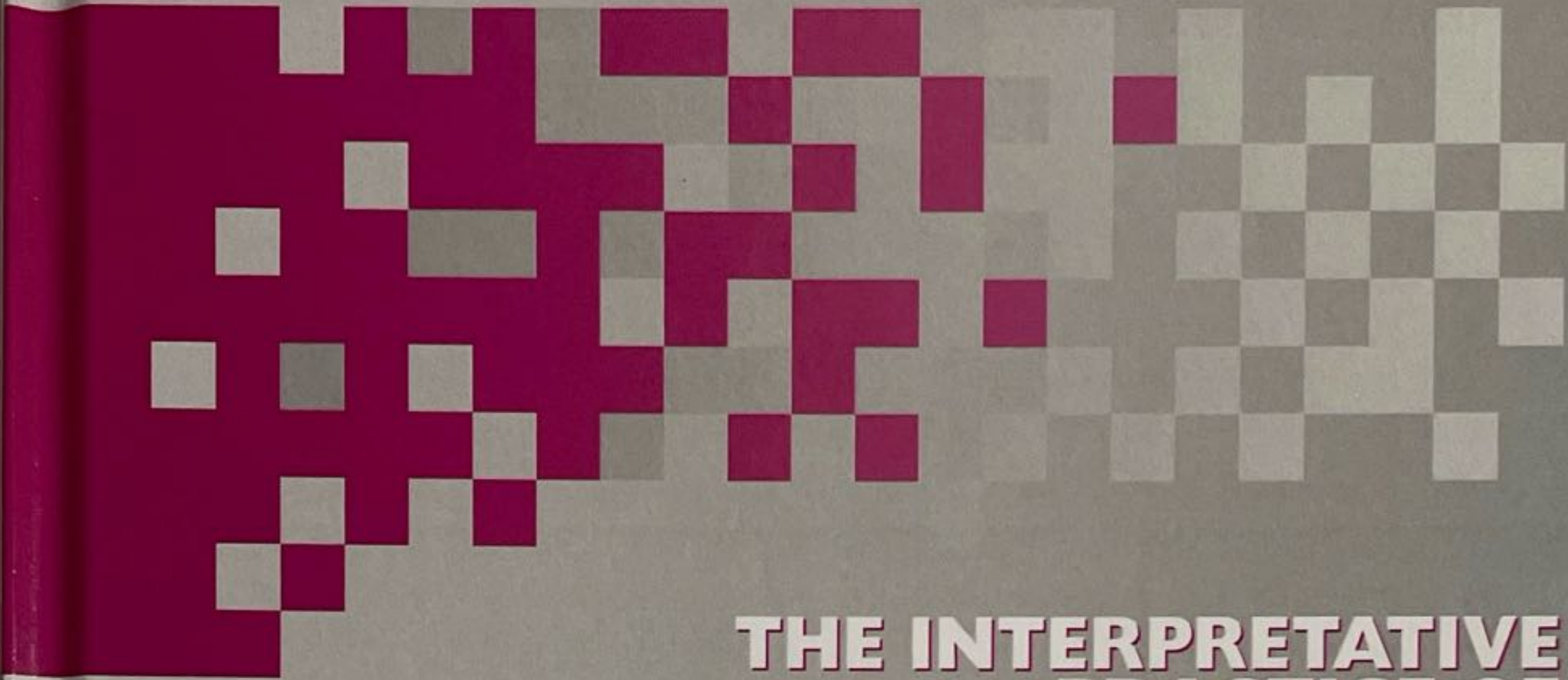


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**THE INTERPRETATIVE
PRACTICE OF
INTERNATIONAL INVESTMENT
ARBITRAL TRIBUNALS**

CLAUDIA SALGADO LEVY



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Introduction

'There's glory for you!'

'I don't know what you mean by "glory,"' Alice said.

Humpty Dumpty smiled contemptuously. 'Of course you don't - till I tell you. I meant "there's a nice knock-down argument for you!"'

'But "glory" doesn't mean "a nice knock-down argument,"' Alice objected.

'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean - neither more nor less.'

'The question is,' said Alice, 'whether you can make words mean so many different things.'

'The question is,' said Humpty Dumpty, 'which is to be master - that's all.'¹

Several aspects of this passage are striking. First, as Humpty Dumpty astutely recognized, words may carry multiple meanings and often lack precision.² Second, where words may have several possible interpretations, a party to a dispute may strategically select the meaning that best serves its interests, thereby disregarding alternative interpretations. Third, the passage highlights that those who wield authority over language possess the power to assign meanings to words as they deem appropriate. By controlling and manipulating language, they can exert considerable influence over those who merely use words as a natural mode of expression.³ That is to say, users of words can attach any meaning to a word they intend to use. The only limitation is to

1. Lewis Carroll, *Through the Looking-Glass and What Alice Found There, Classics* (London: Macmillan Children's, 2015), Chapter 6, 35-36.
2. Regarding the different meaning of language, see also Wittgenstein's work. Pierre de Boisdeffre et al., *Dictionnaire des Idées Contemporaines* (Paris: Éditions universitaires, 1966), 692-693.
3. Renée Haynes, "'Which Is to Be the Master?'" Three Humpty Dumpties', *Journal: The Tablet*, a weekly newspaper & review, 1840. London: The Tablet Publishing; 9 February 1955, 9.

they are not direct sources of international law and are therefore not the proper means for creating rules of law.

Decisions issued by other international courts and tribunals are also relevant to the interpretation of well-established principles of international law. However, on many occasions, these courts and tribunals interpret and apply the law in isolation from other fields of international law, and consequently their decisions are of limited significance. Moreover, precedents constitute a self-imposed means of restricting tribunals' interpretative freedom. In other words, arbitral tribunals may limit their interpretative freedom by considering prior decisions.⁶⁹⁹

After having addressed the different methods and techniques used by investment arbitral tribunals for the interpretation of treaties, this work now turns to an examination of the interpretation of customary international law rules.

CHAPTER 2

Interpretation of Customary International Law by Investment Tribunals

Customary international law (CIL) is an important source of international law. Under certain circumstances, the applicable law for the settlement of investment disputes may include CIL rules. In particular, tribunals have noted that investment treaties are not 'a self-contained, closed legal system', and therefore rules from customary international law may be integrated by direct reference, as well as by implied incorporation.⁷⁰⁰

Some treaties expressly mention CIL, or, more generally, international law as the applicable law,⁷⁰¹ whereas other treaties have omitted any reference to it. Under either scenario, tribunals have not been precluded from applying CIL rules. As observed by the AAPL tribunal, 'the non-reference to international law in Article 2.(2) of the Sri Lanka/UK Treaty should not be taken as implying the Parties' intention to avoid its application under any aspect, including its role as supplementary source providing guidance in the process of interpretation'.⁷⁰² Likewise, in the AES case, the tribunal acknowledged that it may apply any CIL rule which it deems compatible with the pertinent treaty provisions and the ICSID Convention.⁷⁰³ A similar reasoning is found in *Sempra*. There, the tribunal did not consider that the lack of an express reference in the treaty to CIL was an impediment to its application.⁷⁰⁴

700. *AAPL v. Sri Lanka* (final award) ¶¶ 21–22. The AAPL tribunal, for instance, was of the view that the submissions of both parties to the arbitration clearly demonstrated that they agreed about 'admitting the supplementary role of the recourse – regarding certain issues – to general customary international law'.

701. *M.C.I. Power Group, v. Ecuador* (award) ¶ 369. The international law mentioned in Art. II of the BIT refers to customary international law; that is, the repeated, general and constant practice of States, which they observe because they are aware that it is obligatory.

702. *AAPL v. Sri Lanka* (final award) ¶ 52.

703. *AES Corporation v. Argentina* (decision on jurisdiction) ¶ 64.

704. *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, ¶ 378.

699. See further Chapter 8, on considering previous decisions, *infra*.

In practice, investment tribunals have assigned different roles to customary international law: *lacunae*-filling; interpretation-harmonizing; multilateralizing and legitimizing and formalizing *de facto* jurisprudence.⁷⁰⁵ On some occasions, customary norms have played the role of *stabilizing rules of law*, namely when customary norms have been codified through treaties and domestic laws.

For some tribunals, CIL rules *establish a floor* for the treatment of investments; they may even impose limits on the State's legislative power. Such was the case in *Burlington*, where the tribunal opined that customary international law on taxation imposed two limitations on the State's power to tax: specifically, taxes may not be discriminatory or confiscatory.⁷⁰⁶

Customary international law has often been used to *fill the gaps* existing in international treaties.⁷⁰⁷ In fact, where in the tribunal's opinion, the treaty itself does not include the needed elements, recourse to CIL is then necessary. For instance, in *Sempra*, the tribunal posited that the treaty itself did not contain 'all the legal elements necessary for the legitimate invocation of a state of necessity'.⁷⁰⁸ The tribunal instead found the rule it needed under customary law.⁷⁰⁹

It may also be the case that tribunals apply CIL rules in order to *shed light* on ambiguous treaty provisions. As the *Amoco* tribunal stated, '[R]ules of customary international law may be useful in order to fill in possible lacunae of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions'.⁷¹⁰

Similarly, for some tribunals, customary law operates in a *residual* way or has a supplementary role: it governs all matters not covered by the treaty, which is *specialis* in investment disputes. As a NAFTA tribunal acknowledged: 'Chapter Eleven of the NAFTA constitutes *lex specialis* in respect of its express content, but customary international law continues to govern all matters not covered by Chapter Eleven. In the context of Chapter Eleven, customary international law – as codified in the ILC Articles – therefore operates in a residual way'.⁷¹¹ On other occasions, CIL rules have served to modify treaty provisions. The Vienna Convention has not accepted the role of customary norms, but the ICJ has recognized it in several cases.⁷¹²

Most importantly, CIL rules have provided '*interpretative yardsticks* for the interpretation of conventional law in which it originates'.⁷¹³ In fact, treaty standards are in general vaguely drafted, and there is no instruction on how they should apply.

705. Jean D'Aspremont, 'International Customary Investment Law: Story of a Paradox,' in *International Investment Law: The Sources of Rights and Obligations*, eds Tarcisio Gazzini and Eric Brabandere (Leiden; Boston: Martinus Nijhoff, 2012), 5–47.

706. *Burlington Resources & Ors. v. Ecuador* (decision on jurisdiction) ¶¶ 392–393.

707. See further Dominique Carreau and Fabrizio Marrella, *Droit International* (Paris: Pedone, 2012), Chapter X.

708. *Sempra v. Argentina* (award) ¶ 378.

709. *Ibid.*

710. *Amoco Int'l. Finance Corp v. Islamic Republic of Iran et al.*, Iran-US.CT., Case no. 56, Chamber 3, Award no. 310-65-3 of 14 July 1987, ¶ 112.

711. *A.D.M. v. Mexico*, Award, 21 November 2007, ¶ 119. See also *AAPL v. Sri Lanka* (final award) ¶¶ 22–24.

712. See Carreau and Marrella, *Droit International*, 322.

713. D'Aspremont, 'International Customary Investment Law,' 26. Emphasis added.

Customary law may then assist with the interpretation of treaties; it can provide guidance on outlining the scope and content of these standards. A direct consequence of using CIL rules as an interpretative tool is that individual treaty provisions, as interpreted by individual arbitral tribunals, become harmonized, and the investment regime becomes multilateral.⁷¹⁴

As the ILC stressed, the application of customary international law is of particular relevance when '[t]he treaty is silent on the applicable law and it is necessary for the interpreter (...) to look for rules developed in another part of international law to resolve the point'.⁷¹⁵ Several investment arbitral tribunals have used customary law to interpret treaty provisions that are usually drafted in very broad terms.⁷¹⁶

Determining and ascertaining the scope and content of CIL rules has created some difficulties. In practice, investment tribunals have applied a large percentage of CIL rules. Indeed, on several occasions, tribunals have had to examine whether the State's conduct was consistent with both the international investment treaty at hand and customary international law.⁷¹⁷ ICSID tribunals have applied CIL rules based on Article 42.1 of the ICSID Convention, whereas other tribunals have based their considerations on Article 35 of the UNCITRAL Arbitration Rules.⁷¹⁸

Both investors and respondent States have invoked customary law principles, either claiming their violation or as a means of defence. In *Chevron & Texaco v. Ecuador*, for instance, the claimants requested that the tribunal declare that the Republic of Ecuador had denied justice under customary international law, alleging that a domestic trial had 'five types of poison: judicial fraud and corruption, gross violations of due process, executive interference, judgments which are a mockery of legal reasoning, [and] factual findings which are taken out of thin air'.⁷¹⁹

Likewise, in *Merck Sharp & Dohme v. Ecuador*, the investor accused the State of another denial of justice by applying its laws to aliens in a fundamentally unfair manner, thereby breaching the FET clause.⁷²⁰ The tribunal found that there was indeed a denial of justice 'whether under the general standard of customary international law or under the specific terms of Article II(3) of the BIT with its internal reference to the international law standard'.⁷²¹

714. *Ibid.*, 27–28; see also Tarcisio Gazzini, 'The Role of Customary International Law in the Field of Foreign Investment,' *Journal of World Investment & Trade* 8 (2007): 710 <https://doi.org/10.1163/221190007x00143> (last accessed September 2025).

715. Report of the International Law Commission, Fifty-eighth session (1 May–9 June and 3 July–11 August 2006), General Assembly Official Records, Sixty-first session, Supplement no. 10 (U.N. Doc./61/10), 414 ¶ 20.

716. *CMS v. Argentina*.

717. That is, *Occidental v. Ecuador* (contract termination case), *Fireman's Fund v. Mexico*; *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador*, UNCITRAL, PCA Case no. 34877 (breach of contract claims). Plenty of other cases could be cited.

718. This was already developed in Chapter 1 *supra*, the section on applicable law.

719. *Chevron & Texaco v. Ecuador* (breach of contract claims), Second Partial Award on the Merits, 30 August 2018, ¶ 8.13.

720. *Merck Sharpe & Dohme (I.A.) Corporation v. The Republic of Ecuador*, PCA Case no. 2012-10, Partial Final Award, 25 January 2018, ¶¶ 399, 401.

721. *Ibid.*, ¶ 696.

Other cases where tribunals were confronted with denial of justice claims are *Vivendi v. Argentina*,⁷²² *Azinian v. Mexico*,⁷²³ the *ELSI* case, *Mondev v. United States of America*,⁷²⁴ *Loewen v. United States of America*⁷²⁵ and *Amto v. Ukraine*.⁷²⁶ The CIL rules relating to States' obligations to maintain and make available to aliens a fair and effective system of justice (the prohibition of the denial of justice) have commonly been applied in investor-State arbitrations.⁷²⁷

Respondent States have also invoked customary principles of international law in their own defence. It is broadly accepted in international law that there are circumstances precluding a State's wrongful conduct. Argentina, for instance, has alleged state necessity in several cases as a justification for the measures it adopted that were prejudicial to foreign investors.⁷²⁸ Tribunals have had to assess Argentina's responsibility under the associated BIT by applying the treaty itself and the relevant CIL rules.⁷²⁹ Similar examples of CIL rules that are frequently introduced in investment disputes are those reflected in the Draft Articles on State Responsibility for Internationally Wrongful Acts (ILC Draft Articles on State Responsibility),⁷³⁰ including rules on attribution, state necessity and force majeure.⁷³¹

Similarly, investment arbitral tribunals have continuously applied certain aspects of CIL rules to the law of expropriation, including the right to compensation and the standard for compensation. Likewise, CIL rules have served to determine States' obligations to make 'full reparation' for the injury caused by an international wrongful act. In this vein, some tribunals have acknowledged the States' rights to regulate or exercise their sovereign powers within the police powers doctrine and have distinguished between indirect expropriations and general regulations, which do not amount to an indirect taking.⁷³² The *Saluka* tribunal, for instance, considered that despite the fact that the treaty's expropriation provision did not contain any exception for the exercise of regulatory power, there was a 'customary international law notion that the deprivation can be justified if it results from the exercise of regulatory actions

722. *Compañía de Aguas del Aconquija v. Argentina*, Award, 21 November 2000, ¶ 80.

723. *Robert Azinian and others v. United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999, ¶ 103.

724. *Eletronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ Reports 1989 p. 15 at ¶ 76, ¶ 128. See *Mondev International Ltd v. United States of America*, ICSID Case No. ARB (AF)/99/2, Award, 11 October 2002.

725. *Loewen Group Inc. & Raymond L. Loewen v. United States of America*, ICSID Case No. ARB (AF)/98/3, Final award, 26 June 2003.

726. *Amto LLC v. Ukraine*, SCC Case no. 080/2005 (ECT), Final Award, 26 March 2008.

727. *Loewen Group Inc. & Raymond L. Loewen v. United States of America*, ICSID Case No. ARB (AF)/98/3, Final Award, 26 June 2003.

728. See *CMS v. Argentina and LG&E Energy Corp. v. Argentina*.

729. That is, cases against Argentina: *CMS, LG&E, Enron, Sempra, Total, and El Paso*.

730. The 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts' were developed by the ILC and adopted at its fifty-third session in 2001. The Draft Articles were then submitted to and accepted by the General Assembly of the United Nations.

731. *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/1, Decision on Responsibility, 15 January 2008.

732. *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB (AF)/99/1), Award of 16 December 2002, ¶¶ 103, 112.

aimed at the maintenance of public order'.⁷³³ Accordingly, the tribunal imported this customary notion into the treaty. Examples of similar cases are the *El Paso* award⁷³⁴ and the *Tecmed* decision.⁷³⁵

Customary international law has also been applied in the context of State contracts. A notable example is the *Cambodia Power Company v. Cambodia* case, an ICSID arbitration arising from contractual disputes. In this case, the tribunal was asked to determine whether it had jurisdiction to decide claims based on customary international law. The respondents raised multiple objections: first, they argued that under English law – the governing law chosen by the parties – such claims fell outside the tribunal's jurisdiction; second, they contended that a plain reading of the arbitration clauses demonstrated the parties' intent to exclude claims based on customary international law. In response, the claimant maintained that its claims were within the tribunal's jurisdiction, asserting that even in the absence of an express reference to international law in the choice of law clause, customary international law remains applicable. The claimant relied on the general availability of international legal norms, particularly within the framework of ICSID arbitration. The tribunal rejected the respondents' objections. It found that the claimant's reference to 'principles of international investment law' was unequivocal, and the very nature of ICSID arbitration should have alerted the respondents that customary international law claims were being pursued. Addressing the argument that the selection of English law excluded customary international law, the tribunal disagreed, relying on scholarly authorities such as Schreuer and Broches. It reaffirmed that customary international law can apply independently of any national law and, under the doctrine of incorporation, forms part of the common law. Accordingly, the express choice of English law did not displace customary international law. Furthermore, the tribunal held that it would be unrealistic to assume that parties to a foreign investment contract intended to exclude the inherent protections provided by customary international law merely by selecting a national law. Any such exclusion would need to be express and unequivocal, which was not the case here. Lastly, the tribunal considered the broad language of the arbitration clauses – which covered disputes 'arising out of or in connection with' the agreements – and found it sufficiently wide to encompass claims grounded in customary international law. The question of whether the claimant's claims would ultimately succeed on the merits was deferred for later determination.⁷³⁶

Beyond its application to State contracts, customary international law has also played a significant role in the interpretation of investment treaties. In this sense, several tribunals have observed that customary rules for treaty interpretation form part of the applicable law in investment disputes.⁷³⁷ For instance, the *LG&E* tribunal observed that 'applying the rules of international law is to be understood as comprising

733. *Saluka v. The Czech Republic* (partial award) ¶¶ 254–255.

734. *El Paso v. Argentina* (award) ¶ 236.

735. *Tecmed v. Mexico* (award) ¶ 119.

736. *Cambodia Power Company v. Kingdom of Cambodia*, ICSID Case No. ARB/09/18, Decision on Jurisdiction, 22 March 2011, ¶¶ 308–338.

737. *Methanex v. United States of America* (final award), *UPS v. Canada* (award on the merits), *Corn Products v. Mexico* (decision on responsibility), *A.D.M. v. Mexico* (award).

general international law, including customary international law, to be used as an instrument for the interpretation of the Treaty'.⁷³⁸

Investment arbitral tribunals have been faced with the difficult task of deciding whether some of the rules invoked by the parties to the arbitration belong to international customary law. On a number of occasions, tribunals have decided this to the negative. An illustration of rules that have not been considered to be part of CIL is found in *Genin v. Estonia*. There, the tribunal was of the view that customary international law does not require that a State treat all aliens (and alien property) equally, or as favourably as nationals.⁷³⁹ The *Methanex* tribunal adopted a similar view, holding that 'whether a rule of customary international law prohibits a State, in the absence of a treaty obligation, from differentiating in its treatment of nationals and aliens, international law is clear. In the absence of a contrary rule of international law binding on the States parties, whether of conventional or customary origin, a State may differentiate in its treatment of nationals and aliens'.⁷⁴⁰

Likewise, according to the dissenting arbitrator in *AAPL*, national treatment and most-favoured-nation treatment applied in order to pay compensation that was not derived from customary law.⁷⁴¹

In *National Grid*, the tribunal held that there was not an established rule of customary international law requiring the claimant to maintain its status as an 'investor' throughout the arbitral proceedings and not only at the time of its submission of a claim.⁷⁴²

In the *Grand River* case, the tribunal dealt with issues regarding indigenous peoples' rights. It opined that there may exist a principle of customary international law requiring government authorities to consult indigenous peoples as collectivities (not as individual investors) on governmental policies or actions significantly affecting them.⁷⁴³

In any case, what is important to note is that customary rules should not, and have not been, in general treated lightly by investment arbitral tribunals.⁷⁴⁴

Investment arbitral tribunals have dealt with the persistent objector doctrine. According to this doctrine, States not in agreement with an evolving customary rule may avoid becoming legally bound by it. A State may have in some instances the right to opt out of a CIL rule before it forms.⁷⁴⁵ Both States and investors have invoked the

738. *LGE v. Argentina* (award on liability) ¶ 89.

739. *Genin v. Estonia* (award) ¶ 368.

740. *Methanex v. United States of America* (final award) Part IV, Chapter C, ¶¶ 25–26.

741. *AAPL v. Sri Lanka* (dissenting opinion) ¶ 40.

742. *National Grid v. Argentina* (award) ¶¶ 113, 115.

743. *Grand River Enterprises Six Nations v. USA, Award, 12 January 2011*, ¶¶ 210–211, 213.

744. *AAPL v. Sri Lanka* case. The dissenting criticized the majority in this regard (dissenting opinion) ¶ 50.

745. For instance, it has been said that 'Although customary law may be built by the acquiescence as well as by the actions of states (...) and become generally binding on all states, in principle a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures. Historically, such dissent and consequent exemption from a principle that became general customary law has been rare. (...) A state that enters the international system after a practice has ripened into a rule of

doctrine.⁷⁴⁶ For instance, in the *BG Group v. Argentina* case, the claimant alleged that the UK was a 'persistent objector' to the rule set forth in Article 25 of the ILC Draft Articles on State Responsibility, and thus this rule could not have any application to the bilateral relations between Argentina and the UK. Consequently, Argentina was prevented from invoking such an Article in its defence.⁷⁴⁷ The tribunal dismissed this allegation.⁷⁴⁸

In turn, in *Grand River v. United States*, the respondent State applied this doctrine to claim that it could not be bound by consultation requirements contained in the UN Indigenous Declaration.⁷⁴⁹ The tribunal did not need to analyse this argument, as the possible existence of a customary rule on consultation requirements did not assist the claimant as an individual investor.⁷⁵⁰

This doctrine was also addressed in the *Daimler* case. There, the tribunal observed that a non-consenting State to a CIL rule is obliged to introduce 'affirmative evidence' of its non-consent via the 'persistent objector doctrine'.⁷⁵¹ Regarding this issue, the ILC observed that the refusal of a State to recognize a rule as customary is evidence of the absence of its *opinio juris*.⁷⁵² This, however, has not prevented arbitral tribunals from elevating a rule to the status of customary law as is shown in the following section.

As a matter of fact, several standards of treatment of foreign investors are considered to be customary international law. States are thus bound by CIL rules, regardless of whether they have codified these rules or ratified treaties codifying them.⁷⁵³ Within this context, and due to the fact that several rules on the protection of foreign investors are well-established customary international law, these rules can be opposed/applied in an arbitration procedure even to States that have not accepted the

international law is bound by that rule.' Restatement of the Law, Third, Foreign Relations Law of the United States ¶ 102 (1987).

746. See further Anthea Roberts, 'Who Killed Article 38(1)(B): A Reply to Bradley & Gulati,' *Duke Journal of Comparative & International Law* 21, no. 1 (2010): 173–190. See also Patrick Dumberry, 'Incoherent and Ineffective: The Concept of Persistent Objector Revisited,' *The International and Comparative Law Quarterly* 59, no. 3 (2010): 779–802 <https://doi.org/10.1017/s0020589310000308> (last accessed September 2025).

747. *BG Group v. Argentina*, Final Award, 24 December 2007, ¶ 399.

748. A similar case was *National Grid v. Argentina* (award) ¶ 256.

749. *Grand River Enterprises Six Nations Ltd et al v. United States*, Counter-memorial of the United States, 22 December 2008, at 129.

750. *Grand River* (award) ¶ 213.

751. *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶ 310.

752. It stated: 'when a State says that something is not a rule of customary international law, that is evidence of the absence of an *opinio juris*. Such assertions by States of rights or obligations under (customary) international law (or lack thereof) could, inter alia, take the form of an official statement by a government or a minister of that government, claims and legal briefs before court and tribunals, transmittal statements by which governments introduce draft legislation in parliament, a joint declaration of States through an official document, or statements made in multilateral conferences such as codification conventions or debates in the United Nations'. ILC Reports.

753. See Mixed Tribunal Decision in *Léontios et Nicolas Arakas c. Etat bulgare*, 31 January 1927 (F). T. A. M. bulgaro-grec, Bulgarian-Greek M. A. T, Rec. T.A.M., VII, 40–46.

rule by way of an express provision in an investment treaty.⁷⁵⁴ *Chevron & Texaco v. Ecuador* is a notable illustration of this. As the investor had advanced a claim for denial of justice under CIL rules, the tribunal had to determine whether the investor's dispute settlement provision of the Ecuador-US BIT conferred jurisdiction over the claims.⁷⁵⁵ The tribunal's finding was that indeed the dispute settlement provision was broadly drafted, and hence it conferred jurisdiction over CIL claims (i.e., denial of justice).⁷⁵⁶ However, in the partial award on the merits, the arbitral tribunal denied denial of justice under customary international law with the FET provision. According to the arbitral tribunal, the FET standard included denial of justice under customary international law, both being equal. Then, the tribunal decided that Ecuador "violated" the FET standard and customary international law in Article II(3)(a) of the Treaty.

A statement regarding the authority of CIL is found in *AAPL v. Sri Lanka*. There the tribunal noted that any foreign investor, even if the investor's national State had concluded a treaty incorporating the full protection and security provision, would not be entitled to protection that required 'due diligence' from the host State, as imposed by customary international law, and which entailed the host State's responsibility.⁷⁵⁷

Likewise, the dissenting arbitrator in *Daimler*, when dealing with 'affirmative evidence', observed that 'established rules of customary international law can bind States that never granted, explicitly or otherwise, consent to individual acts of the host State that gave rise to the principles in question. Those States' consent to be bound is presumed'.⁷⁵⁹

Further, some investment tribunals have posited that once the applicable law is any rule of international law, the tribunal is able to consider breaches of customary international law. This was the case in *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, where the tribunal stated that the investment treaty in question "sanctions" not only breaches of specific Treaty provisions, such as Article 3.1, but also breaches of any rule of international law (Article 7.3). The Treaty thus covers also a denial of justice under international law'.⁷⁶⁰

However, some tribunals have considered that, in order to rule on the breach of a CIL rule, they need to first determine their jurisdiction on a different basis. For instance, in *M.C.I. v. Ecuador*, the tribunal observed that 'the existence of a breach of a norm of customary international law before a BIT enters into force does not give the investor a right to have recourse to the BIT's arbitral jurisdiction'.⁷⁶¹

754. *S.D. Myers, Inc. v. Canada*, Separate Opinion by Dr. Bryan Schwartz on the Partial Award, 11 November 2000, ¶ 78.

755. In *Chevron & Texaco v. Ecuador (breach of contract claims)* (interim award) ¶¶ 203-208.

756. *Ibid.*, ¶ 209.

757. *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, ICSID Case No. ARB/00/1, PCA Case no. 2009-23, Second Partial Award on the Merits, 30 August 2018, ¶ 4.3.1 (environmental case).

758. *AAPL v. Sri Lanka* (final award) ¶ 69.

759. *Daimler v. Argentina*, Dissenting Opinion of Charles Brower, fn. 8. See also the Award, ¶ 4.3.1 on Jurisdiction, 11 September 2009, ¶ 154.

760. *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, ¶ 154.

761. *M.C.I. Power Group v. Ecuador* (award) ¶ 96.

Likewise, in *Feldman v. Mexico*, the tribunal found that it did not have 'jurisdiction to decide upon claims arising because of an alleged violation of general international law or domestic Mexican law'. It further added that both legal systems might become relevant insofar as treaty provisions that explicitly refer to them. Other than that, the tribunal held that it was not authorized to 'investigate alleged violations of either general international law or domestic Mexican law'.⁷⁶² In this sense, it is important to note that tribunals do not have general jurisdiction over causes of action based on the obligations of States under customary international law. On the contrary, tribunals have to base their jurisdiction on causes of actions arising from treaty provisions, laws or contracts in force.⁷⁶³

Investment treaties may have an important role in 'recording and defining rules deriving from custom' as well as in developing them.⁷⁶⁴ As D'Aspremont observed: 'Treaty law can codify existing customary international law endowing it with the formalistic virtues that it usually lacks'.⁷⁶⁵ In general, several possibilities may be envisaged.

International treaties may, and do, incorporate several standards of protection and treatment of foreign investors as they are recognized under customary international law. For instance, the *Electrabel* tribunal observed that all the standards of protection set out in Article 10(1) of the Energy Charter Treaty (ECT) were part of CIL.⁷⁶⁶ In that sense, several tribunals, when addressing whether some treaty provisions entailed obligations additional to those required by the minimum standard of treatment of aliens under CIL, have considered that some of the standards under the treaty and under CIL were substantially similar. For example, the *Azurix v. Argentina* tribunal held that: '[T]he minimum requirement to satisfy this standard has evolved and the Tribunal considers that its content is substantially similar whether the terms are interpreted in their ordinary meaning, as required by the Vienna Convention, or in accordance with customary international law'.⁷⁶⁷ The *Duke v. Ecuador* tribunal concurred with the conclusion that these standards were essentially the same.⁷⁶⁸

Treaties may also seek to implement and specify a more general rule of CIL, or to create an independent treaty standard to address the lack of clarity in customary international law.⁷⁶⁹ The latter scenario is found in Article II(7) of the Ecuador-US BIT

762. *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Decision on Jurisdiction, 6 December 2000, ¶ 61.

763. *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, 24 December 1996, 14 *ICSID Review-Foreign Investment Law Journal* (1999, no. 1) 161-196, 180; *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Final Award, 16 September 2003, ¶ 11.3.

764. The International Court of Justice in the *Libya/Malta Continental Shelf Case* 1985 ICJ Reports 13, 29, ¶ 27.

765. D'Aspremont, 'International Customary Investment Law', 26.

766. *Electrabel v. Hungary* (decision on jurisdiction, applicable law and liability) ¶ 7.158.

767. *Azurix v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 361.

768. *Duke Energy v. Ecuador* (award).

769. *Ibid.*, Art. II(7) of the BIT in question requires each Party to ensure effective means for asserting claims and enforcing rights related to investments. The tribunal interpreted this provision as guaranteeing access to courts and institutional mechanisms for protecting investments, thereby

THE INTERPRETATIVE PRACTICE OF INTERNATIONAL INVESTMENT ARBITRAL TRIBUNALS

CLAUDIA SALGADO LEVY

Legal interpretation is crucial to striking the right balance between what a norm is – or should be – and its meaning as applied in a concrete case. Given the complex hybrid nature of investor-State arbitration, the act of interpretation acquires particular significance. This far-reaching work explores how investment arbitral tribunals accomplish their task of interpreting the different rules of law within the international investment framework, and how they address the interpretative problems they face.

In its wide-ranging coverage of the interpretative practice of international investment arbitral tribunals, the author provides the following:

- in-depth analysis of how investment arbitral tribunals interpret multiple sources of law, including treaties, customary international law, general principles, national laws, contracts, and transnational law;
- critical evaluation of the interpretative methods used by tribunals, highlighting their strengths in protecting foreign investments and their limitations in promoting a cohesive investment law regime; and
- exploration of the self-imposed interpretative limitations of arbitral tribunals, encompassing their reliance on de facto precedents, their duty to ensure the enforceability of awards, and their awareness of the risk of annulment for misinterpretation of the law.

Extensive review of relevant arbitral awards, jurisprudence, and case studies illustrates how tribunals navigate legal sources. The author also examines possible reasons for tribunals' interpretative flexibility and indicates the limitations to their interpretative exercise.

With its insights into how tribunals' interpretative choices influence the consistency, legitimacy, and predictability of the investment arbitration system, this book will help legal practitioners and scholars to understand the complexities and challenges faced by investment arbitral tribunals, thus enabling an anticipation of the scope and limits of arbitral interpretative reasoning. It offers a major contribution to the ongoing debate on the development of a cohesive and predictable international investment law framework by revealing how interpretation shapes legal outcomes.

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