally invite consideration of approaches taken in other cases.¹¹ The reasoning of the earlier awards may also serve as an inspiration or be applied by analogy.

Still, while there are shades of difference between arguments, there is a point when reliance on earlier awards goes further than that. The case law regarding open-textured substantive rules (particularly most-favoured-nation ('MFN') treatment, indirect expropriation and fair and equitable treatment) shows a case-by-case fleshing out and refinement of presumptions, criteria and sub-criteria, often developed on the basis of particular case-specific factual circumstances by references to earlier awards. For example, the *Waguib Elie George Siag and Clorinda Vecchi v Egypt (Siag)* tribunal observed that

While its [fair and equitable treatment's] precise ambit is not easily articulated, a number of categories of frequent application may be observed from past cases. These include such notions as transparency, protection of legitimate expectations, due process, freedom from discrimination and freedom from coercion and harassment. Claimants submit that Egypt has violated each of the

and Awards' in AK Björklund et al (eds) *Investment Treaty Law: Current Issues III* (London, BIICL, 2008) 95.

⁸ Fauchald, above n 1, 335-336.

⁹ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v Argentina*, ICSID Case no ARB/97/3, Decision on Annulment, July 3, 2002, paras 94-115.

¹⁰ *CMS Gas Transmission Company v Argentina*, ICSID Case no ARB 01/08, Decision of the *ad hoc* Committee on the Application for Annulment, September 25, 2007, paras 129-134.

¹¹ *Pan American Energy LLC and others v Argentina*, ICSID Cases no ARB/03/13 and ARB/04/8, Decision on Preliminary Objections, July 27, 2006, paras 99-113.

generally recognised “strands” of the fair and equitable treatment doctrine and the Tribunal upholds this contention.¹²

The approach identifying ‘a number of categories of frequent application ... from past cases’, conceptualising them as ‘notions’ and then finding breaches of these ‘generally recognised “strands”’ seems to proceed on an implicit premise of the mutual normative relevance of all the arbitral pronouncements.¹³

Such a case-by-case identification of different aspects and criteria from the factual mistreatment in particular cases would be unremarkable if all adjudicators interpreted the same rule of law (or at least the rule of law interpreted in other cases was legally relevant for the rule applicable in the particular instance). However, at least *prima facie* that is not the case: the *Siag* tribunal had to interpret a treaty rule on fair and equitable treatment in a 1989 Italy-Egypt Bilateral Investment Treaty (BIT), while the authorities it referred to were a 2000 award interpreting the 1994 North American Free Trade Agreement (NAFTA), a 2003 award interpreting a 1996 Spain-Mexico BIT, a 2006 award interpreting a 1991 Germany-Argentina BIT and a 2007 award interpreting a 1991 US-Argentina BIT.¹⁴ Since the limit of adjudicatory explanation of the content of the rule appears to be logically set by the scope of the rule itself, one is faced with the question of whether and how the interpreter of the Italy-Egypt BIT can attribute such normative importance to ‘categories’,

¹² *Waguïh Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case no ARB/05/15, Award, June 1, 2009, para 450 (internal footnotes omitted).

¹³ This is not an isolated example of such reasoning. To consider the most recent publicly available awards interpreting clauses on fair and equitable treatment, all tribunals to a greater or lesser degree relied on criteria formulated in earlier cases regarding other treaties to identify the content of the rule, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v Kazakhstan*, ICSID Case no ARB/05/16, Award, July 29, 2008, para 609; *Duke Energy Electroquil Partners & Electroquil S.A. v Republic of Ecuador*, ICSID Case no ARB/04/19, Award, August 18, 2008, paras 333-344; *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case no ARB/03/24, Award, August 27, 2008, paras 173-178; *National Grid v Republic of Argentina*, UNCITRAL Arbitration, Award, November 3, 2008, paras 172-175; *Jan de Nul N.V. and Dredging International N.V. v Egypt*, ICSID Case no ARB/04/13, Award, November 6, 2008, paras 185-194; *L.E.S.I. S.p.A. et ASTALDI S.p.A. c. République algérienne démocratique et populaire*, CIRDI no ARB/05/03, Sentence, 12 Novembre 2008, para 151; *EDF (Services) Limited v Romania*, ICSID Case no ARB/05/13, Award, October 8, 2009, paras 216, 218, 219; *Joseph Charles Lemire v Ukraine*, ICSID Case no ARB/06/18, Decision on Jurisdiction and Liability, January 21, 2010, paras 259-262, 264. Recent NAFTA tribunals tend to refer only to the classic customary law authorities and earlier NAFTA awards in interpreting Article 1005, *Glamis Gold Ltd. v US*, UNCITRAL Arbitration, Award, June 8, 2009, paras 598-626; *Merril & Ring Forestry L.P. v Canada*, UNCITRAL Arbitration, Award, March 31, 2010, paras 182-213; *Chemtura Corporation v Canada*, UNCITRAL Case, Award, August 2, 2010, paras 121, 215.

¹⁴ *Siag*, above n 12.

'notions' and 'strands' from post-conclusion treaties and awards. As the tribunal in the *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v Ecuador* ('Chevron') case cautiously noted after setting out the interpretative framework of the Vienna Convention on the Law of Treaties ('VCLT'), '[i]t is not evident whether and if so to what extent arbitral awards are of relevance to the Tribunal's task'.¹⁵

The interpretative approaches adopted by the investment treaty tribunals need to be situated in the broader context of international courts dealing with fragmentation. The quantitative increase in fragmentation of rules and proliferation of adjudicators seems unquestionable.¹⁶ However, it is less certain that this increase always raises qualitatively new challenges. From the very creation of the Westphalian system by three bilateral treaties,¹⁷ the problems of fragmentation (and later of proliferation) often show a remarkable degree of conceptual continuity to the modern challenges.¹⁸ In investment treaty law and arbitration, despite the factually remarkable developments¹⁹ it is arguable that the principal features of the regime reflect continuity much more than discontinuity.²⁰ From a general international law perspective, the justification of claims of conceptual novelty is not self-evident: the language of primary rules in question may be traced back for centuries;²¹ the substantive and procedural

¹⁵ *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v Ecuador*, UNCITRAL Arbitration, Partial Award on the Merits, March 30, 2010, para 163.

¹⁶ Conclusions of the Study Group of the ILC, 'Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law' UN Doc A/CN.4/L.682, para 9.

¹⁷ J Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 *Recueil des Cours de l'Académie de Droit International* 325, 349-352.

¹⁸ Y Shany, *The Competing Jurisdiction of International Courts and Tribunals* (Oxford, Oxford University Press, 2003) 230-234, 239-242, 247-248.

¹⁹ Acknowledged by those supporting and criticising the investment arbitration regime alike, cf. J Paulsson, 'Arbitration without Privity' (1995) 10 *ICSID Review – Foreign Investment Law Journal* 232, 256; G van Harten, *Investment Treaty Arbitration and Public Law* (OUP, Oxford 2007) particularly Chapter 5.

²⁰ J Crawford, 'Continuity and Discontinuity in International Dispute Settlement' in C Binder and others (eds) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford, Oxford University Press, 2009) 802.

²¹ The language of most-favoured-nation (MFN) and national treatment clauses may be traced to late-17th century, H Neufeld, *The International Protection of Private Creditors from the Treaties of Westphalia to the Congress of Vienna* (A.W. Sijthoff, Leiden 1971) 110-114. Despite the apparent consensus to the contrary, treaty rules on fair and equitable treatment may also be traced back at least to mid-17th century British treaties. For example, the 1670 Treaty with Denmark (concluded by Cromwell's Commonwealth and re-made by Charles II) in its Article 24 required States to 'cause justice and equity to be administered to the subjects and people of each other according to the laws and statutes of either country', *Ambatielos case (Greece v UK)* ICJ Pleadings 484, see generally 412-413, 483-484 (Fitzmaurice).

debates often continue those in the classic law;²² already in 1907 States negotiated with complete nonchalance treaties providing individuals with access to international courts;²³ and investor-State arbitration is simply a(nother) regime of invocation of State responsibility.²⁴ While the elegant technical craftsmanship of treaty drafters is admirable, the building blocks themselves are unexceptional elements of the traditional legal order.²⁵ Against the background of the complex mix between continuities, discontinuities and innovations, the present chapter will focus on interpretative practices and consider whether they can be explained in traditional terms or require a formulation of a new framework of analysis.

The argument will be made in three steps. First of all, a brief historical overview of international investment law will be given, suggesting that the somewhat specific interpretative challenges may be explained by the peculiarities of the post-World War II investment law-making (Part II). Secondly, a number of traditional ways of explaining the relevance of case law on *pari materia* treaties will be considered, discussing the arguments of ordinary meaning, generic terms, supplementary means of interpretation and customary law (Part III). Thirdly, the possibility of qualitatively new approaches will be addressed (Part IV). It will be suggested that even though the traditional approaches cannot fully explain the existing practice, no qualitatively new framework has emerged and therefore a more formalistic or alternatively a more cautious approach to interpretation and sources would be preferable. In particular, to the extent that the anterior adjudicator has explained a rule of customary or treaty law that falls within the admissible interpretative materials of the particular interpretative exercise, reliance on the case law in the manner of *Siag* would be permissible. In the absence of such nexus, direct reliance on

²² Crawford, 'Continuity and Discontinuity', above n 20.

²³ See the discussion regarding the International Prize Court at the 1907 Hague Second Peace Conference, *Deuxième conférence internationale de la paix: La Haye 15 juin - 18 octobre 1907: Actes et documents* (Tome II, Martinus Nijhoff, La Haye, 1909) 789-791, 811.

²⁴ J Crawford, 'Treaty and Contract in Investment Arbitration' (2008) 24 *Arbitration International* 351, 355-356.

²⁵ DM Price, 'Some Observations on Chapter Eleven of NAFTA' (1999-2000) 23 *Hastings International and Comparative Law Review* 421, 421; DM Price, 'Chapter 11 - Private Party vs. Government, Investor-State Dispute Settlement: Frankenstein or Safety Valve?' (2000) 26 *Canada-US Law Journal* 107, 107-108; B Legum, 'The Innovation of Investor-State Arbitration' (2002) 43 *Harvard Journal of International Law* 531.

earlier awards for case-by-case elucidations would be justified only in limited circumstances.²⁶

Before engaging in the analysis, it should be noted what this chapter is not about. It is not disputed that arbitral awards can authoritatively explain international law – they surely represent one of the storehouses²⁷ from which the material content of rules can be extracted.²⁸ It is not argued that international adjudications (should) have no relevance in determining the content of the rules of international law. It is not disputed that arbitral awards may be appropriate for elucidating the content of the broadly textured investment protection rules, and that – unless systemic conditions radically change – the most important legal issues will continue to be explained in precisely this manner.²⁹ The equivalence of investment and trade law will also be not addressed here,³⁰ limiting the discussion to *pari materia* investment rules. The shade of science and art in the interplay of different admissible interpretative materials will not be dealt with,³¹ focusing rather on the anterior question of their admissibility. It is precisely the likely emergence of a clearer and more detailed understanding of the content of the rules that requires a consideration of the interpretative limits of the international adjudicators: how can the case-by-case elucidation of rules be conceptualised in terms of interpretation and sources when the underlying rules in each case are *prima facie* different?

II. HISTORICAL PERSPECTIVE OF LAW-MAKING

²⁶ M Paparinskis, 'Investment Protection Law and Sources of Law: A Critical Look' (2009) 103 ASIL Proceedings [forthcoming].

²⁷ S Rosenne, *The Law and Procedure of the International Court, 1920-2005* (Leiden, Martinus Nijhoff Publishers, 2006) 1551.

²⁸ G Guillaume, 'Can Arbitral Awards Constitute a Source of International Law under Article 38 of the Statute of the International Court of Justice' in Y Banifetami (ed) *Precedent in International Arbitration* (New York, Juris Publishing, Inc., 2008); see discussion below at Part III.C.

²⁹ Of course, treaty parties themselves still possess crucial law-making and (re)interpretative powers that may directly affect the existence and meaning of disputed rules, M Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2008) 79 *British Yearbook of International Law* 264, 342; A Roberts, 'Power and Persuasion in Investment Treaty Interpretation: the Dual Role of States' (2010) 104 *American Journal of International Law* 179.

³⁰ M Paparinskis, 'Equivalent Primary Rules and Differential Secondary Rules: Countermeasures in WTO and Investment Protection Law' in T Broude and Y Shany (eds) *Multi-Sourced Equivalent Norms* (Oxford, Hart Publishing, 2010) [forthcoming].

³¹ RY Jennings, 'General Course on Principles of Public International Law' (1967) 121 *Recueil des Cours de l'Académie de Droit International* 323, 544.

The context of contemporary investment law is shaped by the historical development of the investment law-making and the experiments by States with different types of law-making methods.³² During the second half of the nineteenth century and the beginning of the last century, the emphasis of law-making efforts in area of protection of aliens (increasingly including investors) was on the customary law, largely reflected in the collections of State practice and arbitral awards.³³ While rules on investment protection were also included in bilateral treaties, they seemed nearly irrelevant, failing to extend the protection to corporate investors³⁴ and being used mainly to confirm the customary nature of certain rules.³⁵ Another element of the pre-Second World War law-making that set the pattern for the further development was the consistent failure of multilateral treaty-making.³⁶

Even general customary rules were subject to considerable criticism. While it may have been the case that 'international law in the late nineteenth century *was* what the Western powers said it was',³⁷ by the time of the 1920s and 1930s the situation had changed. The earlier law-making efforts were now viewed much more critically, 'conceived as misuse of law by former colonial and imperial powers'.³⁸ The existing State practice and case law on the treatment of aliens was viewed with suspicion, and the attempts to invoke general principles of law were dismissed as externalisation of peculiar domestic conceptions of a limited

³² A Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (The Hague, Wolters Kluwer, 2009) Chapter 1.

³³ E Borchard, *Diplomatic Protection of Citizens Abroad* (New York, The Banks Law Publishing Co., 1915).

³⁴ H Walker, 'Provisions on Companies in United States Commercial Treaties' (1956) 50 *American Journal of International Law* 373, 379-380.

³⁵ C de Visscher, 'Le déni de justice en droit international' (1935) 52 *Recueil des Cours de l'Académie de Droit International* 369, 374.

³⁶ JW Cutler, 'Treatment of Foreigners: In Relation to the Draft Convention and Conference of 1929' (1933) 27 *American Journal of International Law* 225; EM Borchard, "'Responsibility of States'", at the Hague Codification Conference' (1930) 24 *American Journal of International Law* 517; 'Texts Adopted by the Committee in First Reading as Revised by the Drafting Committee' in S Rosenne (ed), *Conference for the Codification of International Law [1930]* (Volume IV, Oceana Publications, Inc., New York, 1975) 1659-1660.

³⁷ M Mendelson, 'The *Cameroon-Nigeria* Case in the International Court of Justice: Some Territorial Sovereignty and Boundary Delimitation Issues' (2004) 75 *British Yearbook of International Law* 223, 232 (emphasis in the original).

³⁸ S Rosenne, 'State Responsibility: *Festina Lente*' (2004) 75 *British Yearbook of International Law* 363, 364.

number of States.³⁹ The 1930 Hague Conference on the Codification of International Law took the debate between national treatment and international standards one step further (or perhaps rather back), debating not only the possibility of any rules other than non-discrimination but also the process of international law-making itself through treaty, custom and general principles.⁴⁰ Discussions about sources of law took five out of the total of available 12 days, and therefore contributed directly to the failure to reach a consensus on the substantive issues.⁴¹

Against this rather uninspiring background, the post-World War II era law-makers continued parallel experiments in the form of customary law, multilateral treaties and bilateral treaties. Step by step, the first two law-making avenues were closed. The attempts at drafting multilateral treaties failed, and the controversies relating to nationalisations carried out by developing, decolonised and Socialist countries made the emergence of any generalised consensus necessary for such treaties unlikely.⁴² The customary law avenue was closed by the *Barcelona Traction, Light and Power Company, Limited* case, with the ICJ lamenting 'the intense conflict of systems and interests' that precluded the indispensable 'consent of those concerned' to create customary rules on the protection of investment.⁴³ When the making of multilateral treaties and general customary law became unfeasible, the only option remaining available for law-makers was bilateral treaty-making (special customary law was *a priori* inappropriate for the task by requiring an opt-out from the general rule).⁴⁴ States modernised the Friendship, Commerce and Navigation Treaties, created the first

³⁹ JF Williams, 'International Law and the Property of Aliens' (1928) 9 *British Yearbook of International Law* 1, 19-22.

⁴⁰ As de Ruelle (Belgium) noted in the *Oscar Chinn* case, while all States at the Hague Conference agreed that a State breaching its obligations regarding the treatment of aliens under treaty, custom or general principles would commit a wrongful act, 'il reste à définir les obligations internationales résultant du droit coutumier, ainsi que des principes généraux de droit. On tourne donc ici dans un cercle vicieux', *Oscar Chinn (UK v Belgium)* PCIJ Rep Series C No 75 284-285.

⁴¹ *Rosenne Conference IV* (n 36) 1442-1476, 1583.

⁴² Van Harten, above n 19, 19-21.

⁴³ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (New Application: 1962) (Second Phase)* [1970] ICJ Rep 3, para 89.

⁴⁴ M Mendelson, 'The Formation of Customary International Law' (1998) 272 *Recueil des Cours de l'Académie de Droit International* 155, 215-217.

BITs and provided them with investor-State arbitration clauses.⁴⁵ However, investors did not fully appreciate the potential of investor-State arbitration until the end of 1990s, and therefore investment protection law lacks the orderly and logical interrelation between law-makers and adjudicators (States creating rules, adjudicators adjudicating upon them, States reflecting upon the judicial interpretation and following it or modifying the rules through State practice and treaties etc.).⁴⁶ The historical record rather shows a 30-year long process of bilateral treaty-making creating a considerable number of similarly worded rules, with the adjudications beginning at the stage when a large number of binding rules (that would be complicated to change) already existed with considerable uncertainty about their content.

The move to bilateral treaty-making had obvious advantages and less obvious disadvantages. From the law-making perspective, when an 'intense conflict of systems and interests' precluded the consensus necessary for generating customary law or concluding multilateral treaties, bilateral treaties permitted the creation of nuanced rules that would for different reasons not command sufficient approval of all States.⁴⁷ The economical and political developments made the BIT programmes spectacularly successful, especially after the end of the Cold War and the declared departure of the ideas of New International Economic Order.⁴⁸ The number of investment protection treaties is nowadays

⁴⁵ *Barcelona Traction*, above n 43, Separate Opinion of President Rivero 57, para 3; F Berman, 'The Relevance of the Law on Diplomatic Protection in Investment Arbitration' in F Ortino et al (eds) *Investment Treaty Law: Current Issues II* (London, BIICL, 2007) 69; M Paparinskis, 'Barcelona Traction: A Friend of Investment Protection Law' (2008) 8 *Baltic Yearbook of International Law* 105, 105-133.

⁴⁶ In investment law context, changes in BIT practice have taken place after the ICJ judgment in the *ELSI* case and the early NAFTA cases, SM Schwebel, 'The United States 2004 Model Bilateral Investment Treaty and Denial of Justice in International Law' in C Binder and others (eds) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford, Oxford University Press, 2009); LY Fortier, 'The Canadian Approach to Investment Protection: How Far Have We Come' *ibid*; JE Alvarez, 'The Evolving BIT' (2009) 6 *Transnational Dispute Management*; KJ Vandeveld, *U.S. International Investment Agreements* (Oxford, Oxford University Press, 2009) 64-82.

⁴⁷ Developed traditional home States could be less compromising within a bilateral negotiation than within a multilateral context, JE Alvarez and K Khamsi, 'The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime' (2008-2009) 1 *Yearbook of International Investment Law and Policy* 379, 410-414.

⁴⁸ TW Waelde, 'A Requiem for the "New International Order"' in G Hafner (ed) *Liber Amicorum Professor Ignaz Seidl-Hohenveldern: in Honour of His 80th Birthday* (The Hague, Kluwer Law International, 1998). Calling for a requiem may have been somewhat premature, OM Garibaldi, 'Carlos Calvo Redivivus: The Rediscovery of Calvo Doctrines in the Era of Investment Treaties' (2006) 3 *Transnational Dispute Management*, just as describing the Calvo Doctrine 'dead as a

assumed to amount to more than 2.600 BITs and several regional or *ratione materiae* specialised multilateral investment treaties.⁴⁹

From the adjudicative perspective, when rules are expressed in customary law or in a multilateral treaty binding on all the relevant parties, adjudicator's explanation of the content of the rule is relevant for all parties bound by the rule. However, BITs 'are concluded *intuitu personae*. The limited scope of their personal reach is part of the game'.⁵⁰ The adjudicatory explanation of one treaty rule is at least in the first instance not relevant for other *pari materia* rules binding other parties. It is in this context that the interpretative question has to be asked: how and to what extent can the interpreter of investment treaties incorporate the reasoning of tribunals interpreting broadly similar rules that for the reason of historical developments are set out in different treaties and are binding on different parties?

III. *PARI MATERIA* TREATY RULES AND TRADITIONAL APPROACHES

In practice, when investment tribunals treat arbitral interpretation of *pari materia* rules as directly relevant, the relevance is usually assumed and not demonstrated.⁵¹ While there is some support for the view that a complete substitution of citations for *de novo* analysis is impermissible,⁵² the following sections will not address particular ways of framing references to earlier cases but rather the anterior question of their admissibility as interpretative materials in the first place. Simply because tribunals have not been explicit in categorising

door nail' in a Dickensian *Christmas Carol* allusion in 1910, 'Intervention for Breach of Contract or Tort where the Contract is Broker by the State or the Tort Committed by the Government or Governmental Agency' (1910) 4 *ASIL Proceedings* 148, 173 (Clark).

⁴⁹ At the end of 2008 there were 2.676 BITs, UNCTAD, *Recent Developments in International Investment Agreements* (2008-June 2009) (New York and Geneva, United Nations, 2009) http://www.unctad.org/en/docs/webdiaeia20098_en.pdf 2.

⁵⁰ R Kolb, 'Note: Is an Obligation Assumed by Two Different States in Two Different Treaties Binding between Them?' (2004) 51 *Netherlands International Law Review* 185, 191.

⁵¹ Although see the discussion below at III.C.

⁵² In the *MTD* annulment proceedings, Chile argued that the arbitral tribunal had manifestly exceeded its power by its excessive reliance on the award in the *Técnicas Medioambientales Tecmed, S.A. v Mexico* case. The *ad hoc* annulment committee rejected the argument because '[t]he *TECMED* dictum was cited in support of this standard, not in substitution for it', *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Chile*, ICSID Case no ARB/01/07, Decision on annulment, March 21, 2007, para 70. It seems permissible to infer that *a contrario* substitution of an award for the treaty standard could have (manifestly) exceeded the bounds of a proper interpretative exercise.

every argument in terms of principles of treaty interpretation does not mean that the argument is *per se* wrong or cannot be made. There are different ways in which rules of international law can play a part in the interpretation of other rules.⁵³ This section will consider in turn four perhaps most obvious arguments that could justify treating *pari materia* rules (and their arbitral interpretations) as part of relevant interpretative materials.

A. *Pari materia* rules and ordinary meaning

Article 31(1) of VCLT provides that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' If the case law interpreting *pari materia* treaty rules explained the ordinary meaning of the treaty rules, its use would be permissible for the purposes of interpretation. The argument is unobjectionable in principle and has been accepted in practice,⁵⁴ assuming that 'the Parties must have had in contemplation at the time when they concluded the second instrument the meaning which had been attributed to like expressions in the earlier instrument'.⁵⁵ The meaning is thus established through the examination of materials extrinsic to particular treaty(-making) but reflecting the generally accepted meaning of the term, somewhat similarly to dictionary definitions. Of relevance to the particular inquiry is that the generally accepted meaning of the earlier treaty instruments may also be established through adjudication. Consequently, to the extent that arbitral interpretations of investment protection rules become generally accepted, they could inform the ordinary meaning of terms and therefore justify their use as interpretative materials.

⁵³ TW Wälde, 'Interpreting Investment Treaties: Experience and Examples' in C Binder and others (eds) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford, Oxford University Press, 2009) 724.

⁵⁴ Eg *Case of the S.S. Wimbledon* [1923] PCIJ Rep A No 1 16, 25-28; *Minority Schools in Albania* [1935] PCIJ Rep A/B No 64 4, 16-17; *Case Concerning Maritime Delimitation in the Black Sea (Romania v Ukraine)* [2009] ICJ Rep <http://www.icj-cij.org/docket/files/132/14987.pdf> paras 133-134.

⁵⁵ E Lauterpacht, 'The Development of the Law of International Organization by the Decisions of International Tribunals' (1976) 152 *Recueil des Cours de l'Académie de Droit International* 377, 396.

The ordinary meaning argument has two logical qualifications. The first qualification is of a temporal character: to conclude one treaty with a certain proposition of ordinariness in mind the other treaty must already be in existence before the conclusion of the first one.⁵⁶ The second qualification is of a qualitative character. The meaning of the particular term has to be both sufficiently clear and sufficiently widely accepted to create the background of 'normality' against which treaty-making takes place. In the adjudicative context, the argument would naturally work in a temporally linear setting, courts authoritatively interpreting treaties in a way that forms the background of ordinariness for subsequent treaty-making. In this way, in the *Oil Platforms* case the ICJ implicitly treated the Permanent Court's 1935 *Oscar Chinn* interpretation of 'freedom of commerce' in a 1919 treaty as informing the meaning of 'freedom of trade' in a 1955 treaty.⁵⁷ Conversely, in the *Methanex v US* case, the tribunal rejected the claimant's argument that WTO approaches to the interpretation of national treatment may be employed in interpreting NAFTA, pointing out that '[t]he drafting parties of NAFTA were fluent in GATT law and incorporated, in very precise ways, the term "like goods" and the GATT provisions relating to it when they wished to do so'.⁵⁸ The classic proposition that 'words which may have a customary meaning in treaties ... must be understood in that meaning' will also provide interpretative unity for temporally linear law-making in contemporary law.⁵⁹

The temporal and qualitative qualifications seem to render reliance on pre-established meaning inapplicable to most investment arbitrations. In temporal terms, the modern controversies in case law about the meaning of key investment protection law standards have arisen relatively recently, mostly at the beginning of the 2000s. Since a large part of the existing treaties were already concluded, at least their ordinary meaning cannot be influenced by arbitral interpretations taking place after the conclusion. In qualitative terms, the

⁵⁶ MA Young, 'The WTO's Use of Relevant Rules of International Law: An Analysis of the *Biotech Case*' (2007) 56 *International and Comparative Law Quarterly* 907, 918-925.

⁵⁷ *Oil Platforms (Iran v US)* (Preliminary Objections) [1996] ICJ Rep 803, para 48; F Berman, 'Treaty Interpretation in a Judicial Context' (2004) 29 *Yale Journal of International Law* 315, 318.

⁵⁸ *Methanex v US*, UNCITRAL Case, Final Award, August 3, 2005 Part IV – Chapter B, para 30, also paras 29-37.

⁵⁹ AP Higgins (ed) *Hall's Treatise on International Law* (8th edn Oxford, Clarendon Press, 1924) 390.

arbitral interpretations of such rules as MFN, indirect expropriation and umbrella clauses is characterised by disagreement rather than consensus.⁶⁰ The unsettled nature of the debate makes it increasingly unlikely that States presently concluding treaties – to the extent that they do not expressly pick and choose the preferred approaches – may be deemed to have implicitly accepted any of the contested meanings. Of course, should consistency in case law emerge, the ‘ordinary meaning’ argument could help to legitimise this consensus for the future treaties.

A final problematic aspect, assuming that consistency exists at the moment of conclusion of treaties and informs the ordinary meaning, relates to the possibility of a radical change in interpretation of the rule explaining ‘ordinariness’ after the conclusion of the treaty. Had the *Methanex* tribunal accepted the argument that NAFTA incorporated the GATT approach to non-discrimination, it would have been faced with a further question about what ‘GATT approach’ to apply. The tribunal may have relied on the approach of 1994 (when NAFTA was concluded and GATT panels considered the purpose of the State adopting the allegedly discriminatory measure to be relevant), second half of 1990s (when the conduct complained of took place and the WTO Appellate Body considered the purpose of the State to be irrelevant), or the beginning of 2000s (when it rendered its award and WTO Appellate Body appeared to be attributing some relevance to the purpose of the State).⁶¹ None of these approaches are persuasive, suggesting respectively an application of a discredited approach, a determination of the content of the rule by a *renvoi* to a

⁶⁰ The only points of apparent agreement about MFN clauses and procedural matters – that MFN treatment applied to remove the requirement to litigate in domestic courts for a certain period of time but that it could not create jurisdiction (Newcombe and Paradell, above n 32, 205-216) – have been rejected by recent awards in respectively *Wintershall*, above n 2, paras 161-197, and *RosInvestCo*, above n 2, paras 130-139. There are many divergent approaches to indirect expropriation, from emphasising the effect of the measures, *L.E.S.I.*, above n 13, paras 131-132, to minimising the relevance of the effect, *Saluka Investment BV v Czech Republic*, Partial Award, March 17, 2006, para 255, with different intermediate positions, *Continental Casualty Company v Republic of Argentina*, ICSID Case no ARB/03/9, Award, September 5, 2008, para 276. Early disagreements between narrow and broad readings of umbrella clauses have now fractured further into different strands of thinking about the standing, object, applicable law and parties to the agreements, A Sinclair, ‘The Umbrella Clause Debate’ in AK Bjorklund and others (eds) *Investment Treaty Law: Current Issues III* (London, BIICL, 2009) 275.

⁶¹ See the summary of evolving approach to non-discrimination, N DiMascio and J Pauwelyn, ‘Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin’ (2008) 102 *American Journal of International Law* 48, 62-66.

different and evolving legal regime and apparent retroactive change of the content of the rule. Such changes in case law are likely to be even more frequent in the decentralised investment protection law context.

B. *Pari materia rules and generic terms*

The most serious qualification of the ordinary term argument was the inter-temporal one: since most disputes are based on treaties concluded before the arbitral controversies properly began, even subsequent consensus cannot be implied back into the ordinary meaning contemporaneous to conclusion. This objection may be dealt with by reliance on the concept of generic treaty terms having an evolutionary potential that States are assumed to have necessarily been aware about.⁶² The conclusion of the treaty for a very long or continuous period⁶³ and the purpose of the treaty to conclusively resolve controversial matters can support the treating the particular term as evolutionary.⁶⁴ As the ICJ recognised in the *Aegean Sea Continental Shelf* case, if a term is a generic one then 'the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time'.⁶⁵ If investment protection rules were generic terms, then their arbitral interpretations could legitimately follow the evolution of investment protection law so as to correspond with the meaning attached to it at the moment of interpretation, most likely expressed in different arbitral awards.⁶⁶

There are three objections to this argument. First of all, it is not clear whether the most contested investment protection rules are *stricto sensu*

⁶² *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Rep <http://www.icj-cij.org/docket/files/133/15321.pdf>, paras 66-67.

⁶³ *Ibid.*, para 66.

⁶⁴ *Ibid.*, para 67; *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium / the Netherlands)* (2005) 10 RIAA 33, para 83.

⁶⁵ *Aegean Sea Continental Shelf (Greece v Turkey)* (Judgment) [1978] ICJ Rep 3, para 77; HWA Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989. Supplement, 2005: Parts One and Two' (2005) 76 *British Yearbook of International Law* 1, 71-77; R Gardiner, *Treaty Interpretation* (Oxford, Oxford University Press, 2008) 172-173.

⁶⁶ B Simma and T Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in C Binder and others (eds) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford, Oxford University Press, 2009) 678, 683-686.

generic. The most common BIT practice seems to be to have a fixed period of duration of ten years with subsequent continuation in force unless notified otherwise.⁶⁷ The implications are at best unclear: treaties are concluded for a continuous period and the purpose may be to provide the contemporary level of protection. At the same time, the period is not excessively long and the obligations do not provide for any kind of definite settlement.

Generic terms are 'known legal term[s], whose content the Parties expected would change through time'.⁶⁸ Fair and equitable treatment is clearly a known legal term.⁶⁹ However, unlike such generic terms as 'territorial status'⁷⁰ or 'natural resources' with a clear meaning at the moment of conclusion that has significantly changed,⁷¹ until the beginning of 2000s there was no significant interest in the meaning of fair and equitable treatment.⁷² Since generic meaning is an exception to the normal inter-temporal principle of contemporaneous interpretation, it seems somewhat strained to argue that States have treated a rule as important enough to implicitly create an inter-temporal *renvoi* when before the treaty-making neither any debates had taken place nor any consensus had been established. MFN clauses themselves are rules by which States link the treaties to further development, so one should perhaps pause before attributing an implicit evolutionary potential to the meaning of a clause that itself operates as an explicit one.⁷³ Finally, the rules of expropriation can be better explained through the lenses of customary international law rules.⁷⁴ In any event, since States have at their disposal more certain tools for linking treaty rules to future

⁶⁷ C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford, Oxford University Press, 2007) 33-34.

⁶⁸ *Kasikili / Sedudu Island (Botswana / Namibia)* (Judgment) [1999] ICJ Rep 1045, Declaration of Judge Higgins 1113, para 2.

⁶⁹ *Oil Platforms (Iran v US)* (Preliminary Objections) [1996] ICJ Rep 803, Separate Opinion of Judge Higgins 847, para 39.

⁷⁰ *Aegean Sea*, above n 65, para 77.

⁷¹ WTO, *US: Import Prohibition of Certain Shrimps and Shrimp Products* (November 6, 1998) WT/DS58/AB/R, para 130.

⁷² S Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70 *British Yearbook of International Law* 99. The divergent views adopted in the first NAFTA arbitrations illustrate the lack of any settled meaning during the earlier law-making processes, S Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 *Fordham Law Review* 1521, 1574-1582.

⁷³ *RosInvestCo*, above n 2, para 40; cf P Reuter, *Introduction au droit des traites* (3e éd., PUF, Paris, 1995) 98-99.

⁷⁴ *Saluka*, above n 60, para 254.

developments of international law (MFN clauses and express reference to customary law), caution is needed before implying the less obvious interpretative argument of generic terms.⁷⁵

Secondly, the generic term argument is structurally problematic. The contemporary meaning of generic terms has in the judicial practice so far been usually sought in the understanding reflected in multilateral treaties and customary law, or otherwise through normatively determinable general consensus. Consequently, even if the term is itself capable of being elaborated through the development of the international legal order, it may be questioned whether bilateral elucidations may ever accurately state the general consensus usually reflected in genuinely multilateral rules. In any event, even if the evolution of generic terms through interpretation of bilateral treaties is not theoretically impossible, one would expect a very high degree of consistency over a lengthy period of time that is usually not present.

Thirdly, the generic term argument is also conceptually problematic. To treat investment protection law standards as generic terms in the meaning adopted by the ICJ would distort the clear dichotomy between the source of the argument requiring contemporary meaning ('territorial status', 'environment', 'natural resources') and conclusion of the argument providing it (customary law and generally accepted multilateral documents). This perspective would turn the investment treaty rules into the start and the finish of the analysis, all rules simultaneously being both evolutionary terms requiring contemporary meaning and authoritative statements providing that meaning. In other words, the interpreter would not engage in a one-way intellectual operation of explaining open-textured classic rules through the lenses of subsequent developments but rather become part of the ongoing process of the subsequent development itself. The circularity of the argument is qualitatively different from the relatively one-way operation of generic terms, and would probably be a distortion of the traditional understanding of this concept. The application of the concept of generic terms to investment obligations may thus at one level seem to be

⁷⁵ Simma and Kill view the practice of reference to customary law as supporting their view that fair and equitable treatment is a generic term. It is complicated to see how an explicit customary *renvoi* could support, rather than undermine, the argument for an implicit treaty *renvoi*, Simma and Kill, above n 66, 704.

favourable to the unity of international law in broadening the scope of interpretative authorities that investment tribunals could use; however, at a more profound level it would fragment the universality of the traditional rules of interpretation.

C. *Pari materia rules and supplementary means*

Article 32 of the VCLT provides that '[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion'. The *Canadian Cattlemen for Free Trade v Canada* ('CCFT') and *Chevron* tribunals have suggested that since judgments and awards are subsidiary means for the determination of law, they could fit in this non-exhaustive list of supplementary means.⁷⁶ Even though the role of Article 32 in the interpretative process is limited, the open-textured nature of most substantive rules in investment treaties would probably be sufficient to characterise them as 'ambiguous and obscure' and therefore justify the application of the case law to 'determine the meaning'.

The *CCFT-Chevron* argument may be criticised on a number of levels. First of all, it is problematic from the perspective of sources. A judgment is one of the subsidiary means for the determination of rules of law, in the sense of not having an *ab initio* binding force independent from the particular rules⁷⁷ (even if judgments are often taken as rightly explaining the content of the binding rule).⁷⁸ Just as an interpretation of customary law would reflect a synthesis of State practice and *opinio juris*, and interpretation of general principles would extrapolate the rules from principles *in foro domestico* or the general framework of the international legal order, so an interpretation of the treaty would fully follow the required rules of interpretation. The result of the interpretation would not become a part of the rule itself, just as the process of interpretation of

⁷⁶ *The Canadian Cattlemen for Free Trade v Canada*, UNCITRAL Arbitration, Award on Jurisdiction, 28 January 2008, paras 49-51, 164-169; *Chevron Corporation (USA) and Texaco Petroleum Corporation (USA) v Ecuador*, UNCITRAL Case, Interim Award, December 1, 2008, paras 119-124.

⁷⁷ C McLachlan, 'Investment Treaties and General International Law' (2008) 57 *International and Comparative Law Quarterly* 361, 391-392.

⁷⁸ H Lauterpacht, *The Development of International Law by the International Court* (London, Stevens & Sonds Limited, 1958) 21.

customary law or a general principle would not transform an international court's judgment into an element of State practice or domestic rules that constituted the formal source for the rule in the first place. Even though States not parties to the particular dispute could in practice follow the judgment, in technical terms they would follow the rules with content authoritatively reflected in the judgment. Of course, there is nothing to preclude States from relying on the judgment in their subsequent practice or treaty-making so as to technically bring it within the formal rules, but that would be a separate issue not covered by the general proposition.

Secondly, the argument is problematic from the perspective of treaty interpretation.⁷⁹ Introducing judgments as elements of treaty interpretation would go against the grain of the model of interpretation reflected in VCLT that incorporates different authorities reflecting the attitude that States have taken (or implicitly approved) towards the treaty, and not developments completely extrinsic not only to the process of treaty-making itself but also to its parties. Even the broader concept of 'circumstances of conclusion' in Article 32 refers to the range of materials and information before the particular parties,⁸⁰ and cases arguably hinting at third party practice as other supplementary materials at their strongest (and most controversial) have not gone further than looking at the treaty practice of one party acquiesced by the other one.⁸¹ It is certainly possible that an authoritative judgment becomes relevant in terms of treaty interpretation, in particular through being adopted in subsequent State practice or agreement, or by informing the ordinary meaning of subsequent treaties. However, in such cases the interpretative relevance flows from the conduct (or lack thereof) of the States themselves and not from the judgments *ipso jure*.

⁷⁹ A Orakhelashvili, 'Principles of Treaty Interpretation in the NAFTA Arbitral Award on *Canadian Cattlemen*' (2009) 26 *Journal of International Arbitration* 159, 167-169.

⁸⁰ Gardiner, above n 65, 343-346.

⁸¹ *Oil Platforms*, above n 57, para 30; Separate Opinion of Judge Shahabuddeen 836; Dissenting Opinion of Vice-President Schwebel 882; Berman, above n 57, 317; HWA Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989. Supplement, 2006: Part Three' (2006) 77 *British Yearbook of International Law* 1, 74-77. It is doubtful whether interpreting Articles 31 and 32 *ejusdem generis* permits implying totally unconnected *pari materia* treaties into Article 32, as Linderfalk appears to suggest, U Linderfalk, 'Doing the Right Thing for the Right Reason – Why Dynamic or Static Approaches Should be Taken in the Interpretation of Treaties' (2008) 10 *International Community Law Review* 109, 139-140.

Thirdly, even leaving aside the two previous arguments, the *CCFT-Chevron* approach does not seem to lead very far in practice. Conceptualising arbitral awards as supplementary means would not permit a broader reference to third-party treaties. Supplementary means of interpretation logically apply to the particular treaty, and within the four corners of this argument there is nothing that would require generalising supplementary materials amongst all *pari materia* treaties. To the extent that arbitral awards have been rendered regarding the particular treaty, it is more natural to identify their interpretative relevance in terms of Article 31(3)(b) of VCLT. Reliance by States on awards in their pleadings or failure to object to a consistent line of cases (where objections could reasonably be expected) would provide the legitimising approval or acquiescence in the more certain terms of the primary rule of interpretation. To conclude, the *CCFT-Chevron* does not seem fully persuasive either in terms of sources or of treaty interpretation, and would have limited practical effect in authorising greater references to arbitral interpretations of other treaties.⁸² Similarly to the broader readings of generic terms, the seemingly progressive extension of the interpretative authority of investment tribunals could disrupt the unity of traditional rules on sources and interpretation.

D. *Pari materia rules and customary law*

Article 31(3)(c) of VCLT and the customary law it reflects⁸³ require the interpreter to ‘take into account, together with the context . . . any relevant rule of international law applicable in the relations between the parties’. The jurisdictional basis of the treaty arbitrations is treaty law, but the applicable law is not necessarily limited to it, since ‘any relevant rule of international law’ may include customary international law. To the extent that the investment protection rules can be demonstrated as having made explicit or implicit

⁸² Importantly, the *Chevron* tribunal appears to have changed its earlier position of treating awards as subsidiary means of interpretation, *Chevron Interim Award*, above n 76, paras 119-124, to explicitly doubting the relevance of earlier decisions and using them without interpretative classification only ‘to the extent that it may find that they shed any useful light on the issues that arise for decision in this case’, *Chevron Partial Award*, above n 15, paras 163-165.

⁸³ *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* (Judgment) [2007] <http://www.icj-cij.org/docket/files/136/14550.pdf> para 112.

references to custom, the reliance on case law interpreting third-party treaties would become acceptable. While starting the interpretative process from different treaty rules set out in their respective treaties, all the tribunals would conclude the process by drawing upon the same rule of customary law (leaving aside special customary law).⁸⁴ Of course, the question would still remain about whether the interpretation of customary law is persuasive, but different awards could be legitimately incorporated in the analysis as admissible authorities purporting to explain the same legal rule.

There are a number of qualifications to the customary law argument. First of all, this argument can apply only to those treaty rules that have broadly analogous customary rules. Consequently, customary law could not explain the case-by-case developments regarding clauses on national treatment and MFN treatment. The debate about the application of MFN clauses to procedural clauses has largely taken place through the case-by-case consideration of the criteria explained by the *Maffezini v Spain* tribunal, and whether the approach is accepted or rejected the very form of analysis often assumes the legal relevance of distinctions drawn in earlier cases.⁸⁵ Customary law cannot explain these developments.

Secondly, because of the bilateral treaty setting, the language of the rules in the treaties is rarely identical, describing broadly similar phenomena in slightly or significantly different terms, in particular regarding indirect expropriation and fair and equitable treatment. The rules on expropriation use apparently different terms like 'expropriation', 'confiscation', 'deprivation', 'dispossession', 'taking' and 'nationalisation'.⁸⁶ Similarly, as Newcombe and Paradell note in their research of treaty practice, '[a]lthough the fair and equitable treatment standard is included in the majority of IIAs, there are important variations among IIA texts', both regarding the formulation of the rule and its relationship with other treaty or customary rules.⁸⁷

⁸⁴ S Ratner, 'Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law' (2008) 102 *American Journal of International Law* 475, 524.

⁸⁵ R Dolzer and C Schreuer, *Principles of International Investment Law* (Oxford, Oxford University Press, 2008) 253-257; although see *Gas Natural SDG, S.A. v Argentina*, ICSID Case no ARB/03/10, Decision on Preliminary Questions of Jurisdiction, June 17, 2005, para 36.

⁸⁶ McLachlan and others, above n 67, 274-286.

⁸⁷ Newcombe and Paradell, above n 32, 257.

The uncertainty about the appropriate criteria for distinguishing implicit references to customary law from a conscious exclusion of customary law may be seen in the example of *Saluka v Czech Republic* award. The tribunal accepted the argument that a treaty rule of ‘deprivation’ made a reference to customary law of expropriation explained in a draft text discussing ‘taking’, but rejected the argument that the treaty rule of ‘fair and equitable treatment’ made a reference to the customary minimum standard.⁸⁸ In both cases the treaty rules were structurally analogous to customary rules, and the wording of treaty and custom sufficiently different to raise the possibility of different substantive content. However, the tribunal did not contrast the interpretative arguments and did not explain why ‘fair and equitable treatment’ was meant to exclude custom while ‘deprivation’ implicitly referred to the customary law of ‘taking’.

The argument of reliance on customary law in investment protection law has three further problematic aspects. The first question is whether the difference in language plays a role in identifying a reference to customary law. The use of different terms could well be read to reflect a different intention regarding the content of the treaty rule, and this intention could be defeated if all the rules referred back to a single rule of customary law of identical content.⁸⁹ While customary law is ‘any relevant rule’, it does not mean that any existing customary law needs to be applied: it is just as plausible that gaps or different emphases in wording have been deliberate.⁹⁰

The second aspect of the problem is whether a reference can be made when the treaty and customary standards are alleged to be different. A number of treaty rules are alleged to provide more stringent obligations than the analogous custom, whether regarding fair and equitable treatment and customary minimum standard, treaty and customary rules on full protection and security, or umbrella clauses and customary law of State contracts.⁹¹ On the one hand, where the difference of content between customary and treaty rules is clearly

⁸⁸ *Saluka*, above n 60, paras 254, 294-295.

⁸⁹ In practice, many treaty rules on expropriation use definitions concurrently, implicitly attempting to cover all possible paths to customary law. Still, the question of principle remains, and is relevant in those cases when the treaty terms do differ (as it was in *Saluka*).

⁹⁰ M Wood, ‘The International Tribunal for Law of the Sea and General International Law’ (2007) 22 *Journal of Coastal and Marine Law* 351, 361.

⁹¹ Newcombe and Paradell, above n 32, respectively 264-268, 309-314, 438-479.

identifiable (particularly regarding umbrella clauses and customary law of State contracts), it could be argued that *lex generalis* should not be implied back into the *lex specialis* treaty rules that were created precisely to provide qualitatively different treatment. On the other hand, where the difference of content is less clear, to reject an interpretative argument because of its presumable result would arguably misapply the requirement of Article 31 to throw all relevant materials into the interpretative ‘crucible’⁹² and would instead assume the correctness of the meaning before the general rule has been properly followed.

Thirdly, even when customary law exists and can be implied in the treaty, the final question is an inter-temporal one. It could be said (as Sir Gerald Fitzmaurice argued before the ICJ in the *Ambatielos case*) that contemporary customary international law should not be used for interpreting the treaty if there has been a fundamental change in the law since the time of conclusion of the treaty.⁹³ In other words, the scope of the implicit *renvoi* that the treaty makers presumably make to customary law should be limited to customary law as it *ratione materiae* was at the moment of conclusion or to its the developments that could have plausibly been foreseen at that point. The argument seems particularly attractive in the investment protection context, where some statements of customary law of for example indirect expropriation may be read as reflecting a qualitatively new type of analysis, addressing the State’s powers to regulate with a significantly higher degree of scrutiny.⁹⁴ If that is the case, the principle of contemporaneous interpretation could arguably limit the application of those rules that do not fall within the ambit of logical and predictable development of the customary law contemporaneous to the conclusion of the treaty. Therefore, even though the States themselves would be bound by the modern customary law, it would not be admissible for the interpretation of the particular treaty rule and thus could not be applied by the tribunal.

Bringing customary law into the discussion provides the most persuasive model for conceptualising the developments. However, even this argument is not

⁹² Gardiner, above n 65, 142.

⁹³ *Ambatielos Case*, ICJ Pleadings 407-411.

⁹⁴ See the classic article on the ‘purpose’ and ‘effect’ approaches, describing the more intrusive analysis of the ‘sole effect’ tribunals, LY Fortier and SL Drymer ‘Indirect Expropriation in the Law of International Investment: I Know It When I See It, or *Caveat Investor*’ (2004) 19 *ICSID Rev – Foreign Investment LJ* 293.

without limitations and controversies, and its full implications are likely to be fleshed out in future treaty practice and case law, if and to the extent that the issues of applicable law are addressed more directly. The International Law Commission's Study Group has suggested certain criteria that support reliance on customary law: unclear or open-textured nature of the treaty rule;⁹⁵ treaty terms having recognised meaning in customary law;⁹⁶ and more generally the presumptive will of the parties to refer to customary law for all questions that they do not resolve in express terms.⁹⁷ While important, these guidelines are not entirely unproblematic because they both seem to unnecessarily distance themselves from the VCLT by creating new terminology of interpretation and seemingly conflate two distinct legal arguments. For example, the concept of 'unclear or open-textured' seems quite close to 'ambiguous or obscure' that Article 32 of the VCLT provides as one of the alternative conditions for its application. As a result, the Study Group may have merged a criterion for application of a part of the primary rule of interpretation with the condition for having recourse to supplementary means, effectively collapsing Article 31(3)(c) into Article 32. Moreover, if a treaty term has a 'recognised meaning' in customary law, would not it be more natural to say that reference to customary law is the 'ordinary meaning' or 'special meaning' of the particular term?⁹⁸ The general presumption for reliance on customary law for matters not resolved expressly may also be contested. The fact that particular matters are not expressly dealt with in a treaty could simply suggest that they do not fall within the intended scope of treaty. Treaty makers are perfectly entitled to draft treaties with narrow scope and fairly abstract content, and there is no presumption towards broader subject matters or more detailed regulation. To use explicit language as a condition for reliance on custom could blur both the application of primary rule with conditions for using supplementary means and admissibility of interpretative materials with their effect in the interpretative process. More generally, Articles 31 and 32 provide treaty makers with a

⁹⁵ Conclusions of the Study Group, above n 16, para 20.a.

⁹⁶ *Ibid.*, para 20.b.

⁹⁷ *Ibid.*, paras 20.c, 19.a.

⁹⁸ JE Alvarez, 'The Factors Driving and Constraining the Incorporation of International Law in WTO Adjudication' in ME Janow and others (eds), *The WTO: Governance, Dispute Settlement & Developing Countries* (Juris Publishing, Inc., New York, 2008) 622.

nuanced framework within which particular acts or omissions have predictable consequences. It would be surprising if this otherwise subtle and sophisticated approach to the particular treaty rule would only provide the rather crude tool of a strong one-way presumption for relating it to other rules.

More generally, it could be argued that the problems in the application of Article 31(3)(c) arise from a conflation of two interpretative techniques for bringing customary law into the interpretative process. The first type of arguments would rely on the sameness or similarity of the subject matter of treaty and custom to determine the 'relevan[ce]' of customary law *qua* admissible interpretative materials. At the same time, the interpretative weight of the admissible customary law will be determined by the *chapeau* of Article 31(3)(c), requiring the interpreter only to 'take[] [custom] into account, together with context'. The other technique would rely on an express or implicit reference to customary law by the treaty itself, with the interpretative weight of customary law directly affecting the ordinary or special meaning of the term.⁹⁹

The second type of question is fundamentally a question of interpretation, and it could be approached in terms of rules of interpretation. Such a perspective would both systematise the existing practice (that already *sub silentio* adopts some traditional rules of interpretation) and provide a subtler framework for dealing with the question than a general presumption can. Despite certain circularity of argument, Articles 31 and 32 could be applied both to elaborating the content of the particular rule, and to identifying the permissible reference to other rule. In particular, supplementary materials could be useful in confirming the interpretative choice of reference to customary law, both as preparatory materials¹⁰⁰ and as the circumstances of the treaty's conclusion, showing the consistently symbiotic customary and treaty law-making regarding the particular rule of law or even field of law.¹⁰¹ ILC has approved a somewhat

⁹⁹ M Paparinskis, 'Investment Treaty Interpretation and Customary Law: Preliminary Remarks' in C Brown and K Miles (eds), *International Investment Treaty Law and Arbitration* (Cambridge University Press, Cambridge, forthcoming).

¹⁰⁰ E Denza and S Brooks, 'Investment Protection Treaties: United Kingdom Experience' (1987) 36 *International and Comparative Law Quarterly* 908, 912.

¹⁰¹ See the argument regarding regulatory expropriation, M Paparinskis, 'Regulatory Expropriation and Sustainable Development' in MW Gehring, M-C Cordonnier-Segger and A Newcombe (eds) *Sustainable Development in International Investment Law* (The Hague, Kluwer Law International, 2010) [forthcoming].

similar meta-interpretative approach in its work on reservations. Guideline 3.1.6 on 'Determination of the object and purpose of the treaty' (object and purpose itself being an interpretative element) requires the application of all approaches of Articles 31-32 except object and purpose itself.¹⁰² While acknowledging the tautological nature of this approach, the ILC concluded that 'it would appear to be legitimate, *mutatis mutandis*, to transpose the principles in articles 31 and 32 of the Vienna Conventions applicable to the interpretation of treaties'.¹⁰³ The interpretative framework to be applied to bringing customary law into investment treaties could be formulated in similar terms, distinguishing the Article 31(3)(c) argument based on the mere sameness of subject-matter and the separate question of a treaty reference, resolved in traditional interpretative terms.

IV. *PARI MATERIA* TREATY RULES AND NEW APPROACHES

The historical development of the investment protection law raises the challenge for the interpreters to explain the considerable importance attributed to *pari materia* arbitral interpretations. As was suggested in the previous sections, this approach is not easily explainable in terms of rules of treaty interpretation as set out in VCLT and relevant customary law.¹⁰⁴ Stephan Schill has taken a different view, arguing for the permissibility of interpretative reliance on *pari materia* rules and suggesting that

what is decisive in cases of interpretation *in pari materia* is that the treaty for interpretation and the third-party treaty form part of a larger framework or system of treaties. The conclusion to be drawn from the practice of international courts and tribunals is therefore that cross-treaty interpretation is accepted and permissible to the extent that the treaties taken into account form part of a common and treaty-overarching system.¹⁰⁵

¹⁰² ILC, 'Draft Guidelines on Reservations to Treaties' in *Official Records of the General Assembly, Sixty-First Session, Supplement No.10* (A/64/10) Guideline 3.1.6.

¹⁰³ ILC, 'Draft Guidelines on Reservations to Treaties' in *Official Records of the General Assembly, Fifty-Ninth Session, Supplement No.10* UN doc no A/62/10 Guideline 3.1.6 Commentaries 4-7.

¹⁰⁴ AF Lowenfeld, 'Investment Agreements and International Law' (2003-2004) 42 *Columbia Journal of Transnational Law* 123, 129-130.

¹⁰⁵ S Schill, *The Multilateralization of International Investment Law* (Cambridge, Cambridge University Press, 2009) 275.

However, the particular instances of practice and case law that Schill relies on do not necessarily support his thesis and may be explained in terms of traditional interpretative approaches outlined in the previous sections.¹⁰⁶ In most cases, the *pari materia* treaties relied on predated the particular instrument and therefore could plausibly be read as simply informing its ordinary meaning.¹⁰⁷ Some cases can be explained in light of the use of the argument by both parties to the treaty, arguably legitimising recourse to such materials through subsequent practice.¹⁰⁸ Other cases interpret ancient treaties or are decided in pre-VCLT time.¹⁰⁹ Both reasons possibly explain a more flexible approach to interpretation.¹¹⁰ Finally, the cases relying on treaty practice posterior to the particular treaty that cannot be clearly explained in terms of any of the recognised interpretative approaches seem to represent only a minority view.¹¹¹ At the end of the day, this practice

¹⁰⁶ Ibid. 270-275.

¹⁰⁷ See Part III.A. The Permanent Court of International Justice ('PCIJ') interpreted arbitration clauses against the background of 'the movement in favour of general arbitration', moreover explicitly denying that any interpretative relevance could be derived even from a treaty between the same parties, *Case Concerning the Factory at Chorzów (Germany v Poland)* (Claim for Indemnity) (Jurisdiction) [1927] PCIJ Rep Series A no 9, 22, 24. In a different advisory opinion, the PCIJ relied on an earlier treaty on the same topic, *Interpretation of the Convention of 1919 concerning Employment of Women during the Night* (Advisory Opinion) [1932] PCIJ Series Rep A/B No 50 365, 374-376. In a later advisory opinion, the PCIJ interpreted Albanian minority obligations by reference to other minority treaties because the Albanian treaty built on matters 'which had already been agreed upon', *Minority Schools in Albania* (Advisory Opinion) [1935] PCIJ Series Rep A/B No 64 4, 16 (or, in the words of the dissenting judges, the Albanian treaty 'follow[ed] closely the wording' of earlier treaties, Dissenting Opinion of Judges Hurst, Rostworowski and Negulesco 24, 27). The term 'disputes' in a 1836 US-Morocco treaty was interpreted against the background of 17th century France-Morocco and 18th century Great Britain-Morocco treaties, *Case Concerning Rights of Nationals of the United States of America in Morocco (France v US)* (Judgment) [1952] ICJ Rep 176, 189.

¹⁰⁸ *Oil Platforms*, above n 57, para 48.

¹⁰⁹ D Greig, 'The Time of Conclusion and the Time of Application of Treaties as Points of Reference in the Interpretative Process' in M Craven, M Fitzmaurice and M Vogiatzi (eds) *Time, History and International Law* (Leiden, Martinus Nijhoff Publishers, 2007) 207-215.

¹¹⁰ "*Kronprins Gustaf Adolf*" (*Sweden v US*) (1932) 2 RIAA 1239, 1258-1259 (interpreting a 1783 Sweden-US treaty confirmed in 1827 in light of late 18th and early 19th century US treaty practice); although see the subtle and narrow Swedish argument 'turn[ing] to the treaties with France and Prussia, which were made just before and just after this treaty with Sweden, because they throw a great deal of light' on interpretation, *Arbitration between the United States and Sweden under Special Agreement of December 17, 1930: the "Kronprins Gustaf Adolf" and the "Pacific": Oral Arguments* (Volume II, Washington, Government Printing Office, 1934) 1257 (Acheson).

¹¹¹ For example, in the *ELSI* case referred to by Schill, only Judge Oda relied on the US treaty practice posterior to the US-Italy FCN Treaty, *Elettronica Sicula S.p.A. (ELSI) (US v Italy)* [1989] ICJ Rep 15, Separate Opinion of Judge Oda 83, 87-88, 90-91. In the early *North Atlantic Coast Fisheries* case where an 1818 Great Britain-US treaty had to be interpreted, the dissenting arbitrator Drago considered that post-1818 British treaties 'may [evolve] the right interpretation', (1910) 9 RIAA 203, 206, while the majority used these treaties only to make *de lege ferenda* policy recommendations, *North Atlantic Coast Fisheries (Great Britain v US)* (1910) 9

may be simply an erroneous application of interpretative rules (possible under any regime).¹¹² If there is a choice of reading these disparate authorities either as reflecting and confirming the existing rules (and misapplying the law in a minority of cases) or as evidencing a fundamental change, it is certainly more natural to explain them in the former way with the grain of the established legal order rather than against it.

The interpretative challenges of the *pari materia* investment treaty rules and decentralised dispute settlement system have led to the development of vernacular *prima facie* reaching further than the traditional approaches. Two approaches have been suggested that may be described as the ‘weak’ and ‘strong’ arguments for consistency. While contributing to unity at the level of interpretative authority, they may challenge the unity of the traditional rules of sources and interpretation. The ‘weak’ consistency argument was made by the *SGS v Philippines* tribunal, seeing ‘the applicable law ... by definition ... different for each BIT’, and therefore arguing for a development of consistent solutions in the form of *jurisprudence constante*.¹¹³ The premise of this argument appears to understate the potential for harmonious development that investment protection law already possesses. It is true that in a treaty dispute applicable law *prima facie* will be different for each treaty. However, it is perfectly possible that Article 31(3)(c) of VCLT requires the interpreter of the particular treaty to take into account customary law that would then provide (special custom aside) identical law for all such treaties. More broadly, the concept of *jurisprudence constante* does not seem to add much to the analytical tools that the interpreter

RIAA 173, 199. In investment treaty arbitration, some tribunals have relied on trends of treaty practice in interpretation (particularly in the earlier cases relating to MFN clauses), *Maffezini v Spain*, ICSID Case no ARB/02/1, Decision on Jurisdiction, January 25, 2000, paras 58-61; *Telenor Mobile Communications a.s. v Hungary*, ICSID Case no ARB/04/15, Award, September 13, 2006, para 96; *Vladimir Berschader and Moise Berschader v Russia*, SCC Case no 080/2004, Award, April 21, 2006, paras 203-205. However, the majority of cases reject the normative relevance of such considerations, *Plama Consortium Limited v Bulgaria*, ICSID Case no ARB/03/24, Decision on Jurisdiction, February 8, 2005, paras 195-196; *Aguas del Tunari S.A. v Bolivia*, ICSID Case no ARB/02/03, Decision on Respondent’s Objections to Jurisdiction, October 21, 2005, para 266; *Berschader* *ibid* Separate Opinion of Weiler, para 24; *RosInvestCo*, above n 2, para 38; cf. Z Douglas, *The International Law of Investment Claims* (Cambridge, Cambridge University Press, 2009) 250-255.

¹¹² *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A.*, Decision on Annulment, ICSID Case no ARB/03/4, September 5, 2007, Dissenting Opinion of Sir Franklin Berman, paras 5-12.

¹¹³ *SGS*, above 2, para 97.

already possesses regarding applicable law and the application of general concepts (cause, object etc.) to particular rules.

The 'strong' consistency argument was made by the *Saipem v Bangladesh* tribunal, suggesting that 'subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases'.¹¹⁴ Even if the proposition is relatively uncontroversial regarding cases interpreting the same rule of customary or treaty law, to say that interpretation of five or seven unconnected treaties without any express or implicit approval *requires* certain interpretation of more than 2.600 other BITs goes further than *lex lata*. The tribunal's purpose 'to satisfy the legitimate expectations of the community of States and of investors as regards the predictability of the law on these questions' is not very helpful in identifying the normative rationale of the argument.¹¹⁵ It is not clear why expectations of investors and States, other than the parties to the dispute and the home State, should be of any immediate normative relevance for interpreting the rules in dispute. Conversely, if for some reason they are, it is not clear why international organisations (like the European Community, member of the Energy Charter Treaty) do not have such expectations. Moreover, if 'community of States' alludes to *erga omnes* obligations,¹¹⁶ it has uncertain application to investment protection law which, even if in its multilateral form amounting to more than multilateral BITs,¹¹⁷ has not moved beyond bundles of bilateral obligations.¹¹⁸

An argument for 'new' rules of interpretation permitting greater flexibility in permissible authorities is certainly unremarkable in principle. Rules of interpretation are only *jus dispositivum* and as such can be modified through subsequent practice. Still, despite the quantitatively impressive nature of modern developments, the better view is that no special new rules have

¹¹⁴ *Saipem*, above 2, para 67; *Casado*, above 2, para 119.

¹¹⁵ *Ibid.*

¹¹⁶ CJ Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge, Cambridge University Press, 2005).

¹¹⁷ *CCFT*, above n 76, paras 164-169.

¹¹⁸ O Schachter, 'Entangled Treaty and Custom' in Y Dinstein and M Tabory (eds) *International Law at a Time of Perplexity — Essays in Honour of Shabtai Rosenne* (Dordrecht, M. Nijhoff, 1998) 735; C Carmody, 'WTO Obligations as Collective' (2006) 17 *European Journal of International Law* 419, fns 76-77; TW Waelde, 'International Investment Law: An Overview of Key Concepts and Methodologies' (2007) 4(4) *Transnational Dispute Management* 48-49 fn 104; Paporinskis 'Countermeasures', above n 29, 330-331.

emerged.¹¹⁹ The complex parallelism of rules and disputes relating to the property interests of foreigners is not an innovation of the 21st century investment law¹²⁰ and was known to the International Law Commission during its work on what was eventually to become the VCLT.¹²¹ While some features of the investment protection system could justify changes *de lege ferenda*,¹²² the policy desirability cannot on its own change the *lex lata*. Just as in any other case of alleged change of customary or treaty law, the desirable change needs to be demonstrated in terms of actual State practice (that may be reflected in case law).

States argue and tribunals accept the rules of VCLT.¹²³ Since the pleadings in most cases are not publicly available, the legal rationale for the invocation of case law by States is uncertain. Still, with all due caution drawing upon the available information, the picture is at best mixed: some States have expressly argued against the normative influence of *pari materia* case law,¹²⁴ others appear to have accepted it,¹²⁵ while yet others seem to have invoked it as explaining customary law.¹²⁶ The case law is by no means unanimous in relying on earlier

¹¹⁹ See a discussion of investment law and *lex specialis* in the context of State responsibility, Paparinskis, 'Countermeasures', above n 29, 345-351.

¹²⁰ In the 1903-1905 Venezuelan Arbitrations similar legal issues were arbitrated in parallel bilateral proceedings in Venezuela-US, Belgium, Great Britain (1903-1905) 9 *RIAA* 111-533; Venezuela-France, Germany, Italy, Mexico, Netherlands, Spain, Sweden and Norway Mixed Claims Commissions (1903-1905) 10 *RIAA* 1-770, while the implications of earlier gunboat diplomacy were addressed in both arbitration, *Venezuelan Preferential Case* (1904) 9 *RIAA* 99, and landmark law-making activities, JB Scott, 'The Work of the Second Hague Peace Conference' (1908) 2 *American Journal of International Law* 1, 15. See also nn 20-25.

¹²¹ Venezuelan cases were extensively discussed in the reports on State responsibility submitted to the ILC at the time, FV García-Amador, 'Sixth Report on State Responsibility' in *Yearbook of the International Law Commission, 1961, Volume II, A/CN.4/SER.A/1961/Add.1* 1, paras 57, fn 89, 67, 69, 103, 104, 106, fn 197, 122, 123, 130, 132, 137, fn 244, 142, 150, 153, 161.

¹²² Z Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 *British Yearbook of International Law* 151, 168.

¹²³ CH Schreuer, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration' (2006) 3 (2) *Transnational Dispute Management* 1-2.

¹²⁴ *AES Corporation v Argentina*, ICSID Case no ARB/02/17, Decision on Jurisdiction, April 26, 2005, paras 20-22 (Argentina); *MTD annulment*, above n 52, para 63 (Chile); *LLC Amto v Ukraine*, SCC Case no 80/2005, Final Award, March 26, 2008, para 28.iii (Ukraine); *Glamis*, above n 13, para 605 (US).

¹²⁵ *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v Kazakhstan*, ICSID Case no ARB/05/16, Award, July 29, 2008, para 609 (Kazakhstan); *Plama Consortium Limited v Bulgaria*, ICSID Case no ARB/03/24, Award, August 27, 2008, para 175 (Bulgaria).

¹²⁶ *Saluka*, above n 60, para 289 (Czech Republic); *Jan de Nul*, above n 13, para 182 (Egypt).

awards, with equally distinguished tribunals adopting positions from very receptive to deeply sceptical.¹²⁷

When tribunals are conceived as engaging in law-making, the State practice has been disapproving. The response by NAFTA States to perceived activist tribunals through Article 1128 submissions, NAFTA Free Trade Commission and changes in subsequent BIT treaty practice support the traditional sources of law in both multilateral and bilateral contexts, emphasising and furthering the classic approaches across-the-board rather than relaxing them.¹²⁸ The responses to creative MFN clause interpretations have been similarly negative.¹²⁹ Of interest is also the broader systemic scepticism directed at the desirability of the elucidation of investment protection law through investment arbitration. The treaty practice of US and Canada now *de facto* internationalises domestic constitutional approaches to regulatory expropriation,¹³⁰ and the Norwegian Model BIT (now abandoned) expressly drew upon the experience of human rights law of expropriation.¹³¹ Whatever view one takes about the merits of these changes in treaty practice, they appear to indicate strong dissatisfaction with the overly flexible interpretative practices, rejecting particular criteria, criticising broader normative foundations and searching for more appropriate approaches in other legal regimes and systems.

V. CONCLUSION

The decentralisation of rules and adjudicators in investment law has caused some strain to the traditional approaches to sources and interpretation. There seems to be a normative mismatch between the pragmatic case-by-case identification of criteria of broadly termed *pari materia* obligations and the *prima facie* lack of mutual legal relevance between these elucidations. The issue may be considered on two levels: first of all, whether in descriptive term the

¹²⁷ Above n 2.

¹²⁸ Newcombe and Paradell, above n 21, 61, 272-275.

¹²⁹ *ibid* 223-224.

¹³⁰ A Newcombe, 'Canada's New Model Foreign Investment Protection Agreement' (2005) 2 (1) *Transnational Dispute Management* 6-7.

¹³¹ 2007 Norway Model BIT <http://ita.law.uvic.ca/documents/NorwayModel2007.doc> Article 6; Comments on the Model for Future Investment Agreements <http://ita.law.uvic.ca/documents/NorwayModel2007-commentary.doc> 22-23.

practice can be explained in terms of traditional approaches to sources and interpretation; secondly, whether in normative terms it signifies a change to or at least a reappraisal of the traditional meta-rules of sources and interpretation. From the four arguments reflecting the traditional approaches only reliance on customary law may implicitly explain some parts of the recent practice. However, even though practice sometimes goes further than the traditional understanding of sources and interpretation, it has not resulted in an underlying normative shift of the meta-rules. Most instances of State practice and case law confirm the traditional understanding of sources and interpretation, and the explicit and implicit attempts to change the traditional approaches are neither widespread nor consistent enough to change the VCLT and customary rules on treaty interpretation. There seem to be a number of possible solutions. The interpreters could change their legal argumentation from *verbatim* incorporation of case-by-case elucidated criteria to *de novo* interpretations. The other alternative would be to demonstrate the existence and relevance of customary law (or other kind of interpretative nexus with the rules elaborated in other awards) before the argument is made. More plausibly, tribunals could be explicit about the lack of direct normative relevance in most instances and minimise the approach of explicit substitution and extensive borrowing from earlier case law.

Whatever *a priori* jurisprudential reasons for consistency States may be presumed to have, it is hard to read the practice otherwise as showing the satisfaction of States with the existing sources framework encapsulating the procedurally and substantively decentralised system. Classic approaches already permit certain flexibility, and to the extent that tribunals have attempted to extend it further, the response of States – when expressed in normatively determinable terms – has been sceptical both regarding particular choices and the broader teleology. States have shown little normatively determinable interest to initiate or acquiesce in any radical reforms, in particular through giving the adjudicators a greater harmonising role than they already enjoy *de lege lata*. This system may be far from perfect for ensuring fully harmonious development of law, but it accurately reflects the unified meta-rules on sources and interpretation and is precisely the kind of system that States have crafted in the last 50 years.

The 2010 award in the *Chemtura* case provides an appropriate arbitral postscript for this chapter. Three distinguished arbitrators that had sat on earlier tribunals making landmark pronouncements on sources and interpretation in investment arbitration (Gabrielle Kaufmann-Kohler in *Saipem*, Charles Brower in *Chevron* and James Crawford in *SGS II*) appeared to now take a cautious stance. The *Saipem* tribunal had earlier suggested that ‘it *must* pay due consideration to earlier decisions of international tribunals. ... subject to compelling contrary grounds, it *has a duty* to adopt solutions established in a series of consistent cases. ... it *has a duty* to seek to contribute to the harmonious development of investment law’.¹³² The language of the *Chemtura* award is slightly but importantly different: ‘a tribunal *should* pay due regard to earlier decisions it *ought* to follow solutions established in a series of consistent cases’.¹³³ The explanation of the role of earlier decisions trails *Saipem* but the imperative language has been changed into merely suggestive, and the arbitral obligation to harmoniously develop the law is completely dropped. If *Chemtura* is indeed a confirmation of and a (re)turn to the traditional perception of sources and interpretation, it provides a symbolic closure for the investment law’s first decade of the third millennium and the imaginative normative innovations that failed to receive the law-making stamp of approval.

¹³² *Saipem*, above 2, para 67 (emphasis added).

¹³³ *Chemtura*, above 13, para 109 (emphasis added).