

Seminar Paper

**Persuasive Authority, Predictability and Consistency in Arbitral Decision
Making**

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Table of Content

Abbreviations	ii
I. Introduction	1
II. Persuasive Authority, Predictability and Consistency in (Arbitral) Decision Making and the Rule of Law	1
a) Allocation in the system of Rule of Law	1
b) the Importance of Persuasive Authority, Predictability and Consistency in the International Investment Dispute Settlement System	2
III. The Current Situation in Investor-State Arbitration	3
a) The Legal Framework	3
b) <i>De Facto</i> Case Law	4
c) Examples	5
aa) <i>Ratione Temporis</i> and the Question of Continuing Acts	6
bb) Umbrella Clauses	8
cc) Fair and Equitable Treatment Clauses	9
IV. The Current Discussion on Persuasive Authority, Predictability and Consistency – Issues	12
a) Number and Range of Treaties and Legal Instruments	13
b) Composition of Tribunals	14
c) Transparency	16
V. The Current Discussion – Possible Solutions	18
a) Appeals Mechanism	18
b) Annulment Mechanism	20
c) <i>Stare Decisis – Jurisprudence Constante</i>	21
d) Preliminary Ruling Mechanism	23
e) A New Centralised Investment Court	23
VI. Conclusion	24
Cases	25
Bibliography	28

Abbreviations

ACHR	American Convention on Human Rights
Art.	Article
BIICL	British Institute of International and Comparative Law
BIT	Bilateral Investment Treaty
ECHR	European Convention on Human Rights
ECT	Energy Charta Treaty
FET	Fair and equitable treatment
FPS	Full protection and security
Hague J Rule of Law	Hague Journal on the Rule of Law
ICC	International Court of Commerce
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
J World Investment and Trade	Journal of World Investment and Trade
MFN	Most favoured nation
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
UNCITRAL	United Nations Commission on International Trade Laws
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organisation

I. Introduction

The contradiction is obvious: How can “arbitral” decision making lead to predictable and consistent rulings? How can a system that is so different from national and also international jurisdiction develop its own coherent line of case law? And ultimately, does it have to change to amount to a certain standard of uniformity, for its own good?

This paper will examine this seemingly contradictory relation with special regards to the principle of Rule of Law as a starting point and interpretative background of persuasive authority, predictability and consistency in arbitral decision making in international investment law. It will explore the importance of those aspects not only in connection with the Rule of Law, but in investment arbitration as a whole, as well as the current situation of the investor-state dispute settlement (ISDS) system. The focus of this paper will lie on the current discussion surrounding persuasive authority, predictability and consistency in investment settlement, in particular outstanding issues and proposed solutions. The aim is to find an answer to the question just stated above: Is there a need for change and reform in investment arbitration?

II. Persuasive Authority, Predictability and Consistency in (Arbitral) Decision Making and the Rule of Law

a) Allocation in the System of Rule of Law

The Rule of Law is a generally accepted standard with no clear cut definition.¹ Although it is overall conceived as a “good thing”² by economists, politicians and law experts alike, there are still disagreements on the scope and content of this very basic principle of national legal systems. The most fundamental debate is conducted around the issue, if Rule of Law should be a rather thin or thick concept,³ or in other words: Does the Rule of Law merely concern procedural matters, or does it extent to substantive ones as well?

It can be disputed if such a discussion is necessary at all, as both concepts are hard to formally separate: While thicker Rule of Law approaches always build on thinner concepts, a solely procedural approach must exist in a political system and therefore adhere to its “moral standards”.⁴ Thus, when allocating certain aspects such as consistency or predictability of judicial decisions in the broad idea of Rule of Law, one should not rely on thicker or thinner definitions of the principle but rather on core elements, as e.g. laid out by Chesterman. He described his three core principles as (1) no arbitral exercise of power by the State, (2) the

¹ Simon Chesterman ‘An International Rule of Law?’ (2008) 56 American Journal of Comparative Law, 332.

² Christopher May ‘Market Exchange and the Rule of Law: Confidence in Predictability’ (2017) Hague J Rule of Law, 1.

³ Chesterman (n 1) 340.

⁴ *ibid.* 341; May (n 2) 6.

application of laws to everybody, including the sovereign, through independent institutions, and (3) the equal treatment of everybody through the laws.⁵ The third point may also be known as “equality before the law”. It is one of the fundamental principles of thin Rule of Law concepts⁶ and can be seen as included in most thick Rule of Law approaches as well, above all those relying on Human Rights as a framework for fair decisions and procedure. In this regard, predictable and consistent jurisdiction can be subsumed under the principle of non-discrimination, while also being part of fair process norms. Both international rules are included in a number of Human Rights treaties and generally accepted as non-derogable laws.⁷

It becomes clear that coherent decision making lies within the centre of what is usually understood by the Rule of Law. It is one of those aspects that, although there is no general agreement on a formal definition of the principle, are accepted as within its range.

b) The Importance of Persuasive Authority, Predictability and Consistency in the International Investment Dispute Settlement System

What is even more important than the fact that persuasive authority, predictability and consistency in arbitral decision making can be found within the principle of the Rule of Law is of what great importance those aspects are in the system of international investment dispute resolution. They are elements that the general public frequently relies on to evaluate the fairness and legitimacy of a judicial system. The adherence to those principles fosters the trust of individuals in the system, and as the usage of international dispute settlement systems is also in the field of investment arbitration, a right, not an obligation, and a possibility, not a limitation, it depends on the confidence of its subjects in it. If this basic trust was to be diminished, it would eventually lead to the loss of the systems sheer right to exist.⁸ Besides, it should be kept in mind that the ISDS system was originally created to foster predictability and consistency for the advantage of foreign investors, as national courts were perceived as not sufficiently impartial and local law as too easily changed to avail security. One of its core objections therefore is consistency.

⁵ Chesterman (n 1) 342.

⁶ e.g. Albert Venn Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (Macmillan 1st ed. 1885) 171, cited in Chesterman (n 1) 336 and Mark Ellis ‘Towards a Common Ground Definition of the Rule of Law Incorporating Substantive Principles of Justice’ (2010) 72 *Pittsburgh Law Review*, 193.

⁷ Non-discrimination can be found in Art. 14 of the ECHR, Art. 20 and 21 of the European Union’s Charter of Fundamental Rights, Art. 24 of the ACHR, Art. 2, 3 and 20 of the Banjul Charter and Art. 2 of the Universal Declaration of Human Rights. The right to fair trial is included in Art. 6 and 13 of the ECHR, Art. 8 and 25 of the American Convention on Human Rights, Art. 7 of the Banjul Charter and Art. 7 to 9 of the Universal Declaration of Human Rights. For details on the status of these rules as peremptory norms in international law see Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Lakimiesliiton Kustannus 1988) 436-443.

⁸ see e.g. August Reinisch, ‘The Issue Raised by Parallel Proceedings and Possible Solutions’ in Michael Waibel, Asha Kaushal, et al. (eds), *The Backlash against Investment Arbitration* (Kluwer Law International 2010) 115; David Gaukrodger and Kathryn Gordon, ‘Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community’, *OECD Working Paper on International Investment*, No. 3 (OECD Publishing 2012) 58.

Additionally, a coherent and predictable line of case law may produce advantages for States as well as investors. Firstly, consistent jurisprudence can decrease the number of disputes arising against a State. It would clarify what kind of actions ought to be considered legal or illegal under an investment protection treaty. States and investors would consequently be able to change their behaviour in accordance with those consistent findings, eventually leading to less legal conflicts. Secondly, by creating a uniform line of decisions tribunals would be able to clear out an enormous number of disputed points, leading to less necessary argumentations and discussions as well as meetings and briefings with councils, therefore eventually increasing cost-efficiency in arbitral dispute settlement.⁹

Hence, it is evident that compliance with the Rule of Law principles of predictable and consistent decision making and an enhanced persuasive authority of decisions would be of great advantage for the investment dispute settlement system and all its subjects. However, there is far more to the situation than just plain improvement. The system in question is a rather special one. States created a net of bilateral treaties, intertwined with a number of multilateral and state-investor agreements, in which tribunals are established on an *ad hoc* basis with ever so changing participants and applicable rules. Although the system and its peculiarities shall be discussed in a later section of this paper, it is at this point important to note that, firstly, States agreed purposefully on the judgment of investment cases on an *ad hoc* basis, and, secondly, that for all those specialties and characteristics investors relying on the system cannot and do not expect the same level of consistency as they would from national courts.¹⁰ Those aspects should not fall out of sight for the mere purpose of achieving more consistency in arbitral decision making.

III. The Current Situation in Investor-State Arbitration

a) The Legal Framework

There is no generally accepted provision concerning the rule of precedents in international law in general or international investment law in particular. When discussing the binding force of decisions many scholars rely on Art 38 of the ICJ-Statute.¹¹ According to it, judicial decisions, such as the ones made by investment tribunals, constitute a subsidiary source of international law, which judiciaries can rely on when taking a decision. However, it is important to only use such precedents as an assistive device to further define and interpret

⁹ Gaukrodger, Gordon (n 8) 58-59.

¹⁰ Reinisch (n 8) 114-115; Eric De Brabandere 'Arbitral Decisions As a Source of International Law' in Tarcisio Gazzini, Eric De Brabandere (eds), *International Investment Law: The Sources of Rights and Obligations* (Martinus Nijhoff Publishers 2012) 255, 273.

¹¹ e.g. De Brabandere (n 10) 246; Jan Paulsson 'The Role of Precedents in Investment Arbitration' in Katia Yannaca-Small (ed), *Arbitration under international Investment Agreements: A Guide to the Key issues* (Oxford University Press 2010), 699-718.

law. If they were used as a primary source, tribunals would run contrary to the very fundamental principles of international law.¹²

Another way to deduce a rule on precedents in investment arbitration is to examine Art. 59 of the ICJ-Statute:

“The decision of the Court has no binding force except between the parties and in respect of that particular case.”

By interpreting this provision in the light of an *argumentum majore ad minus* it can be concluded that, if not even the ICJ is bound by its decisions, neither is an arbitral tribunal.¹³

When going further into the field of international investment law itself, the first sentence of Art. 53(1) of the ICSID Convention delivers hints concerning the binding force of former decisions within its system:

“The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.”

As an ICSID award is only binding *inter partes*,¹⁴ just as decisions by the ICJ or other international judiciaries, in result the ICSID Convention does not legally stipulate a system of binding precedents. Especially when read in conjunction with the *travaux préparateurs* to the Convention it is overall agreed on that there is no further obligation to adhere to past decisions, as those documents do not mention a principle binding effect.¹⁵

b) De Facto Case Law

However, in practice there is a strong reliance on former decisions and the reasoning of past tribunals, which consolidates in a *de facto* case law system. All or almost all decisions in ISDS reference decisions of other tribunals or international judiciaries.¹⁶ Nevertheless, it was also repeatedly pointed out that tribunals are not bound by former awards: In the case *AES v. Argentina* it was stated that decisions by other panels may only bind the parties involved and that there was no rule on precedents in ICSID-Arbitration,¹⁷ but the Decision also included the following statement:

¹² De Brabandere (n 10) 247 and 262.

¹³ *ibid.* 247-248; Paulsson (n 11) 702-703.

¹⁴ Similar Art. 1136 NAFTA: “An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case”.

¹⁵ e.g. Christoph Schreuer, *The ICSID Convention: A commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Cambridge University Press 2010) 1101 para.16; also referenced by Stephan Schill ‘Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law’ (2006) 3(5), 7, *Transnational Dispute Management* available at <www.transnational-dispute-management.com>, accessed on 23 January 2017.

¹⁶ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012) 33.

¹⁷ *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17. Decision on Jurisdiction, 26 April 2005, para. 23.

*“Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem; but decisions on jurisdiction dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order to compare its own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solution.”*¹⁸

The motivation or reasons to adhere to former decisions varies. While in the above cited case the observance of consistency was the focal point of conformity, in *Saipem v. Bangladesh* it was the Tribunal’s self-declared duty to contribute to a harmonious development of the law:

*“The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.”*¹⁹

Nevertheless, there also exist examples in which tribunals, with or without giving reasons for it, departed from former decisions or even de facto jurisprudence, e.g. *SGS v. Philippines*, *Eureko v. Poland*, *El Paso Energy v. Argentina*, *Suez, Sociedad General de Aguas de Barcelona SA*, and *InterAguas Servicios Integrales del Agua SA v. Argentina*, *Plama v. Bulgaria*, *Wintershall v. Argentina*, *Tza Yap Shum v. Peru* and *SGS v. Paraguay*.²⁰

c) Examples

To further examine the current situation of consistency and predictability in arbitral decision making it appears useful to analyse specific examples of case law. Thus, it can be determined if stable jurisdiction or even jurisprudence can be found in international investment

¹⁸ *ibid.* para. 30.

¹⁹ *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, para. 90.

²⁰ Dolzer, Schreuer (n 16) 34; *SGS Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, para. 94; *Eureko B.V. v. Republic of Poland*, Netherlands-Poland BIT, Partial Award, 19 August 2005, paras. 256-258; *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, paras. 76-77; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina*, ICSID Case No. ARB/03/19, 2017, Decision on Jurisdiction, 16 May 2006, para. 64; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. Arb/03/24, 2008, Decision on Jurisdiction, 8 February 2005, paras. 216-221; *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, 2008, Award, 8 December 2008, paras. 178, 194; *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction, 19 June 2009, para. 173; *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, paras. 41-42.

arbitration, and if there are issues or discrepancies between different dispute settlement fora or areas within the law. I therefore chose three specific examples to clarify the existing state. Despite their significant differences, what all examples share is the demonstration of a law developing character of jurisdiction, which stems from the vague formulations and voids within the fragmented, bilateral system of investment protection.

aa) *Ratione Temporis* and the Question of Continuing Acts

The first example that will be addressed in this paper is the question of *ratione temporis* in conjunction with the issue of continuing violations. In practice questions arose concerning cases where a violation began before the entry into force of an applicable treaty, but continued until after the treaty was in force. As there was no fitting norm concerning such problems, it became the duty of tribunals to decide on the matter and, thus, take on the task of developing law instead of merely applying it.

The first instance in which the issue of *ratione temporis* and a continuing violation occurred was *Feldman v. Mexico*²¹, in which a US-American shareholder of a tobacco exporting company in Mexico sued the later for not granting his company tax rebates and consequently changing the national laws, so it would not be obligated to award him those financial advantages. The Tribunal concerned decided that only after NAFTA came into force the alleged actions constituted a breach of it. Hence, it rejected jurisdiction over the violations that took place before the Agreement's entry into force, but confirmed that a continuous act that started before entry into force of a treaty could still constitute a breach thereafter.²²

In *Mondev International Ltd v. USA*²³ a Canadian company had been commissioned to rehabilitate an area in the City of Boston. After NAFTA came into force Mondev sued the US as the City had failed to enable the Claimant to exercise its options under the contract and for an alleged violation of fair process, because Mondev had not been allowed to sue within the national judicial system of the United States for reasons of immunity. The tribunal stated:

*“An act, initially committed before NAFTA entered into force, might in certain circumstances continue to be of relevance after NAFTA's entry into force, thereby becoming subject to NAFTA Obligations.”*²⁴

A very important distinction was made in the course of this decision that violations from a time before the treaty came into force may still be important, but would not lead to a retroactive application of the legal instrument in question. This reasoning was later adhered to

²¹ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues of, 6 December 2000.

²² *ibid.* para. 62.

²³ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002.

²⁴ *ibid.* para. 58.

by the tribunal in the case *TECMED v. Mexico*.²⁵ In this instance, a Spanish company sued Mexico after their license for a hazardous landfill had been revoked and the landfill closed. In the decision it was stated that what “*happened before the entry into force, may be considered a constituting part, concurrent factor or aggravating or mitigating element of conduct or acts or omissions of the Respondent which took place after such date to fall within the scope of this Arbitral Tribunal’s jurisdiction.*”²⁶

In *SGS v. Philippines*²⁷, a Swiss company providing pre-shipment import certification for the Philippines Bureau of Custom in exporting countries sued the Philippines for non-payment of unsettled accounts. The tribunal agreed with the *Mondev* findings on the significance of continuing acts.²⁸

Lastly, in the case *Impregilo S.p.A v. Pakistan*²⁹ an Italian company which was part of a Swiss joint venture signed two contracts with the Pakistan Water and Power Development Authority in 1995. However, the project was impeded by delay from the Pakistani Company and Impregilo was denied any extension and payment of additional costs. In 2003, Impregilo sued Pakistan on behalf of the joint venture on the basis of the Italy-Pakistan BIT, which came into force in 2001. The Italian company relied on *SGS v. Philippines*, but the Tribunal found:

*“In this respect, the present case is completely different from that described in the SGS v. Philippines’ award which was relied upon by Impreglio, In that case the Respondent recognised its obligation to pay sums due under a contract, and disputed only the quantum of the indemnity. In contrast, the current dispute is to be compared with cases of expropriation as mentioned by the Rapporteur of the draft Articles in the International Law Commission [...] in which the act itself occurred at a specific point in time, and must be assessed by reference to the law applicable at that time.”*³⁰

In conclusion, this very stringent line of case law demonstrates that, on the one hand, there are instances in which tribunals rely closely on past decisions, discussing them and accepting their reasoning even across treaty regimes and jurisdictional fora. On the other hand, it underlines mainly in conjunction with the following two examples how much stricter jurisprudence is in matters of procedural and jurisdictional issues.³¹ The *Impregilo* case further displayed that tribunals consider certain cases as a matter of due process if a party relied on them in its legal statement.³² But as there is no general rule on precedents in investment arbitrations, tribunals are not obligated to give reasons for why they do not

²⁵ *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003.

²⁶ *ibid.* para. 68.

²⁷ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004.

²⁸ *ibid.* para. 166-167.

²⁹ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, 2005. Decision of Jurisdiction 22 April 2005.

³⁰ *ibid.* para. 313.

³¹ De Brabandere (n 10) 274; see also IV. a).

³² *Impregilo* (n 30) para.168.

comply with findings of former awards, although it is generally expected of arbitrators to do so, if they accept the findings of other international judiciaries and tribunals for their own decision.³³

bb) Umbrella Clauses

Umbrella clauses are included in many BITs as well as in the Energy Charta Treaty.³⁴ They generally read as follows:

*“Each contracting Party shall observe any obligation it may have assumed with regards to investments.”*³⁵

For their very vague wording and broad possible understanding umbrella clauses serve as perfect example for the need of tribunals to interpret and simultaneously develop international investment law to protect States and investors from the dangers of inaccurate treaty terms and unknown obligations. Two opposing lines of case law evolved surrounding the interpretation and scope of umbrella clauses. Interestingly, their respective starting points were only a short time apart, and both cases concerned the same claimant.

In *SGS v. Pakistan*, the host State had allegedly breached its contract (“Pre-Shipment-Inspection Agreement”) with SGS. The Tribunal concerned interpreted the umbrella clause included in the Swiss-Pakistan BIT narrowly, thus finding that such a provision would not automatically render a breach of contract a violation of the BIT.³⁶ Many tribunals followed this reasoning, e.g. *Salini v. Jordan*, *Joy Mining v. Egypt*, *El Paso v. Argentina* and *Pan American v. Argentina*.³⁷

Only a few months later the tribunal in *SGS v. Philippines* chose a very different, broader approach and concluded that the umbrella clause in question would elevate the contractual violation to a breach of the BIT.³⁸ This line of reasoning was also followed by other tribunals

³³ De Brabandere (n 10) 261-263: the author pays special attention to the fact that, e.g. under the ICSID Convention, awards may be subject to annulment for “failure to state reasons” or “manifest excess of power”. Nevertheless, he also emphasises the important differentiation that has been drawn from the fact that there is no general rule on precedents. Hence, reasons will have to be stated by tribunals when relying on former findings or rejecting a decision that was broad forward by one of the parties, however not for general discard of previous findings.

³⁴ see Art. 10(1) of the ECT.

³⁵ comprehensive version by Axel Weissenfels, ‘Umbrella Clauses’ (2007) 5, available at <deicl.univie.ac.at/index.php>, accessed on 23 January 2018.

³⁶ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, para. 167.

³⁷ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. the Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award, 31 January 2006, para. 130; *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 16 December 2005, para. 81; *El Paso Energy Company v. the Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2001, para. 531-532; *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, para. 110.

³⁸ *SGS v. Philippines* (n 27) para.128.

in the following years, e.g. *Eureko v. Poland*, *Noble Venture v. Romania* and *Siemens v. Argentina*.³⁹

There is not yet a uniform understanding of umbrella clauses, especially due to the fact that there are many different alternatives concerning the formulation of such provisions.⁴⁰ It is questionable if consistent case law can and even should be achieved, keeping in mind that one umbrella clause can include “*shall observe any commitment*” and therefore offer a broad interpretation, while the other may state “*shall maintain a legal framework apt to guarantee the continuity of legal treatment*” and so point to a rather narrow approach. Umbrella clauses are thus not only a good example to demonstrate the issues and weaknesses of de facto case law in investment arbitration, but also to emphasize that the system for its many specific components needs a case by case attitude to decide legal dispute correctly and in accordance with the respective applicable laws.⁴¹

cc) Fair and Equitable Treatment Clauses

The last example to demonstrate the practical reality of de facto case law is the FET standard. Fair and equitable treatment clauses are provisions that, similar to umbrella clauses and other investment protection standards, are usually very vaguely formulated. They belong to a certain group of core standards that are contained in virtually every BIT and international investment protection treaty.⁴² Despite its prevalence, there are still disputes surrounding the exact meaning and scope of this standard.

Arbitral decisions have especially contributed to the understanding of FET and of its range and meaning. Its substantive content and specific requirements have been mapped out by tribunals on a case by case basis.⁴³ Moreover, there is a continuing development, reinforced by the practice of tribunals to refer to and discuss earlier awards. Reliance on jurisprudence can particularly be observed in conjunction with unqualified FET clauses. Those provisions do not state a specific source of “their” standards.⁴⁴

Many investment law decisions concerning FET refer to a non-investment case: the *Neer* case. Mr Neer was an American citizen living and working in Mexico, where he was killed by

³⁹ *Eureko B.V. v. Republic of Poland*, Netherlands-Poland BIT, Partial Award, 19 August 2005, para. 257; *Noble Venture, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 53; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, para. 260.

⁴⁰ Although, one could say that there is a general and consistent understanding of tribunals to judge umbrella clauses on their respective wording.

⁴¹ Katia Yannaca-Small ‘Interpretation of the Umbrella Clause in Investment Agreements’, *OECD Working Paper on International Investment*, No. 3 (OECD Publishing 2006) 22.

⁴² Further examples for these core obligations are the MFN standard, FPS and the prohibition of expropriation without compensation.

⁴³ see. e.g.: United Nations Conference on Trade and Development (UNCTAD), *Fair and Equitable Treatment: A Sequel* (United Nations Publications 2012); Gabriella Kaufmann-Kohler ‘Arbitral Precedents: Dream, Necessity or Excuse?: The 2006 Freshfields Lecture’ (2007) 23 *Arbitral International*, 357-378; Christoph Schreuer ‘Fair and Equitable Treatment in Practice’ (2005) 6 *J World Investment and Trade*, 357-386.

⁴⁴ see for further detail on unqualified FET clauses: UNCTAD (n 43) 20-22.

armed men in 1924. The claim was filed with the U.S.-Mexican General Claims Commission by the US on behalf of Neer's widow and daughter, and included allegations of denial of due process. The reasoning of the Claims Commission in its decision was not very "stringent or exacting on States".⁴⁵ Additionally, it set a considerably high liability threshold for States, speaking of: "*wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.*"⁴⁶

Investment law cases dealing with similar questions concerning the treatment of aliens followed. The first one to be referenced shall be *Pope & Talbot v. Canada*⁴⁷, a NAFTA case, in which a US-American wood exporting company in Canada sued the host State for violating the NAFTA Agreement through its Export Control Regime on softwood. The Tribunal defined FET as additive to the minimum standard of aliens as proclaimed in the *Neer* case. In its decision from 2002 the Tribunal stated that the findings of the Commission did not "freeze" customary international law at this specific time in 1926, but that the standard continued to develop.⁴⁸

The Tribunal in *Mondev v. USA* agreed to the findings in *Pope & Talbot* of an additive FET standard.⁴⁹ Subsequently, in 2003 the appointed Arbitrators in *ADF Group Inc v. United States*⁵⁰, a case concerning a highway construction project impeded by State regulations, stated in accordance with the reasoning in *Mondev*:

*"[W]hat customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the Neer case was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development"*⁵¹

Those Tribunals therefore all concluded that FET was not bound by the *Neer*-standard, while simultaneously not offering an alternative test to identify its content and threshold.⁵² In consequence, other tribunals attempted to fill the void by combining results of earlier cases to a list of possible violations. In *Waste Management v. Mexico II* award⁵³, which addressed a breach of a 15-years concession for public waste management services, the Arbitrators combined a number of earlier arbitral interpretations of the FET standard into their own understanding of the minimum standard of treatment, including arbitrary and grossly unfair

⁴⁵ *ibid.* 46.

⁴⁶ L.F.H. Neer and Pauline Neer (USA) v. United Mexican States, Opinion of Commissioners, 15 October 1926, Award, 1.

⁴⁷ *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award in Respect of Damages, 31 May 2002.

⁴⁸ *ibid.* paras 54 and 57-58.

⁴⁹ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para.116.

⁵⁰ *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003.

⁵¹ *ibid.* para. 179.

⁵² UNCTAD (n 43) 50-51.

⁵³ *Waste Management, Inc. v. United Mexican States ("Number 2")*, ICSID, Case No. ARB(AF)/00/3, Award, 30 April 2004.

conduct, discriminatory actions, lack of due process and manifest failure of natural justice.⁵⁴ In this way they simplified the identification of breaches of such provisions for States and investors.

This approach was followed in *GAMI v. Mexico*⁵⁵. The claim concerned the expropriation of sugar mills in Mexico through issuance of a decree. Additionally to its decision, the Tribunal had discovered a number of suggestions stemming from the findings of the *Waste Management* tribunal, among them that “[p]roof of a good faith effort by the Government to achieve the objectives of its laws and regulations may counter-balance instances of disregard of legal or regulatory requirements.”⁵⁶

The *Waste Management II* decisions was thus not merely applied, but also further interpreted.

In 2006 *Thunderbird v. Mexico*, concerning an investor suffering damages through the closure of his gaming facilities by the Mexican government, renounced this freshly developed standard. Instead, the Tribunal returned to the customary and extremely vague minimum standard of the treatment of aliens with a high threshold and narrow scope of protection.⁵⁷

Lately a trend is observable towards a more watchful interpretation of fair and equitable treatment, specifically under NAFTA Article 1105.⁵⁸ It points to the more limited standard of review as was proclaimed in the *Neer* decision. However, the recent NAFTA award in *Merrill & Ring v. Canada*⁵⁹ aims at the opposite direction. The concerned Tribunal held that the stand-alone FET standard had become part of customary international law and represents the latest stage in its evolution. This approach would go beyond the restrictive *Neer* standard.⁶⁰

After this extensive review of case law concerning FET and its development through jurisdiction it becomes clear that there is no stringent jurisprudence or case law adherence on the matter, but merely outlining trends clarifying the content of the FET standard. Nevertheless it also demonstrates how frequently tribunals reference former findings. In conjunction with this paper's subject of predictability, consistency and persuasive authority in arbitral decision making, it is important to also keep in mind that what tribunals have achieved until now is merely a definition of what possibly constitutes a violation of FET without internally tackling the question of what the standard itself means and what purpose it serves.⁶¹ Consequently it is still mostly unpredictable for States as well as investors what essentially amounts to a breach of the standard. In addition, as the past evaluations of FET often relied on an *ex post facto* approach and repeatedly gave special importance to investors' expectations, a risk developed towards claimants using alleged breaches of a respective clause

⁵⁴ *ibid.* para. 98.

⁵⁵ *Gami Investment v. United Mexican States*, UNCITRAL, Final Award, 15 November 2004, paras. 94-96.

⁵⁶ *ibid.* para. 97; see also UNCTAD (n 43) 51.

⁵⁷ *International Thunderbird Gaming Corporation v. the United Mexican States*, UNCITRAL, Arbitral Awards, 26 January 2006, paras. 193-194.

⁵⁸ UNCTAD (n 43) 52 with reference to *Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, paras. 284-285.

⁵⁹ *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010.

⁶⁰ *ibid.* para. 213.

⁶¹ Schill (n 15) 37.

for the purpose of suing host States and abusing investment protection as a means for changing governmental actions in their favour. This danger is especially striking where tribunals interpret FET in the light of the purpose of investment treaties, as their main objective is the protection of the investor against State conduct. This could potentially lead to the result of consistency in jurisdiction becoming a rule breaker to fairness and the Rule of Law in ISDS.⁶²

IV. The Current Discussion on Persuasive Authority, Predictability and Consistency in Arbitral Decision Making – Issues

There appears to be a number of reasons why predictability and consistency developed to a lesser extent in international investment arbitration than in other international judicial systems. One of them is the sheer number of cases which poses a challenge to arbitrators, councils and scholars alike. On the one hand, these high numbers create a situation where enormous effort has to be put in the examination of possible earlier reasoning and decisions offering a variety of possibilities to choose from when building a case or deciding it. On the other hand, the amount of case law falls out of proportion in comparison to other international courts and tribunals. To illustrate: The ICJ concludes on average two important decisions annually, which will be covered extensively by scholars.⁶³ Regarding investment arbitration, in 2016 41 cases were concluded under ICSID alone, not including those under ICSID's Additional Facility or the ones merely administrated by the Centre.⁶⁴ The difference is striking and poses a great challenge to the development of consistent case law and convincing jurisprudence.

However, there are also rather trivial reasons for possible inconsistency, which could also appear in national court systems, e.g. the quality of legal arguments, the behaviour and actions of parties and councils before the tribunal, or the pursuit of a certain strategy by the parties' councils.⁶⁵ But those reasons appear insignificant in comparison to the structural characteristics of investment arbitration, which can be considered the main source of the system's lack of predictability and consistency. The following as well as preceding examples do not constitute an exhaustive list, but should rather illustrate why ISDS demonstrates a smaller level of adherence to former decisions than other international adjudicative organs.

⁶² see UNCTAD (n 43) 91.

⁶³ Reinisch (n 8) 113-114.

⁶⁴ available at <<https://icsid.worldbank.org/en/Pages/cases/searchcases.aspx>>, accessed on 23 January 2018: cases concluded from 01.01.2016 until 01.01.2017; including discontinued cases as well as such which ended with an award or were annulled.

⁶⁵ Gaukrodger and Gordon (n 8) 61; Paulsson (n 11) 701.

a) Number and Range of Treaties and Legal Instruments

As stated before, one of the main characteristics of international investment dispute settlement is its fragmented, bilateral character. Currently more than 3000 BITs⁶⁶ exist around the globe, supplemented by numerous multilateral treaties (e.g. the ICSID Convention or the ECT) and investor-state agreements. This sheer variety of legal instruments leads to diverging applicable laws and dispute settlement systems.⁶⁷

Many treaties, especially BITs, include similar provisions, particularly concerning substantive laws of investment protection. These rules create a “normative core”, but are especially vague in their formulation. The “core” includes, among others, the aforementioned FET clauses, to which the United Nations Conference on Trade and Development in *Fair and Equitable Treatment: A Sequel* cites Brower:

*“Fair and Equitable Treatment is an intentionally vague term, designed to give adjudicators a quasi legislative authority to attribute a variety of rules necessary to achieve the treaty’s object and purpose in (the context of) particular disputes.”*⁶⁸

In terms of very vague provisions arbitrators fulfil the task of development and creation of norms, becoming *de facto* law making organs and furthering the development of international investment law. But as was shown before concerning the case of FET this vagueness may foster reliance on preceding decisions, but it does not necessarily lead to more predictability or consistency.

Besides those very vague provisions, BITs often vary in their terms, e.g. when defining the scope of investments. While some bilateral treaties include demonstrative enumeration of what could possibly constitute an investment, others merely contain a very broad provision (“every investment”).⁶⁹ Again, others give additional prerequisite, restricting protected investments to such that were made „in the territory of the host State“, or „in accordance with the law of the host State“⁷⁰. In such cases tribunals found past decisions not to be applicable for reasons of different wordings or terms of the respective BITs.⁷¹

The situation is different with view to procedural clauses, where adherence is more frequently observable. Especially in ICSID cases a relatively uniform case law has developed, in particular because most, if not all, investment treaties in procedural issues rely on ICSID or

⁶⁶Gaukrodger, Gordon (n 8) 61.

⁶⁷De Brabandere (n 10) 272.

⁶⁸UNCTAD (n 43) 62, referencing Charles Brower II ‘Structure, legitimacy and NAFTA’s investment chapter’ (2003) 36 Vanderbilt Journal of Transnational Law, 66.

⁶⁹e.g. Art. 1 of the US-Argentina BIT, available at <investmentpolicyhub.unctad.org/Download/TreatyFile/127>, accessed on 28.01.2018.

⁷⁰Concerning “in accordance with the host State’s law” e.g. Ukraine-Lithuania BIT, Turkey-US BIT, Italy-Morocco BIT; concerning “within the territory of the host State” see e.g. Art 26(1) ECT, Art. 1101(1) NAFTA, Netherland-Venezuela BIT.

⁷¹e.g. *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001, para 50-58; see also III bb) Umbrella Clauses concerning their possible diverging scope depending on their wording.

the UNCITRAL Rules, reducing the variety of possible norms and conflicts.⁷² In *Global Trading Corp v. Ukraine* and *Tokio Torkeles v. Ukraine* the role of tribunals concerning the development and clarification of procedural issues was emphasized.⁷³ Both panels agreed to former findings. Additionally, in *Tokio Torkeles* it was stated that “[i]t is to be recalled that, according to a well-established principle laid down by the jurisprudence of the ICSID tribunals, provisional measures “recommended” by an ICSID tribunal are legally compulsory; they are in effect “ordered” by the tribunal, and the parties are under a legal obligation to comply with them.”⁷⁴ Thus, the penal accentuated the persuasive authority of such procedural decisions.

In conclusion, the net of bilateral treaties as well as their partially vague formulation constitute one of the main reasons why uniformity is not only difficult to achieve, but also less expected in international investment arbitration.

b) Composition of Tribunals

Investment tribunals are established *ad hoc*. They consist of usually three arbitrators, two of them each selected by one party, the third one as a compromise between both parties or, if no agreement is reached, by a third and neutral person or institution, the “appointing authority”. Every tribunal is established in a decentralised manner and for a specific case. Thus, there is no consistency in the composition of each tribunal, leading to lesser expectancy of continuity in the final decision making.⁷⁵ This issue in practice was tackled by parties through choosing the same arbitrators for their disputes, partially even in parallel proceedings. Many examples for such strategies can be found in cases concerning the Argentinean Economic Crisis. In *Camuzzi v. Argentina* and *Sempra v. Argentina*⁷⁶ the chosen arbitrators were identical in both cases. The disputes were furthermore dealt with at approximately the same time and the tribunals in their respective decisions even referred to the other case.⁷⁷ Eventually, although the litigations were based on different BITs (Argentina-Belgium-Luxemburg and Argentina-United States BIT), both were decided equally and even justified on the same reasoning. As another example serves *Enron v. Argentina* and *Sempra v. Argentina*, in which Professor Francisco Orrego Vicuña was the presiding arbitrator, which can be seen as a main reason for the adherent outcome and reasoning of both cases.⁷⁸ Yet, while indubitably the same or

⁷² De Brabandere (n 10) 274.

⁷³ *Global Trading Resources Corp. and Globex International Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010, para. 29 – 31; *Tokio Torkeles v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 1, 1 July 2003.

⁷⁴ *Tokio Torkeles* (n 73) para. 4.

⁷⁵ Reinisch (n 8) 114-115; Eric De Brabandere (n 10) 255.

⁷⁶ *Camuzzi International S.A. v. the Argentine Republic*, ICSID Case No. ARB/03/2; *Sempra Energy International v. The Republic of Argentina*, ICSID Case No. ARB/02/16.

⁷⁷ Both companies were shareholders in gas distribution companies in Argentina, and as each of them had been violated by the host States actions, among them the introduction of new taxes and levies, they decided to appoint a single tribunal to deal with their cases in a combined manner.

⁷⁸ *Enron Corporation and Pondersa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3; *Sempra Energy International v. The Republic of Argentina*, ICSID Case No. ARB/02/16; see also Reinisch (n 8) 120.

similar composition of tribunals improves consistency in arbitral decision making, it does not necessarily guarantee a coherent outcome.

Despite the fact that each tribunal is established anew for every case, in practice it is observable that a few arbitrators are elected more frequently than others. One example can be found in Professor Brigitte Stern.⁷⁹ Such frequently appointed arbitrators for their great amount of participation in the system can influence case law on a large scale, referring back to their former findings in similar cases, consequently strengthening the persuasive authority of their own decisions, and over time developing accepted jurisprudence. This mitigated form of personal continuity leads to more uniformity in arbitral decision making, as it reduces one internal source of inconsistency. But the repeated election of certain individuals as arbitrators in ISDS also bears risks for the system and for fairness itself. Arbitrators may be inclined to decide cases that contain very different facts similarly just to underpin their past reasoning. Eventually, this practice could endanger the system's credibility.⁸⁰ Such arbitrators might also easily be subject to challenges, as it could be possible that a party, after choosing an arbitrator, subsequently builds parts of its argumentation on decisions that were made by this arbitrator in the past, which could be perceived by the opposing party as an indication to possible bias or lack of impartiality.⁸¹

Hence, this development on the one hand has the potential to decrease the lack of continuity over time, although not as significantly as to lead to full consistency, while simultaneously opening a door for new risks concerning the impartiality of arbitrators. There have already been instances in which challenges were raised against an arbitrator for the frequent involvement in former cases, underlining the significance of the risk.⁸²

Lastly, in conjunction with the composition of tribunals, it should again be emphasised that the *ad hoc* character of the deciding body constitutes an integral part of the system that States agreed to build around the issue of investment protection. The factor that each tribunal is established for a certain dispute secures its solution on the basis of its own facts and the applicable laws. Hence, the role of arbitrators can be disputed and, indeed, was so in the past.

⁷⁹ Prof. Stern was an arbitrator for 87 investment cases (according to <investmentpolicyhub.unctad.org/ISDS/FilterByArbitrators>; accessed on 23 January 2018).

⁸⁰ Vanessa Giraud, 'The Problem of Repeated Arbitrators in Investment Arbitration' (2014) available at <<http://arbitrationblog.kluwerarbitration.com/2014/09/01/the-problem-of-repeat-arbitrators-in-investment-arbitration/>>, accessed on 23 January 2018.

⁸¹ for more details on impartiality of frequently elected arbitrators see e.g. Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators* (Brill 2017).

⁸² Professor Stern was challenged for her repeated appointments in *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator, 23 December 2010, and *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators, 20 May 2011. Another example would be the aforementioned Professor Vicuña, who was also challenged for his frequent selection, e.g. in *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, 13 December 2013, and *Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic*, ICSID Case No. ARB/12/38, Decision on the Proposal for Disqualification of Francisco Orrego Vicuña and Claus von Wobeser, 13 December 2013.

The decision on jurisdiction of *Burlington v. Ecuador* emphasises the controversial nature of the relationship between arbitrators and jurisprudence:⁸³

*“The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. The majority believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek contribution to the harmonious development of the community of States and investors towards the certainty of the rule of law. Arbitrator Stern does not analyze the arbitrator’s role in the same manner, as she considers it her duty to decide each case on its own merits, independently of any apparent jurisprudential trend.”*⁸⁴

In conclusion, the *ad hoc* and decentralised establishment of tribunals and their changing composition is one of the “roots” of the issue of reduced consistency, predictability and persuasive authority of decisions in ISDS. Nevertheless, *ad hoc* tribunals are an important condition for the main principle of the system itself, showing again that a balance has to be achieved between what investment arbitration is and what (especially scholars) want it to be.

c) Transparency

The transparency issue of international investment law was subject to many changes through the years and is therefore more a problem of the past than of the present system. It is nevertheless important to address this special issue, as on the one hand it stipulates one of the reasons why investment arbitration was drawn into a credibility crisis while, on the other hand, it is one of the main “selling points” for the system.⁸⁵

The rise and fall of the transparency issue began with BITs. These international legal instruments were not dealing with transparency or publishing matters, or left the decision about it to the parties. In consequence, most awards were not made publically available. It was often not even known if a case was pending, and many disputes never reached the public sphere. Consequently, without publishing or availability, there could be no knowledge or usage of former decisions, making unpredictable and inconsistent awards as well as parallel proceedings more likely to happen. In other words: How should a party’s counsel be able to bring forward a preceding decision to build a case around it, if there was no public access to it? How should arbitrators adhere to decisions of other tribunals, if they are unknown to them? There was no basis for the development of coherent case law or even jurisprudence at this

⁸³ De Brabandere (n 10) 268.

⁸⁴ *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, 2017, Decision on Jurisdiction, 2 June 2010, para. 100.

⁸⁵ Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007) 159; concerning lack of transparency also Katharina Diel-Gligor, *Towards Consistency in International Investment Jurisprudence: A Preliminary ruling system for ICSID* (Brill Nijhoff 2017) 167.

stage. Improvement was later achieved especially through the UNCITRAL Transparency Rules.⁸⁶

Concerning the legal framework for transparency in international investment law, firstly attention should be drawn to the ICSID Convention. Art 48(5) states:

“The Centre shall not publish the award without the consent of the parties.”

Additionally, Regulation 22 of the Administrative and Financial Regulations of the ICSID-Convention and Rule 33(3) of the Rules of Procedure for Conciliation Proceedings (Conciliation Rules) of the ICSID Convention bind the publication of certain documents to the agreement of the parties. The registration of request for conciliation or arbitration will always be published.⁸⁷ Evidently, under ICSID the publishing of awards and information still depends on the agreement of the parties, but today nonetheless most awards are made publically available. This development was, furthermore, reached through the acceptance of *amicus curiae* briefs in ICSID as well as NAFTA, as such contributions rely on public information about pending cases for third parties to participate.⁸⁸

Public availability of information and results of proceedings is the main objective of the UNCITRAL Transparency Rules. The most important provision can be found in Article 3(1), in which it is stated that certain documents, among them notices of arbitration, written statements or submissions by the parties, orders and awards, will be made publicly available. Under the UNCITRAL regime there is thus no possibility for parties to influence the publishing of awards or certain other case related documents. Main exemptions for the general publication of documents are made in reference to secret and confidential information.⁸⁹

Transparency is furthermore necessary for States to know how their obligations under BITs were interpreted before, and for investors to be aware, if a certain, otherwise very vague standard, e.g. FET, is applicable in their situation. Enhanced transparency and increased publishing is a step towards additional legal security and predictability and offers chances to strengthen the trust in the system of its subjects as well as the general public. However, it also bears the potential to lead to further problems for scholars, councils, arbitrators and potential parties of a dispute. The rising number of cases available entails a growing number of sources for councils and arbitrators, thus leading to longer procedures, more briefings and discussions.⁹⁰ The resulting time intensive proceedings would become much more expensive,

⁸⁶ Diel-Gligor (n 85) 78-82.

⁸⁷ Regulation 22(1).

⁸⁸ see Art. 4 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and Rule 37(2) of the ICSID Convention Arbitration Rules; For further details on *amicus curiae* briefs and their influence on transparency and legitimacy of investment arbitration see Nigel Blackaby, Caroline Richard ‘Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?’ in Michael Waibel, Asha Kaushal, et al. (eds), *The Backlash against Investment Arbitration* (Kluwer Law International 2010) 253-274.

⁸⁹ see Art. 7 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

⁹⁰ Andrea Bjorklund ‘Investment Treaty Arbitral Decisions as Jurisprudence Constante’ in Colin Picker, Isabelle Bunn, Douglas Arner (eds), *International, Economic Law: the State and Future of the Discipline* (Hart Publishing 2008) 266.

effectively excluding minor (and often more vulnerable) small-budget investors. Scholars, on their part, would find it harder and more burdensome to develop consistent case law when facing the sheer amount of potentially important cases.⁹¹

Concisely, transparency is an issue that was confronted. The situation has improved to a large extent, but it should be kept in mind that more access to awards does not stipulate a cure for inconsistency or unpredictability, and that a great challenge lays ahead of the system when observing the growing number of cases pending.

V. The Current Discussion – Possible Solutions

In conjunction with the perceived legitimacy crisis⁹² and the promotion of confidence in the system of ISDS, many scholars have concerned themselves with the question on how to foster consistency, predictability and persuasive authority in arbitral decision making. The proposed solutions rank from very practical and uncomplicated suggestions as for example interpretative statements by States and increased scholarly systematisation of case law to the idea of a completely new, centralised court for the settlement of investment disputes.⁹³ In the following section of this paper, a selection of suggested solutions will be examined more thoroughly; their advantages will be discussed as well as their disadvantages and feasibility.

a) Appeals Mechanism

The idea of a centralised appeals tribunal or court has been discussed mainly in conjunction with the ICSID system, but was later abandoned.⁹⁴ There are, furthermore, treaties already including such appellate bodies, e.g. the US Model BIT, Dominican Republic-CRAFTA-US BIT, and other US FTA Treaties.⁹⁵ Yet, it is important to emphasise that such a mechanism would only lead to more consistency if it was included in all or at least in the majority of

⁹¹ Paulsson (n 11) 704: Paulson dealt with the problem of growing case loads and innumerable sources. In his theory a “Darwinian Reality” would eventually resolve the issue without further need for action. Decisions that were “poorly reasoned” would fall out of the spectrum of case law, reducing the number of sources and cases to a manageable one.

⁹² for more details see Michael Waibel, Asha Kaushal, et al. (eds), *The Backlash against Investment Arbitration* (Kluwer Law International 2010) xxxvii-li.

⁹³ see Diel-Gligor (n 85) 335-353: the author also proposes e.g. clarifying and supplemental revisions by States; Van Harten (n 85) and below V e).

⁹⁴ Kaufmann-Kohler (n 43) 357-378; Diel-Gligor (n 85) 364-366; Dolzer, Schreuer (n 16) 35; see also ICSID-Secretariat, ‘Discussion Paper: Possible Improvements of the Framework for ICSID Arbitration’ (22 October 2004), available at <<https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf>>, accessed on 10 January 2018.

⁹⁵ Diel-Gligor (n 85) 346.

bilateral treaties, hence the idea of a centralised appeals instrument would be the only one serving the objective of fostering uniformity.⁹⁶

Christoph Schreuer in his contribution *Coherence and Consistency in International Investment Law and Revising the System of Review for Investment Awards* brings forward an important disadvantage of such a system: An appeals body would only lead to improvement after an error has already occurred and would hence not tackle the root of the problem.⁹⁷ It is disputable how more effective it would be to prevent flaws (*ex ante*) from occurring by, e.g. a preliminary ruling mechanism, instead of merely correcting them.⁹⁸

Nevertheless, the concept of a centralised appellate institution in ISDS still offers the possibility of improved adherence to former decisions, as a supervising authority could be established with the power to change decisions in case of gross departure from existent case law or similar decisions of factually diverging cases. On the question if such an authority could function in the system of investment arbitration, Donald McRae approached the answer by examining the already existent WTO-Appellate Body as a model for ICSID or investment arbitration in general.⁹⁹

The WTO Appellate Body consists of fixed members and deals with legal issues and the interpretation of laws and treaties within the WTO system. However, as McRae summarises, international investment law is not a "system" like the one within the WTO. Although there are core obligations included in the various treaties, which exhibit the same and partly even customary international law standards, the bilateral character is undeniable. Additionally, there are no strict time tables in the investment arbitration process and dissenting or separate opinions are very common, as opposed to WTO standards. The sum of this let McRea to the conclusion that the WTO Appellate Body was not suitable for the ICSID-system or investment arbitration in general. Nevertheless, he recognized the potential of an appellate body in ISDS to foster consistency in certain treaty regimes like NAFTA or the Energy Charta Treaty.¹⁰⁰

Although it is indubitable that through a two instances system correctness and consistency of awards could increase quickly, its feasibility and further advantages are rather small. The introduction of an appeals body would need the change or addition of a treaty, or more precisely, of all or the majority of bilateral treaties existing.¹⁰¹ The ICSID Convention even prohibits awards to be subject to appeals;¹⁰² hence, it would need an amendment to introduce an appellate body to the system. The change or addition of treaties will usually be difficult to

⁹⁶ Christoph Schreuer 'Coherence and Consistency in International Investment Law', in Roberto Echandi and Pierre Sauvé (eds) *Prospects of International Investment Law and Policy – World Trade Forum* (Cambridge University Press 2013), 401.

⁹⁷ *ibid.* 401; Christoph Schreuer, 'Revising the System of Review for Investment Awards', 5, available at <www.univie.ac.at/intlaw/worldpress/pdf/99_rev_invest_awards.pdf>, accessed on 23 January 2018.

⁹⁸ see below d).

⁹⁹ Donald McRae 'The WTO Appellate Body: A Model for an ICSID Appeals Facility?' (2010) 1 *Journal of International Dispute Settlement*, 371-387.

¹⁰⁰ McRae (n 99) 371-387.

¹⁰¹ Diel-Gligor (n 85) 373.

¹⁰² Art 56(1) of the ICSID Convention; principle of finality of an award.

achieve, e.g. concerning an amendment the ICSID-Convention dictates a 2/3 rate of acceptance for the request of the amendment by the Administrative Council's Members as well as the ratification or acceptance by all States members to the Convention.¹⁰³ To achieve such majorities or, in case of the net of bilateral treaties, the agreement of all States subject to one or more BITs is hardly realistic.

A new controlling remedy would further on make proceedings longer and more costly leading to the effect that smaller investing companies were no longer able (or willing) to use the system. Another problem could arise out of the composition of the appellate body, as "judges" would most probably be chosen by States resulting in a re-politicising of disputes.¹⁰⁴

Besides the idea of an international appeals body, Van Harten in his critical work "Investment Treaty Arbitration and Public Law" proposed more controlling powers for States in a way that goes beyond the already existing annulment of awards for procedural or jurisdictional reasons but for legal errors as well: Control through appeal to national courts. But as Van Harten sees national courts as not in a strong position for such increased control, due to their disregard to a more substantive review of awards in the past, he does not put much focus on the issue.¹⁰⁵

Van Harten names such increased national control as an alternative to an international solution, namely a centralised investment court. This option will be discussed later under e). As for now, I consider it important to state that an increased national influence on investment dispute resolutions would most probably lead to less confidence in the system and a re-politicising of ISDS. A main objective of establishment of arbitral investment tribunals was to create a system that was independent from State control and possible uncertain national legal systems. I would thus not agree with the author's proposal.

b) Annulment Mechanism

Annulment mechanisms already exist in investment arbitration, most prominently under ICSID.¹⁰⁶ But those options are only treaty related, and to in fact achieve consistency in the bilateral system of investment arbitration the annulment mechanism in place would need to be centralised.

Annulment mechanisms as for example under ICSID provide for the dissolution of awards or decisions on the grounds of lack of jurisdiction of the tribunal or grave procedural errors.¹⁰⁷ As for this narrow scope an annulment mechanism does not appear ideal to solve the issue of inconsistency in a comprehensive manner. Nevertheless, concerning inconsistency in points of jurisdiction it could offer a possible measure.¹⁰⁸ The ICSID system also demonstrates that

¹⁰³ Art 65 and 66 of the ICSID Convention; see also Diel-Gligor (n 85) 373-377, where the author additionally proposes an *inter se* modification of the ICSID Convention by only the willing States.

¹⁰⁴ Diel-Gligor (n 85) 378; Gaukrodger, Gordon (n 8) 59.

¹⁰⁵ Van Harten (n 85) 175-180.

¹⁰⁶ Art. 52 ICSID Convention.

¹⁰⁷ Article 52 of the ICSID Convention, Arbitration Rules 50 and 52-55.

¹⁰⁸ Kaufmann-Kohler (n 43).

annulment decisions may heavily vary in their findings, diminishing their effects on increased uniformity.¹⁰⁹

Concerning its feasibility and disadvantages, one can point to the facts explained above concerning appeals mechanisms. As a second instance an annulment body would lead to longer and more costly proceedings. A re-politicising of disputes through the composition of the institution could not be ruled out, and an annulment body, too, would need the addition of treaties. Hence, in the eye of an objective observer the creation of such a mechanism does not seem realistic.

c) *Stare Decisis – Jurisprudence Constante*

Stare decisis stems from a common law background and can roughly be translated as „to stand by a (past) decision“. Through the principle of *stare decisis* courts are bound by decisions of higher or supreme courts (vertical effect) or those of courts on a similar or coordinate level (horizontal effect).¹¹⁰ It is often named in conjunction with a Rule of Law argument. Jointly it is regularly stated that the principle of *stare decisis* would foster consistency and predictability in decision making and that it would lead to a necessity of very good reasoning by judges, which in consequence would support transparency.¹¹¹

On the other hand the standard of *stare decisis* can be criticised for creating a temptation to decide superficially similar cases alike, despite important reasons not to, and for being too inflexible in the sight of developing law, as very old decisions are hard to change although they are “outdated” and not responsibly applicable in modern times.¹¹²

The question arises, whether this common law principle is at all fitting for the system of investment arbitration. There are a number of facts speaking against their compatibility, especially concerning the systems decentralised structure and the *ad hoc* establishment of tribunals, which stand in a strong opposition to the permanent national court institutions in common law countries. Moreover, there is less transparency concerning proceedings and (in earlier times) awards in investment arbitration, which would be needed to consolidate a system of *stare decisis*. But what appears most striking is the lack of clear hierarchy between tribunals. Who should decide which decisions are precedents or which tribunal has the

¹⁰⁹ De Brabandere (n 10) 278; the author states two decisions which did not adhere to former annulment decisions: *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic’s Application for Annulment of the Award, 29 June 2010, and *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006.

¹¹⁰ For further details on the dimensions of *stare decisis* see Santiago Legarre, Julio César Rivera ‘Naturaleza y Dimensiones del “Stare Decisis”’ (2006) 33 Revista Chileno De Derecho, 109-124.

¹¹¹ e.g. Stefanie Lindquist, Frank Gross ‘Stability, Predictability and the Rule of Law: Stare Decisis as Reciprocity Norm’, 12, available at <<https://law.utexas.edu/conferences/measuring/The%20Papers/Rule%20of%20Law%20Conference.crosslindquist.pdf>>, accessed on 13 January 2018; Jeremy Waldron, ‘Stare Decisis and the Rule of Law – a Layered Approach’ (2012) 111 Michigan Law Review, 27.

¹¹² Waldron (n 112) 25-26.

competence to take these more influential decisions? Even rulings of annulment bodies are far too narrow in scope to have such high ranking persuasive authority.¹¹³ Concerning the feasibility of introducing the standard of *stare decisis* in ISDS, it would need the adjustment of international rules, as there is no general rule on precedent in international investment law. The changing of treaties, as was stated before, is a rather burdensome act, and hence the possibility to introduce *stare decisis* within the system of arbitral decision making appears comparatively small.

Jurisprudence constante, in contrast, has a civil law background and is especially present in the French legal system. This principle seems more fitting for the system of investment arbitration as it incorporates two understandings of precedents: Firstly, decisions by higher courts, which are not binding, but for practical purpose ought to be followed and, secondly, decisions by lower or similar courts, which are not binding as well, but may serve as positive models for future cases.¹¹⁴ The second understanding offers a particularly appropriate solution for ISDS. Through *jurisprudence constante* decisions of similar courts receive increased persuasive authority, which leads to future panels adhering to them (on a voluntary basis). This enhanced persuasive authority would not stem from another court or institution deciding that a certain tribunal should have the power to give such influential rulings, but it would be established through a consistent line of decisions by a certain number of tribunals. *Jurisprudence constante* therefore would not need an implementation through treaty changes, but could develop as customary international law over time if tribunals frequently relied on former decisions with the *opinio juris* to do so.¹¹⁵

However, this principle “is not a perfect model in all respect”¹¹⁶ for the system of investment arbitration. As opposed to the French court system, there is no vertical structure of courts in ISDS and no higher institution to prove and change former decisions. This aspect of judicial control, though, is necessary for the development *jurisprudence constant*.¹¹⁷

Further on, there are disadvantages included in the principle of constant jurisprudence. Harmonisation and consistency would not come overnight but can only emerge as a result of evolution and development. Additionally, it is generally agreed upon that certain highly disputed areas as for example the interpretation of Umbrella Clauses, that require the adherence to one side or another, will be hard to solve within the framework of *jurisprudence constante*.¹¹⁸

¹¹³ Bjorklund (n 90) 270-271.

¹¹⁴ *ibid.* 272.

¹¹⁵ Diel-Gligor (n 85) 358; Bjorklund (n 90) 274.

¹¹⁶ Bjorklund (n 90) 273.

¹¹⁷ *ibid.* 273

¹¹⁸ Kaufmann-Kohler (n 43): “By comparison, established jurisprudence on umbrella clauses – where the choice is between yes or no – would be much more constraining. This may be one of the reasons why it may take longer to achieve.”

d) Preliminary Ruling Mechanism

The system of preliminary rulings has already been successfully applied within the EU system, where national courts have the right, and courts of last instance the obligation, to request such decisions from the European Court of Justice concerning the interpretation and application of European Union Laws.¹¹⁹ One of its advantages is that problems will be addressed preventively, before they amount to interpretative discrepancies.¹²⁰

A similar provision can be found in NAFTA, where the Free Trade Commission can issue binding interpretations of the treaty.¹²¹

Such a system of preliminary ruling would have to be newly established within the fragmented system of investment arbitration, for example by change of treaties or through the establishment of an additional protocol to ICSID.¹²² Ideally, one body should be available under all dispute settlement systems (e.g. ICSID, the ICC, and the PCA system), and, to ultimately achieve the objective of increased consistency through preliminary rulings, decisions of this new authority should to a certain extent have binding force. The right or duty of each tribunal to, in case of requesting a preliminary opinion, suspend the procedure would have to be implemented in the treaties as well.¹²³

Preliminary rulings, in conclusion, would be a suitable addition to the merely procedural corrective of an annulment committee and would foster consistency at an earlier stage as appeals mechanisms or annulment systems. On the other hand, just as those other remedies, it would make the procedure more costly and time intensive, although not to the extent as high as an *ex post* corrective.¹²⁴

e) A New Centralised Investment Court

The creation of a new, centralised investment court may seem to be the perfect solution for the problem of inconsistency and lack of predictability in arbitral decision making, as it would, after all, eliminate most of the reasons presented in the course of this paper. Most importantly, it would take the “arbitrariness” out of the system, providing it with a fixed staff and uniform rules of procedure and jurisdiction.

Van Harten in his aforementioned work *Investment Treaty Arbitration and Public Law* outlines such a new international judicial authority as a measure to significantly improve the system of investment arbitration as a whole, not only its consistency flaws. The court would consist of a fixed number of judges appointed by States for a fixed set of term. Three judges would comprise a tribunal. In case a judge was challenged for lack of impartiality or

¹¹⁹ Art 267 (ex Art 234 TEC) of the Treaty on the Functioning of the European Union.

¹²⁰ see a) Appeals Mechanism.

¹²¹ 1131 (2) NAFTA.

¹²² Diel-Gligor (n 85) 384.

¹²³ Schreuer (n 96) 11.

¹²⁴ Diel-Gligor (n 85) 387.

independence, the remaining judges would decide. Internally, there would be an individual set of rules of the court on matters as e.g. confidentiality or procedures. Appeals would be filed with and decided by a special assembly.¹²⁵

This model of an investment court bears many advantages. It would solve all problems at once, taking the *ad hoc* characteristic out of the system, introducing a centralised appeals body and, through fixing the court and its members, enhancing the persuasive authority of its decisions. It is very probable that the introduction of such a judicial organ would result in more consistency and confidence in the system. However, how realistic, how feasible is the establishment of such a court in the international community?

Van Harten, for his part, believes it to be very much probable that the majority of States would agree on an international treaty creating an investment court. He bases his opinion on the sheer fact that States do not have reasons not to agree. Capital importing countries would solely gain advantages by receiving more predictability, more consistency, more independence and openness in the judicial system, while capital exporting countries would only have to give up little compared to the advantage of having a court with more international influence than the decentralised institutions before.¹²⁶

I strongly disagree with Van Harten's findings, firstly because the decentralised *ad hoc* character is one of the main reasons why States initially agreed on investment arbitration as we know it today.¹²⁷ Secondly, because consenting to an entirely new set of terms, especially in the current global situation, would take an immense amount of time for discussion and would most probably prove to be very complicated. It is highly questionable if the necessary number of States would eventually agree to the new court as to consider it a global system.

VI. Conclusion

In the light of the system itself, its decentralised character and *ad hoc* basis, the variety of legal sources and possible compositions of tribunals, it is obvious that consistency is hard to accomplish. Surprisingly, incoherence is not a very outstanding problem in investment arbitration, neither is the lack of predictability.¹²⁸ The system developed *de facto* case law adherence out of itself. Furthermore, tribunals for the most part avoid using case law as material law instead of a subsidiary source of international law, acting in accordance with the basic principles of international rules as laid out by the ICJ Statute.¹²⁹

¹²⁵ Van Harten (n 85) 181-183.

¹²⁶ Van Harten (n 85) 183-184.

¹²⁷ De Brabandere (n 10) 255-257.

¹²⁸ Reinisch (n 8) 115.

¹²⁹ De Brabandere (n 10) 286.

Regarding the standard of consistency reached until today in investor-State arbitration, it is far from close to what national or other international judicial system may have achieved. Nevertheless, the system is a comparably young one, and inconsistency may be viewed as a natural “flaw” of relatively new judicial structures.¹³⁰ It will be a question of time and development to achieve a certain level of uniformity, especially when facing the peculiarities of a fragmented system like the one of international investment treaties.

To the question if the system needs change, I would state that more important than pro-active reformation it is to keep the balance between the objectives of the system and a beneficial level of conformity. Case by case decisions and changing arbitrators are the conditions on which States agreed to investor-State arbitration. Predictability and consistency may foster the trust in the system, and are therefore of grave importance for its basic right to exist, but one should remember not to fall too far into, on one side, uniformity, deciding cases based on different treaty wording similarly merely to achieve predictability, or, on the other, "arbitrariness" as a breach of the core obligation of the Rule of Law to decide similar cases similarly and different cases differently.

I, personally, neither see an acute need for reform within the system, nor a realistic possibility to change existing laws in a substantial way. As was discussed in the course of this paper, almost all proposed solutions would need a change of treaty laws, which does not simply mean the agreement of two or three parties, but of all States, which are part of one or more BITs and/or the ICSID Convention. It hence seems to me like an almost impossible thing to accomplish, especially against the aforementioned background that inconsistency has not yet posed an eminent problem within the system. On the contrary, the numbers of cases pending and of new cases being filed within the system is out of proportion in comparison to other international judicial bodies.

In conclusion, consistency and predictability may be an aspect one should keep an eye on during the further process of “maturing” of the system, observing that it keeps its balance between the inherent principles of investment arbitration and the Rule of Law. Until now, natural evolution has maintained this balance, one will see about the future.

¹³⁰ Gaukrodger, Gordon (n 8) 58; Diel-Gligor (n 85) 118.

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