

The Role of General Principles in International Law and their Relationship to Treaty Law

AF CHRISTINA VOIGT, DR.JURIS., POST-DOC RESEARCHER, UNIVERSITY OF OSLO, DEPARTMENT OF PUBLIC AND INTERNATIONAL LAW

Summary: General principles play an important role in international law. They are referred to in international jurisprudence and relied upon in the course of treaty interpretation. Yet, their provenance and role remain obfuscated.

In the first part of this article the argument is made that provenance and legitimacy of general principles derive from three different directions: (i) From acceptance in a high number of domestic legal systems (from where they can be induced), (ii) from acceptance directly in an international setting (from where they can be deduced), and (iii) from natural law arguments. All three arguments are based on a shared understanding that these general principles exist and what they imply, based on an *opinio juris communis*.

The second part analyses the role of general principles in relation to treaty law. The role ascribed to general principles is relative to the classification of principles either as fundamental principles, fall-back principles, dynamic principles, or interpretation and conflict resolution principles. The particular function depends on the context and overlaps between those classifications exist. It becomes clear, however, that general principles provide an important dynamic element of international law by preventing treaty law from being 'outdated and irrelevant'. Importantly, general principles allow international law to grow and to respond to modern challenges.

Keywords: General principles, Normative foundation, State practice, *opinio juris*, Indeterminacy, Dynamism, Discretion, Self-contained regimes, *lacuna*, Fragmentation, Integration

1 Introduction

'International law is not rules. It is a normative system.' These are the first two sentences of Rosalyn Higgins acclaimed book *Problems and Process. International Law and how we use it*. Her point is that in order to secure the role of law, that is, the achievement of common values, such as freedom, justice, security, the provision of sufficient material goods to fulfil basic needs etc., it requires a normative system. A normative system, however, consists of norms which interlink and take account of the humanitarian, moral, political and social purposes of law.

Certainly, there are ‘rules’, which need to be determined and impartially applied in order to decide a case, but there is more to the normative foundations of international law than rules only. International law is a *process* – it is a system of constant renewal, dynamism and development. This entails that the sources of law cover a large spectrum with a sliding scale of normative force. Normative force behind this process can be expressed in many different ways; it is provided by – *inter alia* – policy considerations and soft law, by principles, custom, and treaties, just to mention a few.

This means that the normative foundations need constantly to be ascertained. Nothing is mechanistic or certain in this process of identifying legal sources and applying norms. It is also in this context that the traditional distinction between *lex lata* and *lex ferenda* becomes blurred and less relevant. Law as process can never only deal with law as it is. This would mean that it quickly becomes outdated and inappropriate. Rather, law as a process requires interpretation and choice of norms that are compatible with the values that are sought to be promoted and objectives sought to be achieved. In this context, as *Rosalyn Higgins* notes, ‘[i]t is only to a rule-based lawyer that this is to be classified as ‘law as it ought to be’, standing in contrast to ‘law as it is’.¹

One normative element of law, which most progressively supports the connotation of international law as a process are *general principles*. These principles are ‘an authoritative recognition of a dynamic element on international law, and of the creative function of the courts which may administer it.’² In law as a continuing process provide general principles for a ‘welcome possibility for growth’³, in which capacity they also contribute to the development of international law.

In this paper, I will argue *why* this is the case and *how* it becomes particularly apparent in relation to treaty-based law. In turn, I will attempt to, first, briefly define general principles, second, to say something about their grounds of legitimacy, before, third, investigating their nature. Fourth, I will examine their function in relation to treaty law and attempt to show how their dynamic power can be realized in different ways in this context. This fourth part will be backed up by examples. Finally, I will draw some conclusions.

- 1 R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994, reprinted in 2003), 10.
- 2 J. L. Brierly (H. Waldock ed.) *The Law of the Nations: An Introduction to the International Law of Peace* (Oxford: Clarendon, 1963), 63.
- 3 See M. Bos, *The Recognized Manifestations of International Law* (1977) 20 *German Yearbook of International Law*, 42.

2 General Principles

2.1 What are General Principles?

General principles of law recognized by civilized nations – or more appropriate: the community of nations – are a manifestation of international law. They are included in Article 38 para 1 lit. c of the Statute of the International Court of Justice and have been classified as a primary source. Still, no consensus among legal scholars exists as to the exact quality of this source. At a first glance, the normative force behind general principles appears to be limited of importance for three different reasons: firstly, international courts and tribunals have remained reluctant in their use and reference to general principles, secondly, general principles as such have limited use as independent formulations of enforceable obligations and have rarely been referred to as a basis for a legal claim, and, thirdly, legal scholars have contributed with their criticism to mark general principles a rather 'ambiguous source of law'.

At a closer look, general principles constitute a crucial element of international law, without which its effective functioning would be jeopardized. Without general principles, also progress and responsiveness of international law to modern challenges would be considerably constrained. Further, it is contended here, that it is largely due to general principles that international law can be defined as a *system*.

There is general agreement that general principles provide a valuable and jurisprudentially coherent supplement to treaty law and custom. Yet, it is impossible to grasp general principles without recourse to their provenance. Where do they come from?

2.2 Legitimacy, Validity and Provenance of General Principles

When setting out to identifying general principles one is faced with considerable uncertainty. Yet, it has to be kept in mind that there is general uncertainty about identification and status of *any* legal norm in international law. The question of provenance of norms in international law is far from settled. Therefore, no clear indications exist as regards the provenance of general principles.

When classifying general principles as a supplement to treaty and custom, they are seen as a category of norms which usually comes after those depending more immediately on the consent of states.⁴ The recourse to general principles suggested here, however, remains grounded in a consensualist conception of international law.

4 I. Brownlie, *Principles of International Law*, 6th ed. (Oxford: Oxford University Press, 2003), 15

This conception implies that courts and tribunals can have recourse to general principles even though States have not given their express consent. Consequently, what is required for the establishment of general principles is the same kind of convincing evidence of general acceptance and recognition in order to arrive at customary law. However, this evidence is paralleled by State practice but can rather be seen as a variety of ways in which moral or humane considerations find a more direct and spontaneous expression in legal form.

General principles – being distinct from customary law – do therefore not depend on actual State behaviour. By reference to the dissenting opinion of *Judge Tanaka* in the *South West African cases (Second Phase)*, general principles extend ‘the concept of the sources of international law beyond the limit of legal positivism, according to which the States are bound only by their own will’.⁵ Likewise, *Bruno Simma* and *Philip Alston* submit that

‘General principles seem to conform more closely than the concept of custom to the situation where a norm invested with strong inherent authority is widely accepted even though widely violated.’⁶

Similarly, *Ben Cheng* regarded the practice element to be unnecessary in the context of general principle when he stated:

‘In the definition of the third source of international law, there is also an element of recognition on the part of civilised peoples but the requirement of a general practice is absent.’⁷

In the absence of general principles, international law would be nothing but the law of consent and auto-limitation of States. In this case, it has been warned, ‘the tasks of the Court would be limited to registering the acts of the powerful’.⁸ The behaviour and consent of States are thus not a necessary prerequisite to the recognition of general principles.⁹

But where derive general principles their legitimacy from?

5 Dissenting opinion, Judge Tanaka, *South West African cases (Second Phase)* ICJ Reports 1966, 298.

6 B. Simma and P. Alston, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles* (1991) 12 Australian Yearbook of International Law, 102.

7 B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (London: Stevens, 1953), 24.

8 See PCIJ, Advisory Committee of Jurists, *Proces-Verbaux* of the Proceedings of the Committee, 1920, 319–320.

9 Dissenting Opinion by Judge Tanaka, in *South West African Cases*, ICJ Report 1966.

In my view, there are two major ways to legitimize the use of general principles: firstly, they can be *induced* from domestic legal systems, and, secondly, they can be *deduced* from international legal logic directly.

As regards the first alternative, general principles are those which can be derived from a comparison of municipal legal systems. If a principle appears to be shared by all – or the majority of – municipal law systems it may be transposed to the international level. Arbitral tribunals have resorted to municipal analogies. In the *Fabiani* case between France and Venezuela, the arbitrator had recourse to domestic public law on the question of responsibility of states for the acts of its agents – here denial of justice by a Venezuelan Court – in the exercise of their functions.¹⁰

Parties to cases before the International Court of Justice have at times conducted comparative studies of municipal law in order to invoke a general principle. For example, in the *Right of Passage over Indian Territory* case, Portugal argued that its right to passage from the coast to certain Portuguese enclaves on Indian territory was supported by the general principle of ‘rights of way of necessity’. To establish this principle, Portugal conducted a comparative study of this provision in various legal systems.¹¹ However, international courts, where they relied on the use of general principle, more often than not took resort without reflecting extensively on domestic law analogies. Where principles were applied as being represented in domestic systems, these principles themselves were not identified by way of detailed investigation of the respective national legal systems. The emphasis on acceptance in *foro domestico* was simply caused by the necessity to validate general principles in a reliable way; it cannot be read as closing the door to alternative means of objective validation.

The second alternative therefore suggests that general principles are primarily – or as some say, even exclusively – principles of international legal logic.¹² Excluding the possibility of domestic origin, *J.H.W. Verzijl*, for example, warns the international lawyer in the following way:

‘the nature of inter-state relationships differs so radically from that of relationships between individuals (private law) or between the Government or State and their subjects (public and penal law) that there is a very strong presumption against the possibility of applying the general

10 (1896) La Fontaine, 344, RIAA, 83.

11 *Right of Passage over Indian Territory*, Merits Judgement, ICJ Reports 1960. See reference by H. Thirlway, ‘The Sources of International Law’ in M.D. Evans, *International Law* (Oxford: Oxford University Press, 2003) 117-144.

12 D. Anzilotti, *Cours de Droit international* (Paris: Recueil Sirey, 1929) 117; F. Castberg, *La méthodologie du droit international public* (1933) 43 Recueil des cours 313.

principles accepted in municipal orders for the latter groups of relationships without reservations or qualifications to the former group of interstate relations.¹³

Besides, some principles may not even be able to be traced back to municipal jurisprudence. Arguably, the principles of non-intervention, of non-interference in the internal affairs of other States, of sovereign right to exploit natural resources, of prohibition of use of force and even the principle of self-determination of peoples have rather minimal, if any, foothold in *foro domestico* of States.

However, it is far from established that general principles exclusively derive either from acceptance in *foro domestico* or from international law. The answer, it is suggested, lies somewhere in between, apparently encompassing both, domestic and international elements.

It has thus been said that general principles are norms recognized by the international community, whether the norm is derived from municipal law or not.¹⁴ They are norms 'of general validity which is manifested not in a single statutory provision, but usually by a group of mutually interdependent legal rules or their system.'¹⁵

Both approaches to identifying general principles have in common that there is a shared understanding by the members of the international community of their existence and their implications. Such a view is based on a 'common legal conscience'; an *opinio juris communis*,¹⁶ which can be found by comparing principles recognized in *foro domestico* or by investigating into the legal logic behind a normative statement in the international forum. If a normative statement can be shown to be part of the 'common legal conscience' it can be considered being a general principle.

The sources for such *opinio* may extend further than to states' behaviour, embracing the general sources of *opinio juris* (declarations, statements etc.) along with a wider spectrum of expressions of a 'legal animus', such as declarations, soft-law, and arguably even statements of international organizations. Eventually the conclusion must be that a mix of actors on the international law scene is relevant in the need for a broad consensus on which *opinio juris communis* is based.

However, there is also a third conception of legitimacy of general principles which links them to natural law – transposing pre-existing moral norms into the

13 J. H. W. Verzijl, *International Law in Historical Perspective*, Vol. I (Leiden: Sijthoff, 1968) 62–63.

14 P. Hulsroij, *Three Sources – No River: A Hard Look At the Sources of Public International Law with Particular Emphasis on Custom and »General Principles of Law«* (1999) 54 *Zeitschrift für öffentliches Recht*, 245. B. Simma and P. Alston, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles* (1991) 12 *Australian Yearbook of International Law*, 102, fn 85.

15 G. Herczegh, *General Principles of International Law and the International Legal Order* (Budapest: Akadémiai Kiadó, 1969), 36.

16 Ibid.

legal system. This view questions the need for back-up of general principles by acceptance and recognition in legal systems. *Louis Henkin* stated in this respect:

[P]rinciples common to legal systems often reflect natural law principles that underlie international law ... [I]f the law has not yet developed a concept to justify or explain how such general principles enter international law, resort to this ...source seems another example of the *triumph of good sense and practical needs* over the limitations of concepts and other abstractions.¹⁷

To sum up, in this section we explored the following:

- General principles remain an ambiguous source of law.
- They are generally based on the acceptance and recognition by States.
- State practice, which is a requirement for custom, is not necessarily a precondition for general principles to emerge.
- The grounds for their legitimacy derive from three different directions:
 - Acceptance in a high number of national legal systems (from where they can be elevated to the level of international law by way of analogy).
 - Acceptance directly on the international level (from where they can percolate down into domestic fora), and
 - Natural law arguments.
- All three arguments are based on a shared understanding that these general principles exist and what they imply, based on an *opinio juris communis*.
- The three directions are not exclusive as they can be interlinked and combined.

2.3 The Nature of General Principles

After having examined the sources from which general principles can be derived and their basis of legitimacy, we will now have a closer look at the nature of these principles. Here, I suggest, three interlinked elements can be identified: (i) indeterminacy, (ii) discretion of courts and tribunals, and (iii) dynamism.

2.3.1 Indeterminacy

The nature of general principles is inherently linked to their generality and abstractness – in short: the indeterminacy of their scope. General principles such as the principle of equity or proportionality must necessarily comprise of such quality. They are inherently broad and open-textured, leaving room for specification by other norms of international law and specific contexts. As such, they are never ‘finished products’. It is a ‘continuing process’ from their identification to the final

17 L. Henkin, *International Law: Politics, Values and Functions: General Course in Public International Law*, 216 Recueil des cours 61-62 (1989).

determination of the principles' content in a particular context.¹⁸ And yet, it is precisely this 'unfinished nature' of general principles that makes them appropriate for fulfilling their functions, in particular the function of 'filling the gaps' left open by treaty and custom and the function as a guide to law makers as we will see later.

2.3.2 *Discretion*

The second criterion marking general principles is that they give significant discretion to judges and law makers. To this extent, it has been criticised that general principles give too wide a margin of appreciation to the judge as they dictate no particular solution but supply relevant arguments in support of one or another solution.¹⁹ According to *Ronald Dworkin*, this is exactly what distinguishes principles from rules: when a rule is found applicable to a certain fact, this rule applies in an all-or-nothing fashion. It directs the answer to a certain legal question or case. Principles, however, like the principle of good faith or prohibition of abuse of rights or equitable sharing of interests, do not set put conditions that make their application necessary. 'Rather', as *Dworkin* says, such principles state 'a reason that argues in one direction, but does not necessitate a particular decision.'²⁰

General principles are a source of arguments for judges in situations where other sources fail. Such a situation could either arise where it is impossible for a judge or arbitrator to find a solution in the positive law as to which of two contradictory norms should be applied or where simply no norm exists.²¹ In these cases, general principles may not dispense set answers to every abstract question. The legal notions expressed in general principles are neither overly prescriptive nor particularly measurable, but in most cases, a reasonably clear jurisprudence of what they do and

18 Bos, 1977, 42.

19 T. Eckhoff and N. K. Sundby, *Rettsystemer: Systemteoretisk Innføring i Rettsfilosofien* (Oslo: Tanum-Norli, 1976) 129. See also M. Koskenniemi, *General Principles: Reflections on Constructivist Thinking in International Law* (1985) Oikeustiede Jurisprudentia (Yearbook of the Finnish Law Society) 117-163 who contends with regard to general principles that 'it is not seldom that even conflicting practices are legitimized by the discursive use of one widely formulated principle.', 159.

20 R. Dworkin, *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press, 1977, 19th reprint 2002), 25-26.

21 See M. Koskenniemi, 'The Silence of Law/The Voice of Justice' in L. Boisson de Chazournes and P. Sands (eds.) *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge: Cambridge University Press, 1999) 489. Also arguing in favour of the possibility of a *non-liquet* is D. Bodansky, 'Non Liqueur and the Incompleteness of International Law' in Boisson de Chazournes and Sands (eds.) 1999, 153-170; and J. Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge: Cambridge University Press, 2003), 152, who suggests that in those exceptional cases where there is simply no applicable law 'the judge may either pronounce a *non-liquet* or himself create the law'.

do not permit might or has already evolved.²² Thus, when put into practice and applied by the judge, principles like the principle of good faith, the rule of law, or human dignity, provide a means of finding an answer to a legal question where no law or colliding rules exist.²³

At the same time, general principles also constrain judges in that they prevent them from relying too much on their own subjective opinion. It would be incumbent on judges to consider how far the dictates of their conscience are in agreement with the conception of justice in international law. When a certain solution is supported by a certain principle, the judge is justified in applying it.

2.3.3 *Dynamism*

Last, but not least, general principles of law furthermore provide a welcome and necessary means by which courts and tribunals can construe the law in a dynamic fashion that is responsive to today's problems. *Winfried Jenks* stated already in this context:

'Neither agreement nor practice, even in the widest sense, can, however, provide sufficiently vigorous seeds of growth to enable the law to cope with new problems pressing for solution.... Legal principles therefore have an indispensable part to play in the development of the proper law ... and its assimilation into the general body of international law.'²⁴

The dynamic potential inherent in general principles is linked to their abstract nature and the discretion they leave to the judiciary. Many challenges facing the international community today, human rights violations, alleviation of poverty, environmental challenges, and unequal economic development are only partly and insufficiently addressed in international treaties. The possibility of the judicial process to take account of the moral, social and political rationale underlying general principles may indeed be what renders judicial organs capable of breaking new ground.

22 R.Y. Jennings, *What is International Law and How do We Tell it when we See it?* (1981) 37 *Schweizerisches Jahrbuch für Internationales Recht* 59

23 See R. Dworkin, *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press, 1977) 105–130. Dworkin argues that judges are generally bound by general principles which they have to identify and to apply in cases where no other (positive) law exists. Opposing positivist theories he contends that judges are not intended to create law themselves. The right answers are 'in the law' that consist of positive legal rules and general principles.

24 C.W. Jenks, *The Proper Law of International Organisations* (London: Stevens, 1962) 259–160.

3 Relationship to Treaty Law

After we clarified the nature of general principles, we will now attempt to define their functions. It is assumed that the best way to approach this issue is by looking at their relationship to treaty law. As mentioned above, general principles are complementary to treaty law and a supplement to it. But the role of general principles also goes beyond this. General principles can guide law-makers and shape the content of treaty law. Thereby, principles can evolve into conventional rules.

It is submitted here to view the normative impacts of general principles as being relative to their different functions ('relative normativity'). I will in the following attempt to place general principles into five categories, though it has to be stated from the outset that there exist no clear dividing line and the borders are blurred as the same principle can fall within various categories.

To highlight the classification, I would like to suggest a metaphor. If we – for once – imagine international law as a system comparable to a *city*, then general principles fulfil different functions in the construction, management and development and extension of this city. Let me explain a few:

3.1 Fundamental Principles

First, on an overarching level, we find *fundamental principles*. In a metaphorical way, these principles are the mass of matter or the 'stones' of which our city is built. Fundamental principles provide the foundations of the international legal system. Here we find principles, such as *pacta sunt servanda*, the principle of state sovereignty, equality of states, the principle of consent, reciprocity, and good faith.

One example of the latter can be found in the proclamation of the International Court of Justice (ICJ) in *the Nuclear Test cases* that:

'One basic principle governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential.'²⁵

The good faith principle is thus a fundamental principle informing and shaping the observance of existing rules of international law and in addition constraining the manner in which those rules may legitimately be exercised.²⁶

25 ICJ Reports, 1974, 253.

26 M. Shaw, *International Law*, 4th ed. reprinted (Cambridge: Cambridge University Press, 2000), 82 – with further references to *Fisheries Jurisdiction case*, ICJ Reports 1974, 3, 33, 55;

In many cases these principles are primarily abstractions from the mass of rules and have been so long and so generally accepted as to be no longer directly connected to state practice. Some of the principle are also so abstract in character that they are unlikely or unsuited to appear in ordinary state practice. These principles provide the preconditions for treaty law and are guarantors for the functioning of treaties and of the international legal system in general.

3.2 Directing Principles

Second, we have *guiding* or *directing principles*. These are the ‘*Architects*’ in our city. They advise the ‘builders of rules’ – the lawmakers – of what they are to built. In other words, they outline a policy path to be followed. In addition, these principles sketch the context of the law-makers’ competence with regard to the policy path and direct the course of the law’s passage. Especially in the absence of a central ‘law-maker’ in the international arena, ‘guidance’ in a legislative context is of significant importance.

We find examples of such principles in different fields of law. In general international law, the principles on non-interference in the affairs of other states, on the prohibition of the threat or use of force, on the peaceful settlement of disputes, on respect for human rights, and on self-determination of peoples have been seen as playing a major role in forming the ‘*constitutional principles*’ of the world community.²⁷

These principles, if followed by consistent state practice, can influence the development of international customary law and evolve into customary principles. But they also guide the policies of states and are designed to channel subsequent negotiations on international agreements into a particular direction.²⁸

In the area of human rights law, for example, the principle of self-determination of peoples has been included in Article 1 of both, the International Covenant on Economic, Political and Cultural Rights and the International Covenant on Civil and Political Rights.

In International Environmental Law one could mention the principles of precaution, polluter pays principle, principle of prevention, Environmental Impact Assessment (EIA), Best Available Technologies (BAT), common but differentiated responsibility, equity to future generations, states’ sovereignty over their natural re-

North Sea Continental Shelf case, ICJ reports, 1969, 3, 46-7; *Lac Lannoux case*, 12 ILR, 119; *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, para 102f.

27 A. Cassese, *International Law*, 2nd ed. (Oxford: Oxford University Press, 2005), 188.

28 R. Wolfrum, ‘International Environmental Law: Purposes, Principles and Means of Ensuring Compliance’, in F.L. Morrison and R. Wolfrum (eds.) *International, Regional and National Environmental Law* (The Hague: Kluwer Law International, 2000) 6.

sources, or the responsibility not to cause transboundary harm (*sic utere tuo ut alienum laedas*).

Many examples in International Environmental Law exist where general principles have formed the basis of new statutory rules. For example, the 1995 UN Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea (UNCLOS) relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks requires a precautionary approach – particularly when estimating the maximum sustainable yield (MSY). According to this agreement, member States are now required to ensure long-term sustainability and optimum utilization of the fish stocks. Here, States need to set precautionary reference points for specific fish stocks, which must identify the safe biological limit for harvesting by using best scientific information.

3.3 'Fall-Back' Principles

Third, we have the category of so-called *fall-back principles*. Here we have to distinguish between (a) those principles that concern matters of judicial process and (b) principles of substance, i.e. principles that determine legal content and consequences. I will discuss them in turn.

3.3.1 Procedural Principles

The first category can be referred to as the '*Civil servants*' of our city. Their role is the administration of justice required for the operation of the international law system. They provide basic procedural tools where formal sources fall short or are missing. In other words, general principles fill the gaps that exist in the body of treaty (and customary) law. The role of general principles in these situations is that of avoiding a *non-liquet*, that is, a ruling by courts that the dispute cannot be adjudicated for lack of legal rules governing the matter.

This means that in cases where international treaties do not contain certain rules of procedure, recourse to principles applicable to legal relations in general ('principles of legal logic' or of 'general jurisprudence') may be had. Among these elementary principles of fairness and due process are, for example, those that no one shall be subjected to unlimited arrest or detention without judicial trial, that there shall be no identity between prosecutor and judge, that no one shall be subject to the same trial twice (*ne bis in idem*), or that no condemnation shall occur without the accused being given a fair opportunity to be heard.²⁹

29 See W. Friedmann, *The Uses of General Principles in the Development of International Law*, 57 AJIL 2 (1963), 290.

Jurisprudential practice provides some examples. In the *Chorzow Factory* case, the Permanent Court of International Justice observed the principle of the duty of reparation of international wrongs when it stated that

‘it is a principle of international law ..., that any breach of an engagement involves an obligation to make reparation.’³⁰

In the same judgment, the Court also recognized the principle whereby one cannot take advantage of one’s own misconduct.³¹

The ICJ has in a number of cases relied on the principle of estoppel or preclusion (acquiescence). In the 1962 *Temple* case, the Court said that

‘it is an established principle of law that a plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error’.³²

In the Advisory Opinion on Application for Review of Judgements, the Court stated that

‘General principles of law and the judicial character of the Court do require that, even in advisory proceedings, the interested parties should necessarily have an opportunity, and on the basis of equality, to submit all the elements relevant to the questions which have been referred to the review tribunal.’³³

In more recent case law of international courts, general principles have been applied to close gaps in more special branches of law. The revival of general principles has to be seen together with the growth of international law into many diverse fields, such as international criminal law, international trade law, humanitarian law, law of the sea etc. This process – often referred to as *fragmentation* of international law – is marked by the creation of many different legal regimes with a high density of rules. However, constantly expanding international law also leaves areas which are only rudimentary regulated and replete with lawless spaces (*lacunae*).

This phenomenon is exemplified by international criminal law. Article 21 of the Statute of the International Criminal Court explicitly includes general principles into

30 *Chorzow Factory* (Merits), PCIJ, Ser. A. No. 17, p. 29.

31 Ibid 31 ‘one party cannot avail himself of the fact that the other has not fulfilled some obligation, or has had recourse to some means of redress, if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him’.

32 ICJ Reports (1962) at 26. See also *Eastern Greenland case* (1933), PCIJ, Ser. A/B. no. 53, *Arbitral Award of the King of Spain*, ICJ Reports (1960), 192, at 209, 213.

33 Application for Review of Judgment No. 158 of the UN Administrative Tribunal (1972-73), ICJ Advisory Opinion of 12 July 1973, ICJ Rep., 1973, at 181.

the applicable law before the Court. Also newly established *ad hoc* tribunals have frequently resorted to general principles of municipal criminal law systems in order to close prevailing normative gaps. The International Criminal Tribunal for Former Yugoslavia (ICTY), for example, proclaimed in its *Tadic* decision the general principle whereby tribunals must be established by law.³⁴ In *Blaskic*, another ICTY Trial Chamber held that

‘the proportionality of the penalty to the gravity of the crime is a general principle of criminal law common to the major legal systems of the world.’³⁵

Another branch of international law where recourse to general principles in the settlement of disputes is accepted practice is international trade law of the WTO. On several occasions have GATT and WTO panels and the WTO Appellate Body invoked general principles of law in order to fill procedural gaps. The WTO Agreement does not contain any provisions on issues such as non-retroactivity of treaties,³⁶ burden of proof, standing and representation before panels, due process, abuse of right, error in treaty formation.³⁷ Principles invoked before the dispute settlement system include, for example, the principle of effectiveness,³⁸ of *in dubio mitius*,³⁹ and of legitimate expectations, legal security and predictability.⁴⁰

34 ICTY, Appeals Chamber, *Tadic* (Interlutory Appeal), 42.

35 *Blaskic* (1996), ICTY decision of the president, ICTY Judicial Reports, 1996 I, § 796.

36 *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:1.

37 For an overview of relevant case law see J. Cameron and D. Gray, *Principles of International Law in the WTO Dispute Settlement System* (2001) 50 *International and Comparative Law Quarterly*, 248-298, and J. Pauwelyn, *The Role of Public International Law in the WTO: How Far Can we Go?* (2001) 95 *American Journal of International Law* 2001, 535.

38 Appellate Body in *Japan – Customs Duties, Taxes, and Labelling Practices on Imported Wines and Alcoholic Beverages* (Complaint by the EC) WT/DS8/AB/R; 4 October 1996, adopted 1 November 1996) with reference to the 1966 Yearbook of the International Law Commission, Vol. II, 219. The Appellate Body in *US-(Reformulated) Gasoline: United States – Standards for Reformulated and Conventional Gasoline 1996* (Complaint by Venezuela) WT/DS2/AB/R, WT/DS4/AB/R, 29 April 1996, adopted 20 May 1996, held that the interpretation of a provision cannot result in a reading that reduces whole clauses or paragraphs of a treaty to redundancy or inutility, as all terms of the treaty must be given meaning and effect. see IV, 22.

39 In *EC – Measures Concerning Meat and Meat Products (Complaint by the US)* WT/DS26/AB/R, adopted 13 February 1998, the Appellate Body interpreted the requirement of Art 3.1 SPS that measures must be ‘based on« international standards as not being a current binding requirement but as a goal to be realized in future. By applying the principle in *dubio mitius*, the Appellate Body rejected the interpretation of Article 3.1 that would transform international standards into binding norms.

Moreover, in *United States – Measures Affecting Imports of Softwood Lumber from Canada*, the panel invoked the principle of *estoppel*.⁴¹ On other occasions the principle has been implicitly invoked, for example, in not allowing a claim the claimant had previously explicitly abandoned in a written statement⁴² or rejecting the establishment of a panel because of the untimely evocation of an issue.⁴³ The Appellate Body has also recognized ‘good faith’ as an ‘organic’⁴⁴ and ‘pervasive’ general principle that underlies all treaties.⁴⁵

3.3.2 Substantial Principles

In addition to applying general principles in order to close gaps in the procedural framework, general principles have also been resorted to for arriving at a *substantial* legal conclusion. They are the city’s legal ‘*Craftsmen*’. Some examples need to suffice.

In its judgement in *Furundzija*, the ICTY had recourse to the general principle of human dignity when providing a definition of rape as a crime against humanity. It held that the

‘general principle of respect for human dignity is the basic underpinning and indeed the very *raison d’être* of international humanitarian law and human rights law; indeed, in modern times it

40 Panel in *US-Underwear (United States – Restrictions on Imports of Cotton and Man-made Fiber Underwear, WT/DS24/R, 8 November 1996)*, 7.20 and GATT Panel in *US-Superfund (United States – Taxes on Petroleum and Certain Imported Substances 17 June 1987, GATT Panel report, B.I.S.D. 34S/136)* where it was noted that the multilateral trading system contains rules not only to protect current trade but also to create predictability needed to plan future trade. See also E. U. Petersmann, *The GATT/WTO Dispute Settlement System* (London: Kluwer, 1997), 95.

41 Estoppel is a legal principle which precludes someone from denying the truth of a fact which has been determined in an official proceeding or by an authoritative body. As ‘a principle of justice and of equity it arises when ‘a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so.’ (*Moorgate Mercantile v Twitchings* [1976] 1 QB 225, CA at 241). The principle responds to the doctrine of *venire contra factum proprium* in legal systems based on civil law.

42 Panel in *US-Steel Plate (United States – Anti-Dumping and Countervailing Duty Measures on Steel Plate from India, WT/DS206/R, adopted 29 July 2002)* 7.29.

43 AB in *US-Meat (United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, WT/DS177/AB/R, WT/DS178/AB/R, 16 May 2001)* para 5.32.

44 AB in *US-Hot-Rolled Steel (United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R, 24 July 2001, adopted 23 August 2001)* para 101.

45 AB in *US-Cotton Yarn (United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, WT/DS192/AB/R, 8 October 2001, adopted 5 November 2001)* para 81.

has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity.’⁴⁶

In this case, by reference to the principle of human dignity the tribunal drew the conclusion that such an extremely serious outrage upon human dignity as forced oral penetration should be classified as rape.

In WTO law, ‘good faith’ has been used as a principle guiding the application of *substantive* WTO law. For example, in *US–Hot Rolled Steel* reference to good faith as a general principle of international law has been used to stress the obligation of States to refrain from acts which would defeat the object and purpose of a treaty to which they are Members.⁴⁷

Another example of the capacity of general principles to establish the normative content of the law is the ICJ’s Advisory Opinion in *Certain Expenses of the United Nations*. The ICJ had to determine whether a certain type of activities of the General Assembly fell outside the scope of its Charter-based powers (*ultra vires*). The Court relied on general principles when it determined that member States could not escape the obligations to contribute to the UN budget by challenging the competence (*vires*) of the activity of organization.⁴⁸

Finally, the question of whether Albania was responsible under international law for the explosions which occurred in the *Corfu Channel* could not be answered by recourse to any treaty law. Here, the Court invoke several general principles to establish Albanias international responsibility. The Court stated:

‘Such obligations are based...on certain general and well-recognized principles, namely elementary considerations of humanity,..., the principle of freedom of maritime communication; and every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.’⁴⁹

In his dissenting opinion to the ICJ judgement in the *South West African Cases*, Judge Tanaka undertook to examine whether the legal principles of non-discrimination and equality, denying apartheid, can be recognized as general principles. He came to maintain the position that

46 *Furundzija*, ICTY, Trial Chamber II, Judgment of 10 December 1998, at §185.

47 See, e.g., AB in *US–Hot-Rolled Steel*, para 101. Panel in *US–Shrimp* (United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R, 15 May 1998) para 7.41; see also Panel in *US–Byrd Amendment* (United States of America – Continued Dumping and Subsidy Offset Act (Byrd Amendment) 2000, WT/DS/217/R/ WT/DS234/R, (16 September 2002)) para 7.64.

48 *Certain Expenses of the United Nations* (Art. 17, para 2 FN Charter) Advisory Opinion ICJ reports 1962, 151.

49 *Corfu Channel* (UK v. Albania) (Merits) ICJ Reports 1949, 22.

‘The principle of equality before the law, however, is stipulated in the list of human rights recognized by the municipal system of virtually every state no matter whether the form of government be republican or monarchical and in spite of any differences in the degree of precision of the relevant provision. This principle has become an integral part of the constitutions of most civilized countries of the world.’⁵⁰

It has been stated that ‘each judgement is a step forward or a step backwards in the development of international law’. Seen from this perspective, the just-mentioned principles of ‘elementary considerations of humanity’, ‘human dignity’ and ‘equality before the law’ have considerably broadened the scope of human rights law and its link with other fields of written and unwritten international law.⁵¹

For both kinds of general principles which we classified in this section: procedural and substantial fall-back principles, the question arises what their exact relationship is to treaty law. In this context, the notion of ‘self-contained regimes’ needs to be addressed. As already mentioned, international law is fragmented into highly specialized regimes. Examples such as the WTO or specific human rights and environmental regimes have spurred a debate under international law about whether such regimes are or can become self-contained, in the sense that they are substantially and institutionally disconnected from general public international law.⁵² This would mean that principles of international law are generally not applicable within the regime. The converging consensus, however, seems to be that international law is never wholly displaced, but may under certain circumstances be reduced to a means of last resort.

3.4 ‘Evolutionary Principles’

The next category of general principles consists of those principles which introduce a *dynamic element* into treaty law. Where the houses of our city become too small or unfit for meeting new challenges, changes need to be made without demolishing the entire house. Similarly, treaty law is often in need of adjustment to modern challenges.⁵³ Principles which construe the law in a dynamic fashion responsive to today’s problems can thus be seen as ‘Engineers’ or ‘Innovators’ in our city.

50 *South West African cases*, ICJ Reports, 1966, 299.

51 See S.R.S. Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice*, 2007, 107.

52 See B. Simma, *Self-Contained Regimes* (1985) 16 NYIL, 115; B. Simma and D. Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 EJIL 3 (2006), 529; M. Koskenniemi *Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol* (1992) 3 Yearbook of International Environmental Law, 123-163.

53 Pauwelyn, 2003, 130.

Here, again we have to differentiate between (a) principles which lay the foundation for the further development of treaty norms and (b) principles which actually give a dynamic meaning (substance) to treaty formulations.

Within the first category we can place interpretative principles, such as those of evolutionary or dynamic interpretations, which we find in the Vienna Convention on the Law of Treaties (VCLT). Of particular relevance is Article 31.3 lit. c VCLT, which states the principle that a treaty shall be interpreted by taking into account any relevant rules of international law applicable in the relation between the parties.

The second – substantial – category comprises of open-textured principles which can be applied in the course of treaty interpretation as a corrective to ‘out-dated’ treaty substance. Traditional examples which have been used to develop the normative content of treaty law are the principles of effectivity, proportionality, or equity.

In newer case law different principles appear. Most prominent are attempts to base a new understanding of the terms of an ‘out-dated’ treaty provision on the principle of sustainable development or the precautionary principle.

An example of the former is the recourse to sustainable development by the ICJ in the *Gabčíkovo-Nagymaros* case, where the court – by reference to sustainable development – required the Parties to ‘look afresh’ at their initial contractual obligations to build a number of dams in the Danube river and to renegotiate a solution which would not endanger the riparian ecosystem of the river.⁵⁴

Also in WTO case law, innovative approaches have been undertaken to adjust treaty law ‘in the light of temporary concerns of the community of nations about the protection and conservation of the environment’. In *United States – I: Import Prohibition of Certain Shrimp and Shrimp Products* by invoking sustainable development (as acknowledged in the Preamble of the WTO Agreement) the Appellate Body extended the meaning of conservation of exhaustible natural resources as to include exhaustible natural resources whether living or non-living.

Attempts to base a dynamic understanding of WTO treaty law on the precautionary principle, as undertaken by the EU in *EC-Beef Hormones*⁵⁵ and, most recently, *EC-Biotech*⁵⁶ failed so far. However, apart from the missing willingness of the WTO Dispute Settlement Body, there is arguably no other legal constraint in international law which would prevent the applicability of this principle to treaty interpretation.

Alternatively, the International Tribunal for the Law of the Sea (ITLOS) in *Southern Bluefin Tuna* seems to have based its ruling on the precautionary principle.

54 *Gabčíkovo Nagymaros Project* (Hungary v. Slovakia) ICJ Reports 1997, 7.

55 *EC-Hormones*: EC – Measures Concerning Meat and Meat Products (Complaint by the US) WT/DS26/R, 18. August 1997, WT/DS26/AB/R, adopted 13 February 1998.

56 *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291, WT/DS292, WT/DS293, Panel Report circulated on Sep. 29, 2006.

The Tribunal, in light of scientific uncertainty, ruled that the parties 'should act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna.'⁵⁷

These principles can be used as a 'go-between' and converging factor between the particular branch of law and the wider corpus of public international law. They introduce and integrate in a dynamic fashion new concerns into the existing body of treaty law.

3.5 Interpretation and Conflict Principles

Finally, there are the traditional '*Lawyers*' in our city. These are principles of interpretation and of conflict resolution. These principles deal with the task of (a) giving meaning to the terms of a treaty, (b) help to choose between two or more conflicting interpretations or (c) decide on the prevalence of norms where they collide.

Again, legal density and fragmentation of international law into specialized regimes not only leads to rudimentary regulation, but also to regulatory overlap and collision. States may agree both on the desirability of trade and economic growth and on the need to promote human rights and the environment, without any established consensus on the balancing of such potentially conflicting values and priorities included in treaty law.

Here, general principles of conflict resolution such as the principle of *lex specialis derogat lege generali* and *lex posterior derogat lege priori* enter the picture and help to establish a certain normative hierarchy.

Still, from a doctrinal perspective, the problem of fragmentation may be held to require the introduction of new ideas and approaches to the interpretation of treaties where there is overlapping and conflicting consensus on fundamental value-questions in different social and political sectors. A number of approaches have been suggested in this regard, such as the recourse to certain general principles of integration such as that constituted by sustainable development. This assumption is based on their broad character and main function of 'filling the gaps' left open by treaty and custom. General principles can symbolically be described in this regard as the 'glue between different treaties' because of their inherently broad and open-textured character and their reconciliatory function.

This nevertheless continues to be a controversial topic in legal discourse, where conflicting views have been voiced *inter alia* on both the possibility and the need for a coherent normative framework.

57 *Southern Bluefin Tuna* (New Zealand v. Japan, Australia v. Japan) Provisional Measures, 38 I.L.M. 1624 (1999) 77.

4 Conclusion

First, principles have different functions in relation to treaty law. We were able to outline the following functions:

- *Fundamental principles*, which lay the foundation of treaty law,
- *Guiding principles*, which direct negotiations and the development of treaties,
- *Fall-back principles*, procedural and substantive, which fill gaps left open by treaty law,
- *Dynamic principles*, procedural and substantial, which guide the adjustment of existing treaties to new challenges and concerns of the international community, and
- *Interpretation and Conflict principles*, which deal with the regulatory overlap of treaties and attempt to establish normative coherence and – in the last resort a certain normative hierarchy.

The particular function depends on the context and the perspective of either law makers ('legal producer's view') or judges ('legal consumer's view'). There are overlaps and moving borders between the outlined functions.

Second, general principles provide an important dynamic element of international law by preventing treaty law from being 'outdated and irrelevant'. Treaties are not set in stone and general principles are an important supplement and corrective to treaty law.

Third, for international law to fully address the problem of fragmentation, the technique of applying general principles needs to be retained – or, perhaps, revived.

Fourth, against this background, general principles 'constitute both the backbone of the body of law governing international dealings and the potent cement that binds together the various and often disparate cogs and wheels of the normative framework of the international community.'⁵⁸

And last, but not least, like a 'living city', international law is a continuing process; principles can evolve into conventional or customary rules, but principles will always remain 'unfinished'. As such, they allow international law to grow and to respond to modern challenges.

References:

- D. Anzilotti, *Cours de Droit international*, 1929, Paris: Recueil Sirey.
 S.R.S. Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice*, 2007 (Hart Publishing, Oxford).

⁵⁸ Cassese, 2005, 188. Cassese, 2001, 151.

- D. Bodansky, 'Non Liqueur and the Incompleteness of International Law' in Boisson de Chazournes, L. and Sands, P. (eds.) *International Law, the International Court of Justice and Nuclear Weapons*, 1999, Cambridge: Cambridge University Press, 153–170.
- M. Bos, *The Recognized Manifestations of International Law*, 1977, 20 German Yearbook of International Law, 42.
- J. L. Brierly (H. Waldock ed.) *The Law of the Nations: An Introduction to the International Law of Peace*, 1963, Oxford: Clarendon.
- I. Brownlie, *Principles of International Law*, 6th ed., 2003, Oxford: Oxford University Press.
- J. Cameron and D. Gray, *Principles of International Law in the WTO Dispute Settlement System*, 2001, 50 International and Comparative Law Quarterly, 248–298.
- A. Cassese, *International Law*, 2001, Oxford: Oxford University Press.
- A. Cassese, *International Law*, 2nd ed., 2005, Oxford: Oxford University Press.
- F. Castberg, *La méthodologie du droit international public*, 1933, 43 Recueil des cours 313.
- B. Cheng, *General Principles of Law as applied by International Courts and Tribunals*, 1953, London: Stevens.
- R. Dworkin, *Taking Rights Seriously*, 1977, Cambridge, Massachusetts: Harvard University Press.
- T. Eckhoff and N. K. Sundby, *Rettsystemer: Systemteoretisk Innføring i Rettsfilosofien*, 1976, Oslo: Tanum-Norli.
- W. Friedmann, *The Uses of General Principles in the Development of International Law*, 1963, 57 AJIL 2, 290.
- L. Henkin, *International Law: Politics, Values and Functions: General Course in Public International Law*, 1989, 216 Recueil des cours 61.
- G. Herczegh, *General Principles of International Law and the International Legal Order* 1969, Budapest: Akadémiai Kiadó.
- R. Higgins, *Problems and Process: International Law and How We Use It*, 1994, Oxford: Clarendon Press (reprinted in 2003).
- P. Hulsroij, *Three Sources – No River: A Hard Look At the Sources of Public International Law with Particular Emphasis on Custom and »General Principles of Law«*, 1999, 54 Zeitschrift für öffentliches Recht, 245.
- C.W. Jenks, *The Proper Law of International Organisations*, 1962, London: Stevens.
- R.Y. Jennings, *What is International Law and How do We Tell it when we See it?* (1981) 37 Schweizerisches Jahrbuch für Internationales Recht 59.
- M. Koskenniemi, *General Principles: Reflections on Constructivist Thinking in International Law*, 1985, Oikeustiede Jurisprudencia (Yearbook of the Finnish Law Society) 117–163.
- M. Koskenniemi *Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol*, 1992, 3 Yearbook of International Environmental Law, 123–163.
- M. Koskenniemi, 'The Silence of Law/The Voice of Justice' in L. Boisson de Chazournes and P. Sands (eds.) *International Law, the International Court of Justice and Nuclear Weapons*, 1999, Cambridge: Cambridge University Press, 489.
- J. Pauwelyn, *The Role of Public International Law in the WTO: How Far Can we Go?*, 2001, 95 American Journal of International Law, 535.
- J. Pauwelyn, *Conflict of Norms in Public International Law*, 2003, Cambridge: Cambridge University Press.
- PCIJ, Advisory Committee of Jurists, *Proces-Verbaux* of the Proceedings of the Committee, 1920, 319–320.
- E. U. Petersmann, *The GATT/WTO Dispute Settlement System*, 1997, London: Kluwer.
- M. Shaw, *International Law*, 4th ed. Reprinted, 2000, Cambridge: Cambridge University Press.
- B. Simma, *Self-Contained Regimes*, 1985, 16 NYIL, 115.

- B. Simma and P. Alston, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*, 1991, 12 Australian Yearbook of International Law, 102.
- B. Simma and D. Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 2006, 17 EJIL 3, 529.
- H. Thirlway, 'The Sources of International Law' in M.D. Evans, *International Law*, 2003, Oxford: Oxford University Press, 117-144.
- R. Wolfrum, 'International Environmental Law: Purposes, Principles and Means of Ensuring Compliance', in F.L. Morrison and R. Wolfrum (eds.) *International, Regional and National Environmental Law*, 2000, The Hague: Kluwer Law International, 6.
- J. H. W. Verzijl, *International Law in Historical Perspective*, 1968, Vol. I, Leiden: Sijthoff.

List of Cases:

ICJ:

- Application for Review of Judgment No. 158 of the UN Administrative Tribunal (1972-73), ICJ Advisory Opinion of 12 July 1973, ICJ Reports (1973).
- Arbitral Award of the King of Spain*, ICJ Reports (1960) 192.
- Certain Expenses of the United Nations* (Art. 17, para 2 FN Charter) Advisory Opinion, ICJ Reports (1962).
- Corfu Channel* (UK v. Albania) (Merits) ICJ Reports (1949) 22.
- Fisheries Jurisdiction case*, ICJ Reports (1974) 3.
- Gabčíkovo Nagymaros Project* (Hungary v. Slovakia) ICJ Reports (1997) 7.
- Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) July 8 1996, ICJ Reports 1996, 66 (request by WHO), 226 (request by the UN General Assembly).
- North Sea Continental Shelf* (Federal Republic of Germany v. Denmark) (Federal Republic of Germany v. Netherlands) ICJ Reports (1969) 3.
- Nuclear Tests* (New Zealand v. France)/(Australia v. France) ICJ Reports (1974) 457/253.
- South West African cases (Second Phase)*, ICJ Reports (1966) 5; (Ethiopia v South Africa; Liberia v. South Africa, ICJ Reports (1966) 34.
- Temple*, ICJ Reports (1962) 26.
- Right of Passage* (Portugal v. India) (Preliminary Objection) ICJ Reports (1957) 142; (Merits) ICJ Reports (1960) 6.

PCIJ, Permanent Court of Arbitration, and International Arbitral Awards:

- Fabiani case*, La Fontaine, (1896) 344, RIAA, 83.
- Chorzow Factory* (Merits), (1928) PCIJ, Ser. A. No. 17, p. 29.
- Eastern Greenland case* (1933) PCIJ, Ser. A/B. no. 53.
- Lac Lannoux case*, 12 ILR, 119
- Tadic* (Interlutory Appeal), ICTY Judicial Reports 1995, Appeals Chamber, 42.
- Blaskic*, ICTY, decision of the president, ICTY Judicial Reports, 1996 I, § 796.
- Furundzija*, ICTY, Trial Chamber II, Judgment of 10 December 1998, at §185.
- Southern Bluefin Tuna* (New Zealand v. Japan, Australia v. Japan) Provisional Measures, 38 I.L.M. 1624 (1999) 77.

WTO:

- Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I.

- EC-Biotech (European Communities — Measures Affecting the Approval and Marketing of Biotech Products)* WT/DS291, WT/DS292, WT/DS293, Panel Report circulated on Sep. 29, 2006.
- EC-Hormones (EC — Measures Concerning Meat and Meat Products) (Complaint by the US)* WT/DS26/R, 18. August 1997, WT/DS26/AB/R, adopted 13 February 1998.
- Japan—Alcoholic Beverages (also: Japan—Taxes): Japan — Customs Duties, Taxes, and Labelling Practices on Imported Wines and Alcoholic Beverages (Complaint by the EC)* WT/DS8/R, WT/DS8/AB/R; (Complaint by Canada) WT/DS10/R WT/DS10/AB/R; (Complaint by the US) WT/DS11/R WT/DS11/AB/R, 4 October 1996, adopted 1 November 1996.
- US—Byrd Amendment (United States of America — Continued Dumping and Subsidy Offset Act (Byrd Amendment) 2000,* WT/DS/217/R/ WT/DS234/R, (16 September 2002).
- US—Cotton Yarn (United States — Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan,* WT/DS192/AB/R, 8 October 2001, adopted 5 November 2001).
- US—(Reformulated) Gasoline: United States — Standards for Reformulated and Conventional Gasoline 1996 (Complaint by Venezuela)* WT/DS2/AB/R, WT/DS4/AB/R, 29 April 1996, adopted 20 May 1996.
- US—Hot-Rolled Steel (United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan)* WT/DS184/AB/R, 24 July 2001, adopted 23 August 2001.
- US—Meat (United States — Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia),* WT/DS177/AB/R, WT/DS178/AB/R, 16 May 2001.
- US—Shrimp (United States — Import Prohibition of Certain Shrimp and Shrimp Products)* WT/DS58/R, 15 May 1998.
- US — Softwood Lumber (United States—Measures Affecting Imports of Softwood Lumber from Canada)* WT/DS236/R, adopted 1 November 2002, Recourse to Article 21.5 of the DSU by Canada, WT/DS277/RW (circulated on 15 November 2005), WT/DS277/AB/RW (circulated 13 April 2006).
- US—Steel Plate (United States — Anti-Dumping and Countervailing Duty Measures on Steel Plate from India)* WT/DS206/R, adopted 29 July 2002.
- US—Superfund (United States — Taxes on Petroleum and Certain Imported Substances)* 17 June 1987, GATT Panel report, B.I.S.D. 34S/136.
- US—Underwear (United States — Restrictions on Imports of Cotton and Man-made Fiber Underwear)* WT/DS24/R, 8 November 1996.

Others:

Moorgate Mercantile v Twitchings [1976] 1 QB 225, CA at 241.