LALIVE LECTURE 2013
International Court of Justice case law in ICSID awards

The 2013 edition of the Lalive Lecture, co-hosted by the Graduate Institute of International and Development Studies (HEID) and LALIVE was delivered by Professor Alain Pellet, Professor at the University Paris Ouest Nanterre/La Défense, former chair of the International Law Commission of the United Nations, President of the French Society for International Law and Associate Member of the Institute of International Law. The subject of the lecture, which was delivered in French, was the “International Court of Justice case law in ICSID awards” (“La jurisprudence de la Cour internationale de Justice dans les sentences CIRDI”). Professor Pellet pointed out that his references to the ICJ were to be taken to include its predecessor, the Permanent Court of International Justice (PCIJ). Similarly, while Professor Pellet referred to ICSID arbitration for reasons of convenience, he considered investment arbitration at large, including UNCITRAL awards.

Professor Pellet introduced his lecture by considering various existing interpretations as to the nature of the ICSID system: autonomous legal order, “sub-system” of international law or “sui generis system”. The nature of the “system” could impact the manner in which it relates to international law. Professor Pellet noted that this was a point to keep in mind when illustrating relations between ICSID tribunals and the case law of the ICJ.
ICSID case law in ICJ decisions

By way of preliminary remark, Professor Pellet pointed out that the title of his lecture could not have been “ICSID case law in ICJ decisions”. First, he referred to the uncertainties as to the existence of a formal body of ICSID case law. According to Professor Pellet, there are only a limited number of areas where ICSID case law can be considered settled – for instance in matters relating to the shareholders’ right of action or to the authority to grant interim measures. This is why, in his view, any general reference to an overall ICSID case law should be avoided.

Second and above all, the ICJ pointedly does not refer to ICSID awards. Even in the Diallo case (Republic of Guinea v. Democratic Republic of the Congo, ICJ Judgment), where the ICJ was perhaps given its biggest opportunity yet to acknowledge ICSID case law, the Court studiously ignored the hundreds of awards and thousands of BITs when reaching its decision, referring to investment arbitration only as a “specific legal regime”. Professor Pellet expressed concern that this indifference to the main regime of investment protection could risk isolating the ICJ. Nonetheless, two consequences can be drawn as to the ICJ’s view of the investment arbitration system. The first is that the Court does not seem to accept the existence of an independent ICSID system. Instead, it considers investment arbitration to consist in a limited number of specific rules applicable on a case-by-case basis. The second is that those specific rules are nonetheless understood by the ICJ to form part of public international law.

Non-binding effect of case law on ICSID tribunals

Professor Pellet first recalled that ICSID tribunals need not apply the stare decisis rule. As other international jurisdictions (whether permanent or not) such as the ICJ, the International Tribunal for the Law of the Sea (ITLOS), the WTO Dispute Settlement Body, the regional courts of human rights and the specialised courts and tribunals, ICSID tribunals use precedent “as subsidiary means for the determination of rules of law” (Article 38(1)(d) of the Statute of the ICJ, to which Article 42(1) of the ICSID Convention implicitly refers). This is illustrated in the AWG v. Argentina award (AWG Group v. The Argentine Republic, UNCITRAL Decision on liability), which ruled that, absent strong reasons to the contrary, an arbitral tribunal should consider “solutions established in a series of consistent cases”.

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Why ICSID tribunals rely on case law

Professor Pellet highlighted certain specificities of the ICSID system as regards the use of case law.

Firstly, ICSID is a treaty-based system anchored into public international law. Absent any contrary agreement by the parties, ICSID tribunals must apply the relevant principles of international law. Secondly, unlike the ICJ, ICSID tribunals do not have general jurisdiction over states (Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Award), and the decisions they render are case-specific, which means that ICSID tribunals need not to reconcile their later decisions with earlier ones (Glamis Gold, Ltd. v. United States of America, UNCITRAL Award). Thirdly, although the ICSID is semi-institutionalised, with a developed secretariat, well-established procedural rules, awards almost always published and a well established procedure to set-aside awards, each arbitral tribunal deems itself “sovereign” (AES Corporation v. The Argentine Republic, ICSID Decision on jurisdiction) and even ad hoc committees have largely failed to ensure the harmonisation of international investment law. Fourthly, the law that ICSID tribunals apply is often vague and uncertain, with elastic legal concepts (a wording Professor Pellet borrowed from Lucy Reed) such as “fair and equitable treatment”, “most favoured nation”, “umbrella clause”, “indirect expropriation” or even “investment”.

In this framework, case law plays a major role by compensating for deficient treaty rules and allows tribunals to circumvent the difficulties of establishing and proving international custom. Professor Pellet described, in a somewhat ironic fashion, the manner in which ICSID tribunals use case law: they invoke precedent abundantly and they practice distinguishing as would common law courts, but they do not mind departing from case law, even if well established; they call for consistency in case law but imperil that same consistency in the name of their own “sovereignty”; and they then rely on future tribunals to ensure a stability that they both call for and jeopardise.

In doing so, ICSID tribunals tend to apply ICSID case law. However, they have no qualm in relying on decisions of other international courts or tribunals external to the “ICSID system”, such as those of the WTO Dispute Settlement Body (Marvin Roy Feldman Karpa v. The United Mexican States, ICSID Award), the regional courts of human rights (Ronald S. Lauder v. The Czech Republic, UNCITRAL Final Award), the European Union (Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia, ICSID Award), international criminal tribunals (Hrvatska Elektroprivreda, d. d. v. The Republic of Slovenia, ICSID tribunal’s ruling regarding the participation
of a Counsel) and, most importantly for the subject of the lecture, to decisions of the ICJ.

Main areas in which ICSID tribunals apply ICJ case law

Turning specifically to the case law of the ICJ, Professor Pellet noted that ICSID tribunals regularly refer to ICJ decisions and that they do so with deference, as illustrated for instance in Azurix (Azurix Corp. v. The Argentine Republic, ICSID Award). However, as emphasised in the Tulip Real Estate decision on bifurcated jurisdictional issues (Tulip Real Estate Investment and Development Netherlands B. V. v. Turkey, ICSID Decision on bifurcated jurisdictional issue), ICSID tribunals usually rely on ICJ decisions with respect to general principles of international law. They rarely do so with respect to the legal framework of the investment, if only due to the limited available ICJ case law and to the ICJ’s overly prudent approach on this subject.

However, decisions of the ICJ relating to the main principles of international law benefit from an undisputed authority in ICSID awards, which rely unhesitatingly on the ICJ to interpret general principles such as the existence of custom (United Parcel Service of America Inc. v. Government of Canada, ICSID Award on jurisdiction), the contents and limits of states’ powers (Victor Pey Casado and President Allende Foundation v. The Republic of Chili, ICSID Award), the jurisdiction of international courts and tribunals (Ceskoslovenska Obchodni Banka, A. S. v. The Slovak Republic, ICSID Decision on Objection to Jurisdiction), procedural issues before international courts such as preliminary objections (Pey Casado), effect of conservatory measures (City Oriente Limited v. The Republic of Ecuador and Empresa Estatal de Petróleos del Ecuador (Petroecuador), ICSID Decision on revocation of provisional measures and other procedural matters), burden of proof (Salini Costruttori S. p. A. and Italstrade S. p. A. v. The Hashemite Kingdom of Jordan, ICSID Award), default proceedings (Antoine Goetz and others v. Republic of Burundi, ICSID Award) and interpretation of awards (Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Decision on interpretation).

The most oft-quoted decisions in ICSID Awards are the cases of The Factory at Chorzów (Germany v. Poland, PCIJ Judgment), Elettronica Sicula (United States of America v. Italy, PCIJ Judgment) and Barcelona Traction (Belgium v. Spain, ICJ Judgment) with respect to the victims’ right of action and the protection of shareholders, along with Gabčíkovo-Nagymaros (Hungary v. Slovakia, ICJ Judgment) with respect to the state of necessity. However, Professor Pellet highlighted that, as far as responsibility of states is
concerned, ICSID awards tend to refer far more often to the Articles of the International Law Commission (ILC) than to ICJ decisions.

**How do ICSID tribunals apply ICJ case law?**

Professor Pellet then addressed the issue of the manner in which ICSID tribunals use ICJ case law. As a preliminary remark, he highlighted the different approach of ICSID tribunals when referring to ICJ decisions. A first category of ICSID tribunals invoke ICJ decisions with no more than “respectful irrelevance”, while a second category of tribunals acknowledge their indisputable authority.

**Shareholders claims**

With respect to shareholder claims, Professor Pellet argued that the approach of ICSID tribunals falls under the first category, in that tribunals pay lip service only to the ICJ. ICSID awards often recount the position of the ICJ on shareholder claims but swiftly conclude that this position is not relevant to investment disputes and is therefore not applicable. This tendency is illustrated by the awards on jurisdiction issued in CMS (*CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Decision of the Tribunal on Objections to Jurisdiction), *Tokios Tokelés (Tokios Tokelès v. Ukraine*, ICSID Decision on jurisdiction) and *Camuzzi (Camuzzi International S. A. v. The Argentine Republic*, ICSID Decision on Objections to Jurisdiction), where tribunals acknowledged the *Barcelona Traction* principle but deemed it irrelevant.

**Attribution**

When addressing the issue of attribution to the state, ICSID tribunals prefer to rely on the Articles of the ILC rather than on ICJ case law. Tribunals appear to consider that the 2001 Articles and their commentaries constitute sufficient evidence of the applicable law (*Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Decision of the Tribunal on Objections to Jurisdiction) and that ICJ decisions are only relied on as a secondary source (*Jan de Nul N. V. and Dredging International N. V. v. Arab Republic of Egypt*, ICSID Award).

**State of necessity**

With respect to the state of necessity, ICSID tribunals also consistently rely on Articles of the ILC. They also often refer to the *Gabčikovo-Nagymaros* decision, as illustrated in CMS.
**Most favoured nation clauses**

As far as MFN clauses are concerned, ICSID tribunals invariably refer to three decisions of the ICJ, namely the *Anglo-Iranian* case (*United Kingdom v. Iran*, ICJ Judgment), the *Rights of the nationals of the United States of America in Morocco* case (*France v. United States of America*, ICJ judgment) and the *Ambatielos* case (*Greece v. United Kingdom*, ICJ Judgment). However, although they rely on the same ICJ case law, these tribunals reach opposite conclusions. On the one hand, the *Maffezini* and *Siemens v. Argentina* (*Siemens A. G. v. The Argentine Republic*, ICSID Decision on jurisdiction) tribunals found that those three decisions should constitute the background within which MFN clauses should be considered. On the other hand, other ICSID tribunals have concluded that these ICJ decisions do not apply, for instance in *Salini, Plama* (*Plama Consortium Limited v. Republic of Bulgaria*, ICSID Decision on jurisdiction) and *ICS Inspection* (*ICS Inspection and Control Services Limited v. The Argentine Republic*, UNCITRAL Award on jurisdiction).

**Jurisdiction of international courts and tribunals**

Professor Pellet noted a peculiarity in the parallel evolution of ICJ and ICSID case law in relation to the jurisdiction of international courts and tribunals, which, somewhat surprisingly, can be traced to the separate opinion of Judge Higgins in the *Oil Platforms* case (*Islamic Republic of Iran v. United States of America*, ICJ Judgment and separate opinion of Judge Higgins). Judge Higgins’ opinion was then picked up by the tribunal in *Methanex* (*Methanex Corporation v. United States of America*, UNCITRAL Partial Award) and it is only subsequently that the ICJ itself agreed with Judge Higgins in the *Case concerning legality of use of force* (*Yugoslavia v Belgium*, ICJ order), thereby affirming its legitimacy. However, the now established ICSID case law has come to rely not on the ICJ’s most recent decision but on the separate opinion of Judge Higgins, as illustrated in the *Duke Energy* (*Duke Energy International Peru Investments No 1, Ltd. v. Republic of Peru*, ICSID Decision of the ad hoc Committee), *Lucchetti* (*Industria Nacional de Alimentos, S. A. and Indalsa Perú, S.A. v. Republic of Peru*, ICSID Decision on annulment), *Chevron v. Ecuador* (*Chevron Corporation (U. S. A.) and Texaco Petroleum Company (U. S. A.) v. The Republic of Ecuador*, UNCITRAL Interim Award) or *SGS v. Paraguay* (*SGS Société Générale de Surveillance S. A. v. The Republic of Paraguay*, ICSID Award) awards.

**Interim measures**

With respect to interim measures, ICSID tribunals unanimously refer to and approve the decision rendered by the ICJ in *LaGrand* (*Germany v.*
United States of America, where the Court upheld its jurisdiction to grant legally binding provisional measures for the first time. Professor Pellet expressed his disagreement with this decision but conceded that it now constitutes established case law. Indeed, the award in *Pey Casado* was the first of a long list of investment arbitration awards all applying the Lagrand decision, except for one – courageous, according to Professor Pellet – award in *Caratube International Oil Company v. Kazakhstan* (*Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Decision on Provisional Measures).

**Conclusion**

As a conclusion, Professor Pellet delivered what he ironically referred to as “pious platitudes” (« banalités affligeantes »), namely that: (i) ICSID tribunals refer to ICJ case law in a pragmatic manner, without any predetermined methods; (ii) ICSID tribunals do not always refer to the ICJ but they usually do so when questions of general international law or procedure arise, rather than on questions of investment law; (iii) the ICJ benefits from a significant influence, despite the fact that it rarely has had the opportunity to rule on investment law; (iv) there is a high degree of porosity between ICSID arbitration and ICJ case law, which confirms – to the extent it was needed – the anchoring of international investment law in general international law; and (v) the ICSID system has asserted itself as a “new legal order of international law”, to follow the original description of the European Community system by the ECJ in *Van Gend en Loos* (ECJ, 26/62).

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