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Cross-Fertilisation of Procedural Law Among International Courts and Tribunals: Methods and Meanings

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Procedural Fairness in International Courts and Tribunals

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ABSTRACT

The proliferation of international courts and tribunals has resulted in interesting instances of cross-fertilisation of procedural law among international courts. This chapter provides a framework to assess specific techniques of cross-fertilisation, used in support of specific conclusions reached by the deciding tribunal. Techniques used include general references to decisions by other tribunals, specific citations to one or more decisions by other international courts and tribunals and references to a standard adopted by other international courts and tribunals explained in a dissenting or separate opinion and differing from the conclusion supported by the majority of the deciding tribunal. Continuous instances of cross-fertilisation also seem to indicate the initial formation of a common international procedural law applicable to a variety of international courts and tribunals.

I. INTRODUCTION

The proliferation of international courts and tribunals has resulted in important developments for international law. On one side, the fragmentation of the international legal system became a feared consequence, and attracted numerous and significant studies.[1] On the other side, it has prompted interesting

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[1] Above all see the important study by the International Legal Commission, Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, adopted by the International Law

instances of cross-fertilisation of substantive and procedural law among different international courts.[2] Cross-fertilisation among different international courts is an important method used by international courts to fill in gaps in their statutes and rules of procedures, as well as to strengthen their conclusions in line with other international courts and tribunals. In doing so, international courts routinely reference customary international law, general principles of law and rules developed in other international judicial and arbitral practice.[3] This chapter focuses specifically on references to decisions of other international judicial and arbitral bodies as a central instrument used to fill in the gaps and avoid a *non-liquet*, to ensure that courts can properly support their decisions; and as an example of cross-fertilisation and development of international law.

A real understanding of the extent and depth of this important phenomenon is now beginning to emerge.[4] Thus far, preference has been given primarily to the assessment and understanding of exchanges related to substantive issues.[5] Yet, procedural standards are at the core of fair process, and cross-fertilisation is also occurring in procedural matters. These include fundamental issues of party equality, the requirement to ensure integrity of proceedings, issues related to third party intervention, timeliness and the requirements necessary to grant preliminary measures as well the extent of their binding nature. As explained below, they also include core issues relat-

Commission at its Fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10, para 251), Yearbook of the International Law Commission, 2006, vol. II, Part Two <http://legal.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf>.

[2] In addition to the chapters in this book generally, see also, for example, RJ Goldstone and RJ Hamilton, 'Bosnia v. Serbia: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia' (2008) 21(1) Leiden Journal of International Law 95, 110; C Giorgetti, 'Horizontal and Vertical Relationships of International Courts and Tribunals – How Do We Address their Competing Jurisdiction?' (2015) 30 ICSID Review 98; J Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands' (2004) 25 Michigan Journal of International Law 903; FG Jacobs, 'Judicial Dialogue and the Cross-fertilisation of Legal Systems: The European Court of Justice' (2003) 38 Texas International Law Journal 547; A Watts, 'Enhancing the Effectiveness of Procedures of International Dispute Settlement' in JA Frowein and R Wolfrum (eds.), *Max Planck Yearbook of United Nations Law* (Max Planck Institute for Comparative Public Law and International Law 2001) vol 5, 29–30; A Pellet, 'The Case Law of the ICJ in Investment Arbitration' (2013) 28 ICSID Review 223; and Y Lupu and E Voeten, 'Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights' (2012) 42 British Journal of Political Science 413.

[3] C Brown, *A Common Law of International Adjudication* (OUP 2007) 52–55. A note on the terminology used: international courts and tribunals and international judicial and arbitral bodies/practice are used interchangeably throughout this chapter.

[4] On this and related issues, see idem.

[5] B Chen and G Schwarzenberger, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press 2006).

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ing to evidence, including the standard and burden of proof, the kind of admissible evidence, the role played by expert witnesses and counsel, and the power of a tribunal to seek evidence and to examine witnesses. Amongst all of these instances, we see international courts and tribunals borrowing from one another's decisions on several similar issues with which they are confronted, while also maintaining differing standards of fairness in other aspects of their respective proceedings.

This chapter provides a framework to assess several specific techniques of cross-fertilisation. The assessment is principally based on the key means available to evaluate this phenomenon: the assessment of decisions published by a variety of international courts and tribunals. Cross-fertilisation techniques are used both in support of specific conclusions reached by the deciding tribunal or as a way to amend previous conclusions reached by the court or in dissenting and separate opinions to call for the adoption of s different standard from the standard used by the majority. Techniques used include general references to decisions by other tribunals, specific citations of one or more decisions by other international courts and tribunals and references to a standard adopted by other international courts and tribunals explained in a dissenting or separate opinion and differing from the conclusion supported by the majority of the deciding tribunal.

It is the purpose of this chapter to consider a variety of international courts and tribunals, including inter-State courts like the International Court of Justice (ICJ or the Court), permanent international human rights courts like the Inter-American Court of Human Rights and investment arbitral tribunals, such as those constituted under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention). Indeed, it is a fundamental argument of this chapter that the techniques analysed in it are common to international courts and tribunals, and that cross-fertilisation amongst tribunals is a continual and standard practice. What this also signifies is the initial formation – a sort of prolegomenon – of a common international procedural law applicable to a variety of international courts and tribunals which is developing the essential core of procedural fairness.[6]

To note, as a consequence of the generally accepted but not formal understanding of judicial hierarchy, which sees decisions of the ICJ playing a fundamental role in international decision-making, ICJ decisions are the ones cited most regularly by other courts. The ICJ is a court that produces relatively few procedural decisions – yet they are usually quite significant. As Malcolm Shaw observes, 'increasing co-operation between the International Court of

[6] See in general, the seminal work by Brown (n 3). On the difficulty of identifying a common core of procedural fairness, or a universal model, see the chapters by Filippo Fontanelli and Paolo Busco and by Arman Sarvarian and Rudy Baker, in this volume.

Justice and other judicial bodies is taking place and all the relevant courts and tribunals are well aware of each other's work'.[7] Indeed, citations to decisions of other courts and tribunals are also common and 'it is not rare for international courts of one type or another to cite each other's decisions'.[8]

This chapter will develop as follows: it will first examine what the courts do and how they do it by looking at examples of cross-fertilisation used by a court in support of existing standards, and then by exploring the use of references to decisions by other judicial and arbitral bodies to depart from standards already established. Finally, it will assess why courts adopt these methodologies and will consider the significance of these techniques as a method for cross-fertilisation, as well as appraise critically the importance of the phenomenon of cross-fertilisation.

A word of caution is due on the scope of this chapter. As with most comparative and general studies, this chapter is not and does not seek to be an exhaustive treatment of all existing examples of cross-pollination in international procedural law. Rather, it seeks to provide examples of possible methodologies and techniques used by international courts and tribunals to internalise and expand their understanding of procedural rules and find support in decisions by other international courts and tribunals. This phenomenon is central to the development of international law and the initial development of a common international procedural practice. Importantly, the focus of this chapter is limited specifically to cross-fertilisation and highlights its importance and legal bases. It does not focus on instances in which courts have reasoned in isolation from each other and without engaging in judicial dialogue. Indeed, the limited confines of this analysis cannot assess the extent to which cross-fertilisation overweighs opposing phenomena, nor does it attribute these conducts to specific courts. An important observation and argument of this chapter is that exploring instances of cross-fertilisation is instructive and important *per se* for our understanding of the international judicial and arbitral system and of the development of procedural international law generally.

II. CROSS FERTILISATION USED IN SUPPORT OF EXISTING STANDARDS

The most common demonstration of cross-fertilisation of procedural matters among different international courts and tribunals is exemplified by direct references to determinations of other international courts in support of a specific conclusion by the deciding court. This is a common exercise that international courts often undertake. This kind of simple cross-fertilisation

[7] MN Shaw, *International Law* (7th edn, CUP 2014) 810.
[8] Ibid, 79.

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can be done in a more or less explicit way, and it is an important demonstration of the existence of a continuous judicial dialogue and of the influence that decisions of courts and tribunals can play in the decisions of other courts. Indeed, in his seminal study on this issue, Chester Brown asserts that 'international courts have often demonstrated their readiness to allow their procedures and remedies to be informed by the practice of other international tribunals'.[9] Decisions in support of existing standards can take a variety of forms and citations can be either general or specific to a particular decision or court.

This technique of seeking support from decisions by other courts and tribunals has been used in many contexts that are essential to guaranteeing fair process, including the powers and requirements to grant preliminary measures and a variety of matters related to evidence, such as the burden of proof, the applicable standard of proof and the kind of evidence.[10]

First, in certain instances, especially when a specific legal conclusion is well-established, a decision of the court seeking support may only refer generally to the support found for that conclusion in the jurisprudence of other international courts and tribunals. For example, in the case of the *EC-Bananas*, the appellate body of the World Trade Organisation (WTO) was confronted with the question of whether member States were allowed to use private counsel in dispute settlement proceedings.[11] In finding in the affirmative, the panel sought support from a variety of sources, and concluded that it had found nothing in the WTO Agreement, the Dispute Settlement Understanding, the Working Procedures, in customary international law 'or the prevailing practice of international tribunals'[12] that would prevent a member of the WTO from determining the composition of its delegation in proceedings of the appellate body.

Cross-fertilisation also occurs by direct references to specific international courts and to specific decisions of these courts. For example, this approach

[9] Brown (n 3), 4. *Contra*, but outside the scope of this chapter, see the dictum in the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Tadic*, Case No IT-94-1-AR72, ICL 36 (ICTY 1995) (2 October 1995); also cited by Brown: 'International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or centralized in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided)'.

[10] See generally, R Teitelbaum, 'Recent Fact-Finding Developments at the International Court of Justice' (2007) 6(1) The Law and Practice of International Courts and Tribunals 119, 130. On evidentiary matters, see the chapters by James Devaney, Hugh Thirlway and Brooks Daly and Hugh Meighen in this volume.

[11] Brown (n 3), 4.

[12] *EC – Regime for Importation, Sale and Distribution of Bananas*, DSR 1997-II, 591, 599 [10]. See further the chapter by Chi Carmody in this volume.

was adopted by another decision of the dispute settlement body of the WTO in *US – Shirts and Blouses*, where it explored issues related to the burden of proof. In confirming the application of the principle of *actori incumbit probatio* in WTO proceedings, the Appellate Body held that:

> [V]arious international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts the fact, whether the claimant or the respondent, is responsible for providing proof thereof.[13]

These kinds of citations are fairly common in international decisions.[14] Although the WTO panels do not make direct references to general principles of international law, the wording used seems to indicate that the references to 'generally and consistently accepted' decisions by other courts should be seen as akin to general principles of law.[15]

Interestingly, moreover, the same legal conclusion can also at first be cited only generally and then evolve into a more specific citation in a separate case, or also, include a more specific citation within the same decision. For example, in *Electricity Company of Sofia and Bulgaria*, the Permanent Court of International Justice (PCIJ) assessed the obligation of parties to abstain from acts that might be of prejudicial effect on the outcome of the judgment in the context of the power of granting provisional measures. In reaching its conclusion, the PCIJ offered as support the existence of 'the principle universally accepted by international tribunals'[16] that required parties to a case to abstain from any measures that would have prejudicial effects in relation to the execution of a future decision.

The same point was also directly cited in support of the finding by the ICJ in *La Grand* on the binding nature of preliminary measures orders. In that occasion, the Court affirmed that:

> A related reason which points to the binding character of orders made under Article 41 and to which the Court attaches importance is the existence of a principle which has already been recognised by the Permanent Court of International Justice when it spoke of "the principle universally

[13] *US – Shirts and Blouses*, WT/DS33/AB/R, DSR 1997-I, 323, 338. See J Pauwelyn, 'Evidence, Proof and Persuasion in WTO Dispute Settlement: Who Bears the Burden?' (1998) 1 Journal of International Economic Law 227, 229.

[14] See, for example, Brown (n 3), 94–95; and Goldstone and Hamilton (n 2).

[15] See further the discussions in the chapters by Filippo Fontanelli and Paolo Busco and by Arman Sarvarian and Rudy Baker, in this volume.

[16] *Electricity Company of Sofia and Bulgaria*, Order dated 5 December 1939, PCIJ Series A/B, No. 79, 199. On the issue, see generally S Rosenne, *Provisional Measures in International Law* (OUP 2004).

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accepted by international tribunals and likewise laid down in many conventions . . . to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute".[17]

This is an interesting example that also demonstrates the development in the thinking of the Court from a reference to a general principle to a direct citation of a decision of its predecessor as specific recognition of a principle as recognised by the other court and also used as a source of law.

Similarly, the Inter-American Court of Human Rights used both general and specific reference to decisions of other international courts in the seminal *Velásquez Rodriguez* case.[18] In that case, the court assessed in detail issues related to the burden of proof as well as the general criteria to consider in evaluating and reaching findings of facts in the proceedings. The court noted first that, because the commission was accusing the Government of Honduras of the disappearance of Mr. Velásquez, it was the commission that, in principle, should bear the burden of proving the facts underlying the request. The commission, however, argued that because policies of disappearances, whether supported or tolerated by a government, are specifically designed to conceal and destroy evidence of disappearances, if the existence of such polices are demonstrated, it would be sufficient to prove the disappearance of a particular individual through circumstantial or indirect evidence or by logical inference. Neither Honduras nor the court found the commission's argument objectionable, so that the question remaining for the court was to establish the standard of proof to be used in the case to prove the existence of the practice and whether Mr. Velásquez's disappearance was linked to that practice. Citing several decisions of the ICJ in support of its statements, the court observed that it had to

> determine what the standards of proof should be in the instant case. Neither the Convention, the Statute of the Court nor its Rules of Procedure speak to this matter. Nevertheless, international jurisprudence has recognized the power of the courts to weigh the evidence freely, although it has always avoided a rigid rule regarding the amount of proof necessary to support the judgment (Cfr. Corfu Channel, Merits,

[17] *LaGrand (Germany v United States of America)*, Judgment of 27 June 2001, ICJ Reports 2001, 466, para 103. The Court cites directly *Electricity Company of Sofia and Bulgaria* (n 16) as well as numerous subsequent cases decided along the same line.

[18] *Applicable Standards of proof in Velásquez Rodriguez Case*, Judgment of 29 July 1988, Inter-AmCtHR (Ser. C) No. 4 (1988), paras 122–137. On this case, see also the chapter by Lucas Lixinski in this volume.

Judgment, I.C.J. Reports 1949; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, paras. 29–30 and 59–60).[19]

The court then also referred to decisions by international courts generally. It first stated that 'the standards of proof are less formal in an international legal proceeding than in a domestic one'.[20] The court then recognised the seriousness of a finding that a State party could have tolerated or carried out a practice of disappearances in its territory and noted that that required the court to apply a standard of proof that took into consideration the seriousness of the charge.[21] The court again found support in decisions by other international courts and stated that 'the practice of international and domestic courts' showed that direct testimonial or documentary evidence was not the only type of evidence that a court could legitimately consider when reaching a decision. Indeed, courts could also consider circumstantial evidence, indicia, and presumptions, so long as they led to conclusions consistent with the facts.[22] The court then concluded that this principle was generally valid in international proceedings, especially, in the context of human rights cases.[23]

This short *tour d'horizon* provides a framework to understand one of the most common cross-fertilisation techniques used by international courts to enhance their decision – citing decisions of other courts and tribunals. Direct citations can refer to general principles/conclusions common to all international courts and tribunals or, more often, a specific court or specific decisions by a specific court. Before assessing the legal foundations and the queries that may arise ftom this methodology, the next section will explore instances of cross-fertilisation used to depart from a standard already established by the deciding court.

III. CROSS FERTILISATION USED TO DEPART FROM ALREADY ESTABLISHED STANDARDS

Interestingly, cross-fertilisation is also found in instances where decisions of international courts or tribunals are used by the deciding tribunal, or a

[19] Ibid, para 127.
[20] Ibid, para 128.
[21] Ibid, para 129.
[22] Ibid, para 130.
[23] Ibid, para 133. The court interestingly also noted that 'Since the Government only offered some documentary evidence in support of its preliminary objections, but none on the merits, the Court must reach its decision without the valuable assistance of a more active participation by Honduras, which might otherwise have resulted in a more adequate presentation of its case', para 137.

Military and Paramilitary Activities in and
v. United States of America), Merits,
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minority therein, to support and introduce a change in the previously used standard. Similar to the techniques explored above, references can be to general or specific decisions or courts. A call for a change in the procedural standard used by a court can also be seen in a dissenting or separate opinion by one or more judges who question a specific decision by the majority of the court and cite in support the different standards used by other international courts and tribunals, calling for the adoption of that different standard.

An important example of this is seen in the fertile context of provisional measures. For example, the ICJ was confronted with the question of the relationship between the power of international courts and tribunals to grant provisional measures and the question of their jurisdiction on the merits. Specifically, the issue the ICJ was called to resolve was whether a clear establishment of jurisdiction over the merits was necessary for the Court to grant provisional measures, or whether the question of jurisdiction was irrelevant for the purpose of issuing provisional measures.

In this context, Judge Hersch Lauterpacht first proposed to use a *prima facie* test in his separate opinion in the *Interhandel* case where he declared that

> The correct principle which emerges from these apparently conflicting considerations and which has been uniformly adopted in international arbitral and judicial practice is as follows: The Court may properly act under the terms of Article 41 provided that there is in existence an instrument such as a Declaration of Acceptance of the Optional Clause, emanating from the Parties to the dispute, which *prima facie* confers jurisdiction upon the Court and which incorporates no reservation obviously excluding its jurisdiction.[24]

In this case, Judge Lauterpacht referred to a principle uniformly adopted by other international courts and a reference to general principles of law, as the correct principle to be adopted, using the example set by other courts and tribunals to urge the ICJ to also adopt that conclusion.[25]

Importantly, the *prima facie* test developed by Judge Lauterpacht was subsequently adopted by the entire Court as the correct test to grant provisional

[24] *Interhandel* (*Switzerland v United States of America*), Order of 24 October 1957, Request for the indication of interim measures of protection, ICJ Reports 1957, 105, Separate Opinion of Judge Lauterpacht, 117, 118–119.

[25] *Interhandel*, Order (n 24), stating that '[w]hereas the Court, in order to decide what action should be taken in pursuance of the request, must, in accordance with Article 41 of the Statute, ascertain what is required by the circumstances to preserve the respective rights of the Parties pending the decision of the Court'.

measures, including, for example, in the *Fisheries Jurisdiction* case[26] and the *Nuclear Tests* case.[27] More recently, in *Armed Activities on the Territory of the Congo*, the Court again confirmed-

> Whereas on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to indicate such measures unless the provisions invoked by the applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be established; whereas moreover, once the Court has established the existence of such a basis for jurisdiction, it should not however indicate measures for the protection of any disputed rights other than those which might ultimately form the basis of a judgment in the exercise of that jurisdiction.[28]

In this case, general conclusions uniformly adopted by other international courts and tribunals were introduced first to the deciding court, the ICJ, by a separate opinion which then became the standard adopted by the majority in subsequent decisions.

Cross-fertilisation can also be seen in more direct reference to specific decisions by other international courts and tribunals. A recent example of this technique can be found in the dissenting opinion that Judges Simma and Al-Khasawneh appended to the *Pulp Mills* decision.[29] The strongly-worded

[26] *Fisheries Jurisdiction* (*United Kingdom of Great Britain and Northern Ireland v Iceland*) Order of 17 August 1972, Provisional Measures, ICJ Reports 1972, 12, para 17: 'Whereas the above-cited provision in an instrument emanating from both Parties to the dispute appears, prima facie, to afford a possible basis on which the jurisdiction of the Court might be founded.'; see also para 34: 'Whereas the above-cited provision in an instrument emanating from both Parties to the dispute appears, prima facie, to afford a possible basis on which the jurisdiction of the Court might be founded'.

[27] *Nuclear Tests Case* (*Australia v France*), Order of 22 June 1973, Request for the indication of interim measures of protection, fixing of time-limits: Memorial and Counter-Memorial case, ICJ Reports 1973, 135, para 13: 'Whereas on a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case, and yet ought not to indicate such measures unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded'.

[28] *Armed Activities on the Territory of the Congo* (New Application: 2002) (*Democratic Republic of the Congo v Rwanda*), Provisional Measures, Order of 10 July 2002, ICJ Reports 2002, 241, para 58; see also *Pulp Mills on the River Uruguay* (*Argentina v Uruguay*), Order of 13 July 2006, Request for the Indication of Provisional Measures, ICJ Reports 2006, 113, para 57: 'Whereas in dealing with a request for provisional measures, the Court need not finally satisfy itself that it has jurisdiction on the merits of the case, but will not indicate such measures unless the provisions invoked by the applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be established'.

[29] See further the chapter by James Devaney in this volume.

dissenting opinion related to the use of experts in international proceedings, rightly urging the court to allow the direct examination of experts, to distinguish between counsel and experts and to name its own experts in cases that rely heavily on complex scientific information. Judges Simma and Al-Khasawneh make a thorough study of the existing jurisprudence on the matter both by the ICJ and by other courts and tribunals. On the issue of the court's nomination of experts, they noted that the Court had already invoked its powers under this provision in the past and cited several cases in support of their statement.[30] Then they remarked that 'this reliance on experts is all the more unavoidable in cases concerned with highly complex scientific and technological facts' such as that particular case, which included issues related to the possible chain of causation of pollution of certain chemicals.[31]

Finally, they cited decisions of several other tribunals stating that 'other international bodies have accepted the reality of the challenges posed by scientific uncettainty in the judicial process: in Iron Rhine Railway (Belgium/Netherlands), Arbitral Award, 24 May 2005 [...] the Tribunal recommended that the parties establish a committee of independent experts to determine several scientifically complex facts'.[32] They convincingly found support in numerous decisions by the WTO, concluding that the WTO had contributed most to the development of a best practice of assessing complex scientific evidence.[33]

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[30] *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment of 20 April 2010, ICJ Reports 2010, 14, Joint dissenting opinion Judges Al-Khasawneh and Simma, para 10: 'Art 50 of the ICJ Statute granting the Court the power to appoint experts'. In the *Corfu Channel case (United Kingdom v Albania)*, Order of 17 December 1948, ICJ Reports 1947–1948, 124, exercising its powers under article 50 of the ICJ Statute, the Court commissioned three naval experts to evaluate visibility off the Albanian coast in order to substantiate the United Kingdom's claim, based on a finding of fact, that Albania could have seen various mine-laying operations occurring off its coast. In Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Appointment of Expert, Order of 30 March 1984, ICJ Reports 1984, 165, 166, the Court, upon a joint request of the Parties, and again using its powers under article 50 of the ICJ Statute, appointed an expert 'in respect of technical matters and . . . in preparing the description of the maritime boundary and the charts...' That expert's report was annexed to the Court's later Judgment in that dispute (Judgment, ICJ Reports 1984, 347).

[31] *Pulp Mills* (n 30), para 11.

[32] Ibid, para 15.

[33] Ibid, para 16: 'Various WTO panels have heard the experts put forward by the parties, have made recourse to specialized international organizations or agencies for information, or have outright heard the views of experts appointed by the Panel (see, e.g., European Communities – Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada, WT/DS48/R/CAN, WT/DS26/AB/R, WT/DS48/AB/R (1998), DSR 1998:II, 235; European Communities – Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States, WT/DS26/R/USA, WT/DS26/AB/R, WT/DS48/AB/R (1998), DSR 1998:III, 699; European Communities – Measures Affecting the Approval and Marketing of Biotech

In calling for the adoption by the ICJ of an approach similar to the one used by other international courts and tribunals, the judges interestingly concluded that not doing so in that dispute had been 'a wasted opportunity for the Court'.[34] In contrast to other decisions cited in this section, this has not reached full circle and the ICJ has not (yet?) espoused the position of the minority. That being said, the thorough citations of cases decided by other international courts and tribunals are remarkable and remain an interesting example of a cross-fertilisation technique.

Another interesting example of cross-fertilisation that begins with a call to adopt a new standard in a separate or dissenting opinion is found when a new standard is first developed in a separate opinion, and is then adopted by the majority of the court, and eventually by other international courts and tribunals. One notable case relates to the allocation of the burden of proof for matrers to be decided prior to the final judgment of the merits. In her now famous separate opinion in the jurisdictional phase of the *Oil Platforms* case, then Judge Rosalyn Higgins developed a new test on the burden of proof related to preliminary jurisdictional objections. In her separate opinion, she first explained that the Court had to decide important questions related to the methodology for determining whether a particular claim fell within the compromissory clause of a specific treaty cited by Iran as a basis for jurisdiction for some of its claims, and then noted that she had thought it useful to briefly address the issue, not least because of a marked uncertainty in the practice of the Court.[35]

Products, WT/DS291/R, WT/DS292/R, WT/DS293/R (2006); Canada – Continued Suspension of Obligations in the EC – Hormones Dispute, WT/DS321/R, WT/DS321/AB/R (2008); United States – Continued Suspension of Obligations in the EC – Hormones Dispute, WT/DS320/R, WT/DS320/AB/R (2008)). The consultation of tribunal-appointed scientific experts by WTO panels may take place even where the parties have not so requested (as in United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R, WT/DS58/ AB/R (1998), DSR 1998:VII, 2821) and even if the parties have agreed that such outside consultation is unnecessary (as occurred in EC-Biotech, Panel Report, para 7.16). Between three and six experts are usually appointed in a two-stage consultation process, comprising both written and oral phases. During the latter phase, parties are invited during a "Joint Meeting" to comment on the expert reports as well as the comments of the opposing party (this procedure was first used in the WTO US-Shrimp case). This second, oral phase is particularly interesting because of the opportunity it affords to the panel and the parties for explanation of the concepts, methods and principles that underlie scientific arguments, and thus to improve their overall level of understanding of the science at play in a given case. Regrettably, a similar course of action was not adopted here'. See the chapter by Chi Carmody in this volume, for further analysis of the WTO's practice in evidentiary matters.

[34] Ibid, para 17. On this point, see B Simma, 'The International Court of Justice and Scientific Expertise' (2012) 106 in Proceedings of the Annual Meeting (American Society of International Law) 230–233.

[35] *Oil Platforms* (*Islamic Republic of Iran v United States of America*), Judgment of 12 December 1996, Preliminary Objection, ICJ Reports 1996, 803, Separate Opinion of Judge Higgins, paras 1 and 2.

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After a thorough review of the methodologies used by the ICJ in its previous cases, Judge Higgins explained that, in the 1953 *Ambatielos* case, the Court had rejected the claim of the United Kingdom that the Court should provisionally accept the facts as asserted and see if they would constitute a violation of the Treaty which was the basis for the Court's jurisdiction. The Court asserted that finding that the facts would constitute a violation was to step into the merits which had been reserved to another adjudicative body.[36] She then suggested that:

> This constraint does not operate in the present case. It is interesting to note that in the Mavrommatis case the Permanent Court said it was necessary, to establish its jurisdiction, to see if the Greek claims 'would' involve a breach of the provisions of the article. This would seem to go too far. Only at the merits, after deployment of evidence, and possible defences, may 'could' be converted to 'would'. The Court should thus see if, on the facts as alleged by Iran, the United States actions complained of might violate the Treaty articles.[37]

Interestingly, the test has been cited with approval by many subsequent international tribunals. In *Plama*, for example, the ICSID Tribunal concluded:

> As regards the burden of proof on the Respondent's jurisdictional objection, the Tribunal adopts the test proffered by Judge Higgins in her separate opinion in the *Oil Platforms* Case.[38]

The *Plama* Tribunal also noted that it did not understand that 'Judge Higgins' approach is in any sense controversial, either at large or as between the parties to these proceedings' and accordingly, applied that approach to the jurisdictional issues to be considered in the case.[39] The Tribunal interestingly also confirmed that the same approach had subsequently been followed by several international arbitration tribunals 'deciding jurisdictional objections by a respondent State against a claimant investor, including, *Methanex v USA*, *SGS v Philippines* and *Salini v Jordan*'.[40]

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[36] Ibid, para 33.

[37] Ibid, para 33 (emphasis added).

[38] *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para 118: <http://www.italaw.com/sites/default/files/case-documents/ita0669.pdf>.

[39] Ibid, para 119.

[40] Ibid, para 119, citing *Salini Costruttori S.p.A and Italstrade S.p.A v The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award of 15 November 2004 <http://www.worldbank.org/icsid>. On this point, see in general A Pellet, 'The Case Law of the ICJ in Investment Arbitration' (2013) 28(2) ICSID Review 223. See further the chapters by Brooks Daly and Hugh Meighen and Oonagh Sands in this volume.

Finally, decisions of other tribunals may be cited to endorse a new standard by the majority of the deciding tribunal. One notable example of this technique relates to the correct standard to be used to decide on challenges of arbitrators in the context of international investment disputes. Grounds to challenge international arbitrators are generally similar in different international arbitration rules, and they pertain to an alleged lack of independence or impartiality by the arbitrators. Most arbitration rules require situations that give rise to 'justifiable doubts' as to the impartiality or independence of an arbitrator.[41] ICSID rules, however, require a party to propose the disqualification of an arbitrator 'on account of any fact indicating a manifest lack of the qualities' of impartiality or independence.[42]

The standard has been criticised as too difficult to meet. Several ICSID tribunals have addressed the issue and have slowly moved towards changing the required standard to the generally accepted standard, while continuing to respect the applicable rules.[43] In *Caratube v Kazakhstan*, the ICSID Tribunal noted:

> Having considered the Parties' respective positions and in the light of recent ICSID jurisprudence, the Unchallenged Arbitrators find that the applicable burden of proof is expressed in the Decision on the Parties' Proposal to Disqualify a Majority of the Tribunal in *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela,* as subsequently confirmed in *Burlington Resources, Inc. v. Republic of Ecuador*, *Repsol S.A. and Repsol Butano S.A. v. Republic of Argentina* and *Abaclat and Others v. Argentine Republic*. In these cases, Dr. Kim Yong Kim, the Chairman of the ICSID Administrative Council found that 'Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias'. Therefore, the Claimants must show that a third party would find that there is an evident or obvious appearance of lack of impar-

[41] See, e.g., UNCITRAL Arbitration Rules, Art 12(1) (2010).

[42] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159 <https://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp> (providing 'A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required').

[43] C Giorgetti, 'Caratube v. Kazakhstan: For the First Time Two ICSID Arbitrators Uphold Disqualification of Third Arbitrator' (ASIL Insights, 29 September 2014) vol 22, issue 18 <http://www.asil.org/insights/volume/18/issue/22/caratube-v-kazakhstan-first-time-two-icsid-arbitrators-uphold>. For a review of the earlier jurisprudence, see C Giorgetti, 'Challenges of Arbitrators in International Disputes: Two Tribunals Reject the "Appearance of Bias" Standard' (ASIL Insights, 6 June 2012) vol 16, issue 20 <http://www.asil.org/insights/volume/16/issue/20/challenges-arbitrators-international-disputes-two-tribunals-reject->.

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tiality or independence based on a reasonable evaluation of the facts in the present case.[44]

This measured shift in position of the Tribunal is supported by other decisions of other ICSID tribunals and as such also refers to a standard used by other international investment tribunals. To conclude, the analytical framework described in this section highlights the variety of cross-fertilisation techniques international courts use to shift from already established standards by employing examples from decisions of other international courts and tribunals. The next section will elaborate on the meanings and motives of cross-fertilisation.

IV. CROSS-FERTILISATION AMONGST COURTS: MEANINGS AND MOTIVES

After explaining how international courts use citations of other international courts in their judgments, it is important to understand why international courts and tribunals resort to such cross-fertilisation methods and the legal implications thereof. The proliferation of international courts and tribunals has been unsystematic and no judicial hierarchy has been established. Whilst this phenomenon has resulted in fragmentation and self-contained regimes, it has also produced an inter-connected system of courts, which has resulted in cross-fertilisation. The legal bases to support cross-fertilisation among international courts are varied.

International courts refer to decisions of other courts when confronted with an issue not exhaustively covered in their constitutive instruments and rules of procedure. This can happen because of a real lacuna in the instruments, or because of an ambiguity in the instruments. There are several ways used by international courts to fill in the gaps by interpreting and applying rules of procedure that are consistent with those used by other international courts and tribunals.

As explained by Brown, courts can interpret their statutes and rules of procedure in a way that takes into account the practice of other international courts and tribunals.[45] To do so, he identifies three principal methods: first,

[44] *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, para 57 (20 March 2014) <http://italaw.com/sites/default/files/case-documents/italaw3133.pdf>. See also, *Blue Bank Int'l & Trust (Barbados) Ltd. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal (12 November 2013) <http://www.italaw.com/sires/default/filcs/case-documents/italaw3009.pdf>.

[45] Brown (n 3), 40–52.

the application of the principle of effectiveness in treaty interpretation, which calls for provisions in treaty not to be meaningless, but to have a certain effect; second, the adoption of an 'evolutive approach'[46] to treaty interpretation which takes into account the development of international relations and international law, and is not static; andthird, reference to Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which requires judges to take into account, together with the context of 'any relevant rules of international law applicable in the relationships between the parties'.[47]

Decisions of international courts and tribunals can also enter the decision-making equation directly as a source of law, in application of Article 38 of the ICJ Statute which international tribunals routinely use to identify the sources of law. Article 38 provides that courts can use 'judicial decisions' as subsidiary means for the determination of rules of law.[48] Importantly, decisions of international courts and tribunals can also be cited as evidence of custom and general principles of law, as noted in several of the general examples analysed above.[49] Courts may not always be explicit as to how they cite decisions of other courts.[50] International courts can also reference decisions of other international courts simply as one of the examples supporting their arguments. The final outcome of a case will be stronger and possibly more acceptable to all parties if it reflects an approach that is common to other international proceedings.

Normatively, cross-fertilisation is not without its critics. First, some could argue that seeking support from decisions of other courts does not serve the interests of the parties in the proceedings and may increase uncertainty.[51] However, cross-fertilisation among international courts is gradually resulting in the development of common principles and a common understanding of international procedural law, and hence, it is increasing, not decreasing, certainty and predictability which are important for all parties.

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[46] Brown (n 3), 46.

[47] Art 31, 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 311 (entered into force 27 January 1980).

[48] Art 38 provides the generally recognised formulation of the traditional sources of international law. Art 38, ICJ Statute (stating, *inter alia* that '1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply [...] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.').

[49] See ibid, para 1 ('The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: [...] b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations.').

[50] This is an interesting issue but it is outside the scope of this chapter.

[51] G Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2001) 2 Journal of International Dispute Settlement 5 (noting that 'if judicial decisions are never fully predictable, they should never be arbitrary.').

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Second, others may argue that international courts should not create new legal procedural standards, as this should remain the domain of the law maker. As explained in this chapter, however, courts operate in the strict confines of their constitutive instruments and rules of procedure. Cross-fertilisation is the result of the application of rules of interpretation and norms relating to the sources of law, and is therefore permissible in international law. Moreover, constitutive instruments are created by compromise, and are at times, necessarily ambiguous. Besides, it is not possible to include detailed provisions that can neatly cover all possible fact patterns. Cross-fertilisation is not only important, but it is also necessary to the functioning of international procedures.[52]

Finally, a more subtle criticism of cross-fertilisation relates to the fact that it is essentially unsystematic. Decisions of any international court or tribunal could be cited in support of a procedural decision of another court, as long as the cited decision is relevant to the issue in question. This is a valid criticism, but it is the inevitable by-product of the unsystematic nature of the international dispute resolution system. As such, cross-fertilisation tries to put some order in the chaos by signalling common understandings and interpretations.

Significantly, in fact, this continuous cross-citation has resulted in important cross-fertilisation of procedural rules among courts and tribunals, and has helped in harmonising rules across different courts. Systematically, this integration has created stronger courts and tribunals and has reduced the legal uncertainty that different standards and procedures have created, and has therefore, positively served the interest of the parties. What is essential to the continuing validity of this method is that cross-fertilisation occurs within the limits of the rules of interpretation and existing rules relating to the sources of law.

V. CONCLUSION

This chapter has focused on the phenomenon of cross-fertilisation in decisions on procedural matters by international courts and tribunals, whereby they increasingly cite one another's practice and adopt comparative methods to draw analogies and distinctions in order to identify legal standards. Two main categories of cross-fertilisation have been analysed – citations of other international courts and tribunals used to support an existing standard by the deciding tribunal on one side, and citations of decisions of other international

[52] On the practice of procedural gap-filling, and its possible legitimacy founded on the inherent powers of international tribunals, see the chapter by Filippo Fontanelli and Paolo Busco in this volume, and the bibliography cited therein.

courts and tribunals used to modify the standard used by the deciding court. In both cases, citations can be to general decisions by courts and tribunals or to specific conclusions or tribunals. Notably, certain calls for changes originate first in dissenting or separate opinions, and are then adopted by the majority of the court and/or by other international courts and tribunals as well.

Citations to decisions of other courts are used as a source of law and generally as one of the ways to support a ruling of the court. As Brown observes 'if customary international law, general principles of law, judicial decisions and the writings of publicists are sources of the substantive rules of international law, there is no reason why they might not also serve as a source of the procedural rules of international law'.[53] Remarkably, while this analysis has only focused on specific examples, the systemic importance of cross-fertilisation is general. Cross-fertilisation is a common occurrence and a significant methodological tool to create and strengthen international procedural decisions.

[53] Brown (n 3), 37.