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Unresolved Issues in Investment Arbitration

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The rapid proliferation of investor-State arbitrations during the last decade has inevitably given rise to the development of diverging views on a number of issues in the arbitral case law and in legal writings. The most hotly debated and yet unresolved issues in investment arbitration today concern in particular the level of protection afforded to investors and related questions of arbitral jurisdiction. For example, the effect of most-favored-nation clauses or the effect of the so-called umbrella clauses on the jurisdiction of arbitral tribunals are questions that have yet to yield a consistent case law. The impact of these international law mechanisms, which are well-known in treaty law, on the protection afforded to investors is therefore a central topic when addressing today's unresolved issues in investment arbitration. A related question, perhaps more enduring, is the extent to which arbitrators having to decide similar questions, in particular when such questions arise under the same investment treaty or similarly drafted investment treaties, must give weight to decisions previously rendered by other tribunals and whether a precedent system exists in investment arbitration. These topics will be addressed in turn. A further question inevitably arises in relation to the forefront role of the International Centre for Settlement of Investment Disputes ("ICSID" or "Centre") established by the Washington Convention of 1965 in the development of investment arbitration: in light of ICSID's undeniable success during the last decade, will other arbitration *fora* grow to compete with ICSID arbitration in investor-State disputes?

I. WILL ICSID REMAIN THE PREFERRED OPTION IN INVESTMENT ARBITRATION?

The number of ICSID cases has steadily increased since 1997. In only ten years, the number of cases pending before the Centre has risen from 48 by year end in 1997[1] to more than 119 pending cases by year end in 2007. Despite this great success and the clear advantages to settling one's dispute within the tried and tested framework of the Centre, the evolution of arbitral practice as well as State practice has evolved to highlight the idiosyncrasies of ICSID arbitration.

These specific aspects relate in particular to the objective jurisdictional conditions of the existence of an "investment" made by an "investor" pursuant to Article 25 of the ICSID Convention. Of interest for the future development of ICSID arbitration are also the possible impact of the newly introduced Rule 41(5) of the ICSID Arbitration Rules and the effect of the denunciation of the ICSID Convention by State parties.

A. The definition of an "investment" under the ICSID Convention

It is commonplace today to observe that the ICSID Convention and more specifically its Article 25, which governs the Centre's jurisdiction, does not define an investment and that this

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1 See E. Gaillard, LA JURISPRUDENCE DU CIRDI, 2004, p. 422. By comparison, in 1987, only 11 cases were pending before the Centre, *id.*, p. 199.

omission was intentional. The Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States has made clear that:

> "no attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanisms through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre [in Article 25(4)]".[2]

In this light, arbitral tribunals have developed a body of case law establishing the criteria to determine whether an investment qualifies as such under the ICSID Convention. There is general agreement that an investment has to satisfy three criteria, namely (*i*) a contribution made by the investor, (*ii*) a certain duration of the project, and (*iii*) a participation to the risks of the transaction. The unresolved issue lies, however, in the role played by a potential fourth criterion—found in the Preamble of the ICSID Convention—for an investment to be protected, namely that it must contribute to the economic development of the host State.

Arbitral tribunals have approached this question in one of three ways. The first approach, as demonstrated by the Tribunal in *CSOB v. the Slovak Republic*,[3] is that while a contribution to the economic development of the host State may exist in a given case, it is not a formal prerequisite for a finding that an investment exists:

> "[…] the broad meaning which must be given to the notion of an investment under Article 25(1) of the Convention is opposed to the conclusion that a transaction is not an investment merely because, as a matter of law, it is a loan. This is so, if only because under certain circumstances a loan may contribute substantially to a State's economic development. […]"
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> "[…] it would seem that the resources provided through CSOB's banking activities in the Slovak Republic were designed to produce a benefit and to offer CSOB a return in the future, subject to an element of risk that is implicit in most economic activities. The Tribunal notes, however, that these elements of the suggested definition, while they tend as a rule to be present in most investments, are not a formal prerequisite for the finding that a transaction constitutes an investment as that concept is understood under the Convention."[4]

The second approach, as illustrated by the decision in *Salini v. Morocco*,[5] is to consider the contribution to the economic development of the host State to be a fourth requirement for an investment to be protected under the ICSID Convention:

> "[…] The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction (*cf. commentary by E. Gaillard, cited above, p. 292*). In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.

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2 *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965)*, ICSID Doc. ICSID–2 *in* HISTORY OF THE ICSID CONVENTION, vol. II-2, p. 1069, para. 27.

3 *CSOB v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction dated May 24, 1999, 14 ICSID REVIEW 251 (1999).

4 *Id.*, paras 76 and 90.

5 *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICISD Case No. ARB/00/4, Decision on Jurisdiction dated July 23, 2001, 42 INTERNATIONAL LEGAL MATERIALS 609 (2003), 6 ICSID REPORTS 400 (2004), para 52. See also *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction dated August 6, 2004, 19 ICSID REVIEW 486 (2004).

> In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here."[6]

The final approach, discussed notably in *Lesi-Dipenta v. Algeria*,[7] is that the contribution to the economic development of the host State should not be considered as an independent requirement for a finding that an investment exists, although it may be implicitly included in the other three criteria:

> "[…] il paraît conforme à l'objectif auquel répond la Convention qu'un contrat, pour constituer un investissement au sens de la disposition, remplisse les trois conditions suivantes ; il faut
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> a) que le contractant ait effectué un apport dans le pays concerné,
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> b) que cet apport porte sur une certaine durée, et
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> c) qu'il comporte pour celui qui le fait un certain risque.
>
> Il ne paraît en revanche pas nécessaire qu'il réponde en plus spécialement à la promotion économique du pays, une condition de toute façon couverte par les trois éléments retenus."[8]

The issue was again raised before the *ad hoc* Committee in *Patrick Mitchell v. The Democratic Republic of Congo*.[9] The Committee decided that for an investment to qualify as such under the ICSID Convention it has to contribute to the economic development of the host State. The Committee emphasized that the requirement was to be found in the Preamble of the Convention, which refers to "the need for international cooperation for economic development, and the role of private international investment therein":[10]

> "There are four characteristics of investment identified by ICSID case law and commented on by legal doctrine, but in reality they are interdependent and are consequently examined comprehensively. The first characteristic of investment is the commitment of the investor, which may be financial or through work; […]. Other characteristics of investment are the duration of the project and the economic risk entailed, in the sense of an uncertainty regarding its successful outcome. The fourth characteristic of investment is the contribution to the economic development of the host country […]."[11]

The Committee concluded that "[i]t is thus quite natural that the parameter of contributing to the development of the host State has always been taken into account, explicitly or implicitly, by

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6 *Salini v. Morocco*, *supra* note 5, para. 52.

7 *Consorzio Groupement L.E.S.I.-Dipenta v. People's Democratic Republic of Algeria*, ICISD Case No. ARB/03/8, Award (in French) dated January 10, 2005, 19 ICSID REVIEW 426 (2004).

8 *L.E.S.I.-Dipenta v. Algeria*, *supra* note 7, para. 13(iv). See also *Lesi & Astaldi v. Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction dated July 12, 2006, available on the ICSID website http://icsid.worldbank.org; *Bayindir Insaat Tuizm Ticaret ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction dated November 14, 2005, available on the ICSID website http://icsid.worldbank.org, para. 137 ("Lastly, relying on the preamble of the ICSID Convention, ICSID tribunals generally consider that, to qualify as an investment, the project must represent a significant contribution to the host State's development. In other words, investment should be significant to the State's development. As stated by the tribunal in *L.E.S.I*, often this condition is already included in the three classical conditions set out in the 'Salini test'").

9 *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision of the *Ad Hoc* Committee on Annulment dated November 1, 2006, available at http://ita.law.uvic.ca/.

10 *Id.*, para. 28: "The Preamble of the Washington Convention sets forth a number of basic principles as to its purpose and aims, which imbue the individual provisions of the Convention, including Article 25 […]."

11 *Id*., para. 27.

ICSID arbitral tribunals in the context of their reasoning in applying the Convention, and quite independently from any provisions of agreements between parties or the relevant bilateral treaty."[12] In the case at hand, the Committee held that "[a]s a legal consulting firm is a somewhat uncommon operation from the standpoint of the concept of investment, in the opinion of the *ad hoc* Committee it is necessary for the contribution to the economic development or at least the interests of the State, in this case the DRC, to be somehow present in the operation." Finding that the tribunal had not provided "the slightest explanation as to the relationship between the 'Mitchell & Associates' firm and the DRC",[13] the Committee annulled the award for failure to state reasons on the qualification of those services as an investment.

This decision was received in the investment arbitration community with criticism.[14] For example, the *ad hoc* Committee's finding that services could not be considered as an investment because they did not contribute to the economic development of the host State was in contradiction with the clear and specific language of the bilateral investment treaty between the Democratic Republic of Congo and the USA which defined "investment" as specifically including "service contracts". It was also in contradiction with the Committee's emphasis on the fact that the economic development of the host State "does not mean that this contribution must always be sizeable or successful; and of course, ICSID tribunals do not have to evaluate the real contribution of the operation in question. It suffices for the operation to contribute in one way or another to the economic development of the host State, and this concept of economic development is, in any event, extremely broad but also variable depending on the case."[15]

Although other tribunals followed suit,[16] the case law today on the definition of an investment under the ICSID Convention is clearly unsettled as to the requirement of a contribution to the economic development of the host State. In the face of such inconsistency, it is worthy of note that an investor choosing UNCITRAL arbitration over ICSID arbitration on the basis of the same bilateral investment treaty would reasonably not need to establish a contribution to the economic development of the host State, which the arbitral case law has found in the Preamble of the ICSID Convention. The rigidity introduced into the definition of an "investment" may thus result in the development of different regimes of investment protection—to the detriment of legal certainty and predictability—either within the ICSID case law or based on the choice of other another forum by the investor, possibly making other options such as UNCITRAL arbitration (if provided by the relevant instrument) more attractive to investors.

B. The definition of an "investor" under the ICSID Convention and the question of dual nationality

The definition of an "investor" is provided by Article 25 of the ICSID Convention, both as regards legal persons and natural persons. As regards the latter, Article 25 sets forth that an investor must be a national of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit the dispute to arbitration as well as on the date on which the request for arbitration was registered. Dual nationals who also hold the nationality of the State party to the dispute are expressly excluded from the definition of an investor under Article 25(2):

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12 *Id*., para. 29.

13 *Id*., para. 40.

14 See in particular E. Gaillard, *Chronique des sentences arbitrales CIRDI*, 2007 JOURNAL DU DROIT INTERNATIONAL 255, at 340; J. Fouret and D. Khayat, *Centre International pour le Règlement des Différends Relatifs aux Investissements (CIRDI)*, 19(1) REVUE QUÉBECOISE DE DROIT INTERNATIONAL 341; W. Ben Hamida, *Two Nebulous ICSID Features: The Notion of Investment and the Scope of Annulment Control – Ad Hoc Committee's Decision in Patrick Mitchell v. Democratic Republic of Congo* 24(3) JOURNAL OF INTERNATIONAL ARBITRATION 287 (2007). See also the article by E. Gaillard (co-authored with Y. Banifatemi), *A Black Year for ICSID*, NEW YORK LAW JOURNAL, February 22, 2007.

15 *Patrick Mitchell v. Democratic Republic of the Congo*, *supra* note 9, para. 33.

16 See in particular *Malaysian Historical Salvors v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction dated May 10, 2007, para. 135 ("[…] To determine whether the Contract is an 'investment', the litmus test must be its overall contribution to the economy of the host State, Malaysia"). This award is currently the subject of annulment proceedings.

> "'National of another Contracting State' means: (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered […], but does not include any person who on either date also had the nationality of the Contracting State party to the dispute".

The question of dual nationals is specific to ICSID arbitration and the application of Article 25(2)(a). The first decision to address this question was *Champion Trading v. The Arab Republic of Egypt*[17]: the Tribunal held that dual nationals who hold the nationality of the host State cannot bring a claim under the ICSID Convention. In this respect, the Tribunal did not take into account the rule of effective nationality under international law in order to determine whether the claimants were, effectively, nationals of the host State.

The exclusion of dual nationals under the ICSID Convention was confirmed in *Soufraki v. United Arab Emirates*.[18] The Tribunal in that case found the timing of the determination of the nationality to be a critical question. The dates used by the Tribunal to determine the claimant's nationality for the purposes of the bilateral investment treaty at issue were the date of the parties' consent to ICSID arbitration and the date of the registration of the claimant's request for arbitration by ICSID[19]. The question was revisited in *Siag and Vecchi v. The Arab Republic of Egypt*.[20] In this case, both claimants had previously been Egyptian nationals but had lost their Egyptian nationality by operation of the law prior to bringing their ICSID claim. At the same time, the claimants also held Italian and Lebanese nationality. The Tribunal upheld its jurisdiction since the claimants had lost their Egyptian nationality. In a dissenting opinion, Professor Orrego Vicuña argued about the importance of the timing of the acquisition and loss of nationality. He focused on the requirement in the ICSID Convention that a claimant not have the nationality of the respondent State "on the date on which the parties consented to submit" the dispute to arbitration and observed that in cases where a State gives consent by way of an investment treaty, the date on which *both* parties consent to arbitration may not occur until much later, and possibly as late as the notice of arbitration. Professor Orrego Vicuña's suggestion was that, in order to "prevent many kinds of abuse"[21] and to avoid the possibility of investors manipulating their nationality up until giving their consent to arbitration, the ICSID Convention should be interpreted as requiring that an investor not have the nationality of the respondent State at the time of the expression of consent of both the investor and the host State. He also raised the possibility of requiring the investor not to hold the nationality of the respondent State at the time the investment was made.

Given the exclusion and the timing requirements contained in Article 25(2) of the ICSID Convention as regards natural persons, the question arises as to whether ICSID arbitration is the most favorable option in the case of dual nationality, especially when such dual nationality is in doubt, for example because an investor has the nationality of the host State without such nationality being effective or because an investor has lost the nationality of the host State before submitting an ICSID claim. To the extent that the same exclusion may not exist under other dispute resolution arrangements offered by the relevant investment treaties, such as the UNCITRAL Arbitration Rules for example, these other options may be viewed by investors as being more advantageous.

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17 *Champion Trading v. The Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction dated October 21, 2003, 19 ICSID REVIEW 275 (2004), p. 288.

18 *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award of July 7, 2004, available on www.investmentclaims.com and www.ita.law.uvic.ca.

19 *Id*., para. 84.

20 *Siag and Vechi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction dated April 11, 2007, MEALEY'S: INTERNATIONAL ARBITRATION REPORT Doc. No. 05-070627-006Z and available on the ICSID website http://icsid.worldbank.org.

21 *Id*., see the dissenting opinion by Professor Orrego Vicuña, p. 65.

C. The Expedited Procedure under Rule 41(5) of the ICSID Arbitration Rules

The new Rule 41(5) of the ICSID Arbitration Rules provides a party with an opportunity to file an objection with the arbitral tribunal that a claim is manifestly without legal merit, such objection resulting, if successful, in the dismissal of the claim. This objection has to be filed within 30 days of the constitution of the tribunal, or, in any event, before the tribunal's first session. The rule came into effect on April 10, 2006 and resulted from the consultations undertaken by the ICSID Secretariat during 2004 and 2005. It was justified by the fact that:

> "[…] the Secretary-General's power to screen requests for arbitration does not extend to the merits of the dispute or to cases where jurisdiction is merely doubtful but not manifestly lacking. In such cases, the request for arbitration must be registered and the parties invited to proceed to constitute the arbitral tribunal.
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> It is suggested to make it clear, by the introduction of a new paragraph (5), that the tribunal may at an early stage of the proceeding be asked on an expedited basis to dismiss all or part of a claim on the merits. The change would be helpful in addressing any concerns about the limited screening power of the Secretary-General."[22]

There is no parallel to Rule 41(5) in other arbitration rules, including the UNCITRAL Arbitration Rules or the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. The ICC Pre-Arbitral Referee Procedure, although similarly concerned with expedited procedures, is directed towards a temporary solution and does not affect the merits of an arbitration which, if initiated, will be a separate proceeding with arbitrators different from the referee who decided the claim.[23]

While this provision has not yet been tested, it is possible to foresee a number of difficulties as regards its implementation. A first question is whether a respondent State may use this provision as a procedural weapon to add an extra layer of proceedings and thus delay the arbitration. Indeed, Rule 41(5) makes it clear that the tribunal's decision "shall be without prejudice to the right of a party to file an objection pursuant to [Rule 41] paragraph 1[on jurisdiction] or to object, in the course of the proceeding, that a claim lacks legal merit." There is therefore a risk that the same objections be presented at different stages of the arbitral proceeding or that the respondent State takes advantages of the Rule to submit its objections piecemeal.

The Rule may also raise issues relating to the arbitrators' impartiality—or at least appearance of impartiality—since the arbitrators who decide on an objection under Rule 41(5) are the same as those who will decide, in the event the objection is dismissed, on questions of jurisdiction and the merits of the dispute. In cases where a party's objection is not unanimously rejected, the question remains as to whether the arbitrator who has found that the claim is manifestly without legal merit under the expedited procedure of Rule 41(5) will have prejudged the claim when the remainder of the arbitral proceeding would address the same or related questions bearing on the tribunal's jurisdiction and/or the merits of the dispute.

Finally, Rule 41(5) does not prescribe how an objection should be dealt with, simply stating that the tribunal "shall decide after giving the parties the opportunity to present their observations on the objection". Will the actual procedure that will be adopted at a Rule 41(5) hearing allow for witnesses to be called? What sort of time limits will there be? Will decisions be published? Considering that a successful objection under this Rule will effectively bring the case to an end,

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[22] Suggested Changes to the ICSID Rules and Regulations, Working Paper of the ICSID Secretariat, May 12, 2005, available at http://ita.law.uvic.ca/documents/052405-sgmanual.pdf, p. 7.

[23] See Article 1.1 of the ICC Rules for a Pre-Arbitral Referee Procedure: "These Rules concern a procedure called the 'Pre-Arbitral Referee Procedure', which provides for the immediate appointment of a person (the 'Referee') who has the power to make certain Orders prior to the arbitral tribunal or national court competent to deal with the case (the 'Competent Authority') being seized of it." The powers of the Referee are set forth in Article 2 of the Rules.

questions of procedure are of crucial concern to ensure that a claimant has a fair opportunity to present its claim.

D. The effect of the denunciation of the ICSID Convention

In April 2007, the member States of the Alternativa Bolivariana para la América Latina y El Caribe (ALBA), namely Bolivia, Venezuela, Nicaragua and Cuba, proclaimed their intention to withdraw from the International Monetary Fund and the World Bank. Bolivia was the first—and so far only—State to implement this resolution, and submitted a notice of denunciation of the ICSID Convention on May 2, 2007[24]. Pursuant to Article 71 of the Convention, this denunciation was to take effect six months after the receipt by the Centre of Bolivia's written notice of denunciation, namely on November 3, 2007.

At this time, the exact consequences of Bolivia's denunciation are unclear. One of the important questions is what becomes of the denouncing State's existing rights and obligations under the Convention at the time of denunciation. Article 72 of the ICSID Convention covers the situations where a denouncing State, one of its constituent subdivisions or agencies, or one of its nationals, has given consent to the jurisdiction of the Centre prior to the notice of denunciation:

> "Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary."

The notion of "consent to the jurisdiction of the Centre" will thus be at the heart of this derogatory regime. In other words, the issue will be whether general consent to ICSID arbitration given by a State in an investment treaty constitutes ongoing "consent to the jurisdiction of the Centre" even after that State's denunciation of the ICSID Convention. The position has been taken by some authors that the denouncing State's consent must be "perfected" before the notice of denunciation.[25] Others believe that in cases in which the investor has accepted the State's general consent prior to the receipt of the notice of denunciation by the Centre or within the six-month period set forth in Article 72, the effectiveness of the existing rights and obligations should raise little difficulty as the host State is still a Contracting Party at those times, but that in the more difficult situations where the investor's acceptance of the general offer by the host State contained in an investment treaty occurs after the denunciation of the ICSID Convention has taken effect and the host State has ceased to be a Contracting Party, effect should be given to the wording of the arbitration clause in the relevant investment treaty or contractual arrangement: where an unqualified consent to arbitration exists, as opposed to an agreement to consent, the rights and obligations attached to such consent should not be affected by the denunciation of the ICSID Convention pursuant to its Article 72.[26]

These questions will probably be addressed by the arbitral tribunal constituted in the case registered by the ICSID Secretariat against Bolivia in October 2007 despite Bolivia's objections.[27] In the meantime, however, in light of the uncertainties entailed in the application of Article 72 of the ICSID Convention by arbitral tribunals, investors faced with a denunciation may consider other alternatives provided by the relevant instrument.

More generally, in view of the restrictions that ICSID arbitration may impose on investors and the uncertainties resulting from the case law or the applicable provisions, the question today is whether the success of ICSID arbitration will be maintained in the years to come or whether investors will find

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[24] See ICSID News Release of May 16, 2007, *Bolivia Submits a Notice under Article 71 of the ICSID Convention*, available on the ICSID Website at www.worldbank.org/ICSID.

[25] See Ch. Schreuer, THE ICSID CONVENTION: A COMMENTARY, Cambridge University Press, 2001, p. 1286.

[26] See the article by E. Gaillard (co-authored with Y. Banifatemi), *The denunciation of the ICSID Convention*, NEW YORK LAW JOURNAL, June 21, 2007, with an analysis of the History of the ICSID Convention in this regard.

[27] *E.T.I. Euro Telecom International N.V. v. Republic of Bolivia*, ICSID Case No. ARB/07/28, registered on October 31, 2007.

new interest in the other options existing in the relevant instrument. The UNCITRAL Arbitration Rules, in particular, may gain additional support based on the ongoing amendments to the rules. For example, the proposed change to Article 1(1) of the UNCITRAL Rules to cover disputes "in respect of a defined legal relationship, whether contractual or not" and not merely "disputes in relation to [a] contract" as is the case today, will no doubt be perceived as a step towards certainty in that the new language will unquestionably cover legal disputes arising from an investment treaty.[28] Further, the proposed change to Article 33(1), which deals with the applicable law, to refer to the "rules of law" applicable to a dispute rather than simply the "law", opens up the possibility of the application to UNCITRAL arbitral proceedings not only of the rules specific to one legal system but also of transnational rules and the rules of international law[29].

II. THE IMPACT OF THE TREATY MECHANISM ON THE PROTECTION AFFORDED TO INVESTORS

Because the vast majority of investor-State arbitrations are today based on investment treaties, either bilateral or multilateral, questions of treaty law are increasingly becoming critical to the resolution of important questions relating to the jurisdiction of tribunals or the merits of the disputes.

The effect of some treaty mechanisms on the protection that is accorded to investors has not yet rendered consisted interpretations by arbitral tribunals. Two of the most controversial questions are the applicability of most-favored-nation ("MFN") clauses to the treaty's dispute settlement arrangements and the extent to which a tribunal's jurisdiction based on an investment treaty can cover claims arising out of an underlying contract.

A. The applicability of MFN clauses to dispute settlement mechanisms

Under an MFN clause, the beneficiary of the clause may invoke and rely on the more favorable treatment that is accorded to the nationals of a third country by the State party to the treaty against whom the provision is invoked. While it is widely accepted that the MFN clause will apply to the substantive protections accorded in the investment treaty, the debate centers around whether the MFN clause extends to the dispute settlement provisions of the treaty. This issue arises at the jurisdictional stage of arbitral proceedings and the case law on the matter diverges sharply.

One line of cases[30] has had no difficulty establishing that the MFN clause extends to the dispute settlement provisions of the treaty. In each instance, the tribunal came to this conclusion after analyzing the language of the MFN clause and the intention of the parties to the treaty. In the words of the *Maffezini* Tribunal, in particular:

> "A number of bilateral investment treaties have provided expressly that the most favored nation treatment extends to the provisions on settlement of disputes. […]
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> Notwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the most favored nation clause, the Tribunal considers that there are good reasons to

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28 See Report of the Working Group II (Arbitration and Conciliation) on the Work of its Forty-Sixth Session (New York, February 5-9, 2007), UN Document No. A/CN.9/619, 22-24.

29 As regards the application of international law under the ICSID Convention, see E. Gaillard and Y. Banifatemi, *The Meaning of 'and' in Article 42 (1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process*, 18 ICSID REVIEW 375 (2003).

30 *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction dated January 25, 2000, 124 ILR 9 (2003); *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction dated August 3, 2004, 132 JOURNAL DE DROIT INTERNATIONAL 142 (2005) (excerpts), also available on the ICSID website http://icsid.worldbank.org; *Gas Natural v. Argentina*, ICSID Case No. ARB/03/10, Decision on Jurisdiction dated June 17, 2005, available at http://www.asil.org/pdfs/GasNat.v.Argentina.pdf; *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction dated May 16, 2006, available on the ICSID website http://icsid.worldbank.org; *National Grid v. Argentina*, UNCITRAL arbitration, Decision on Jurisdiction dated June 20, 2006, available at http://ita.law.uvic.ca/.

> conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors [...].
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> […] If a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause […]."[31]

In parallel, a number of arbitral tribunals have found that, on the contrary, the MFN clause cannot apply to the dispute settlement provisions of an investment treaty.[32] As with the cases applying the MFN clause to the dispute settlement provisions of the treaty, these tribunals also considered the specific language of the clause and the intention of the parties in reaching their decisions. Their point of emphasis was however that an MFN clause does not apply to the dispute settlement provisions of a treaty unless the parties to the treaty have expressly indicated otherwise. As stated by the Tribunal in *Plama v. Bulgaria*:

> "an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them."[33]

This approach was approved and echoed by the Tribunal in *Telenor v. Hungary*:

> "In the absence of language or context to suggest the contrary, the ordinary meaning of 'investments shall be accorded treatment no less favourable than that accorded to investments made by investors of any third State' is that the investor's *substantive* rights in respect of the investments are to be treated no less favourably than under a BIT between the host State and a third State, and there is no warrant for construing the above phrase as importing *procedural* rights as well. It is one thing to stipulate that the investor is to have the benefit of MFN investment treatment but quite another to use an MFN clause in a BIT to bypass a limitation in the very same BIT when the parties have not chosen language in the MFN clause showing an intention to do this, as has been done in some BITs."[34]

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31 *Maffezini v. Spain*, *supra* note 30, paras. 52–56. See also *Siemens v. Argentina*, supra note 30, paras. 102–103 ("[…] the term 'treatment' and the phrase 'activities related to the investments' are sufficiently wide to include settlement of disputes").

32 *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction dated November 29, 2004, 44 INTERNATIONAL LEGAL MATERIALS 569 (2005), paras. 115–119 ("[The arbitration clause of the BIT] does not envisage 'all rights or all matters covered by the agreement'. Furthermore, the Claimants have submitted nothing from which it *might* be established that the common intention of the Parties was to have the most-favored clause apply to dispute settlement", at para. 118); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction dated February 8, 2005, 44 INTERNATIONAL LEGAL MATERIALS 721 (2005), paras. 183–227 ("It is not evident that when parties have agreed in a particular BIT on a specific dispute resolution mechanism, as is the case with the Bulgaria-Cyprus BIT (*ad hoc* arbitration), their agreement to most-favored nation treatment means that they intended that, by operation of the MFN clause, their specific agreement on such a dispute settlement mechanism could be replaced by a totally different dispute resolution mechanism (ICSID arbitration). It is one thing to add to the treatment provided in one treaty more favorable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism", para. 209); *Telenor Mobile Communications AS v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award dated September 13, 2006, 21(2) ICSID REVIEW 488 (2006), para. 92.

33 *Plama v. Bulgaria*, *supra* note 32, para. 223.

34 *Telenor v. Hungary*, *supra* note 32, para 92. See also para. 95: "Those who advocate a wide interpretation of the MFN clause have almost always examined the issue from the perspective of the investor. But what has to be applied is not some abstract principle of investment protection in favour of a putative investor who is not a party to the BIT and who at the time of its conclusion is not even known, but the intention of the States who

All these cases in reality show that the question of the applicability of an MFN clause to dispute settlement arrangements is chiefly determined by the language of the clause, and there is hardly any controversy over the necessity of giving effect to the language of the relevant instrument and the intention of the State parties in incorporating such a clause in their treaty. When the provision expressly sets forth limitations, such as Article 1103(2) of NAFTA for example,[35] such limitations must be given effect. Equally, when the contracting parties have expressly included dispute settlement arrangements in the scope of their MFN clause, such as Article 3(3) of the model UK BIT,[36] such intention must be given effect. The question arises, by definition, in those instances where the clause is broadly phrased and the contracting parties to the treaty have neither expressly excluded dispute resolution mechanisms nor clarified their intention of including such mechanisms in the protection that is accorded to the beneficiaries of the MFN clause. In those situations, which remain unsettled in the arbitral case law, the intention of the contracting parties can reasonably be interpreted to include the whole range of the rights accorded to the investors of a third country, including the dispute settlement provisions of the treaty.[37]

B. Treaty-Based Jurisdiction over Contractual Claims

The other sharp controversy in the investment arbitration community concerns the question whether a tribunal's jurisdiction based on an investment treaty may cover a claim arising out of a contract relating to the investment. This question in reality covers two types of controversies, namely the effect of broadly phrased dispute resolution clauses and the effect of observance of undertakings clauses (also known as "umbrella" clauses).

1. A first question, as yet unsettled, concerns the effect of broadly phrased dispute resolution clauses contained in investment treaties: does a tribunal's jurisdiction cover contractual claims where the dispute resolution clause provides that "any" or "all" disputes "with respect to", "relating to" or "concerning" investments between a Contracting Party to the treaty and an investor of the other Contracting Parry can be submitted to international arbitration?

The first decision to address this question was *Salini v. Morocco*. The Tribunal in that case held that the terms of the dispute settlement provision were "very general" and that "[t]he reference to expropriation and nationalisation measures, which are matters coming under the unilateral will of a State, cannot be interpreted to exclude a claim based in contract from the scope of application of this Article".[38] It however restricted its jurisdiction to only those contractual claims arising out of a "breach of a contract that binds the State directly. The jurisdiction offer contained in Article 8 does not […] extend to breaches of a contract to which an entity other than the State is a named party".[39] The same approach was adopted by the Arbitral Tribunal in *Impregilo v. Pakistan*.[40]

Other tribunals have applied a wider philosophy, namely that not only contracts entered into by the State are covered but all contractual claims may be covered by a broad dispute resolution clause.

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are contracting parties. The importance to investors of international arbitration cannot be denied, but in the view of this Tribunal its task is to interpret the BIT and for that purpose to apply ordinary canons of interpretation, not to displace, by reference to general policy considerations concerning investor protection, the dispute resolution mechanism specifically negotiated by the parties".

35 Article 1103(2) of NAFTA provides for more favorable treatment "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." Dispute settlement is evidently not provided for under this MFN provision.

36 Article 3(3) provides that "for the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement" (which include the arbitration clause).

37 See the article by Y. Banifatemi on the *Most-Favored-Nation Treatment*, based on a speech given in London on September 14, 2007 at the Investment Treaty Forum on THE EMERGING JURISPRUDENCE OF INTERNATIONAL INVESTMENT LAW, to be published by Oxford University Press.

38 *Salini v. Morocco*, *supra* note 5, para. 59.

39 *Id*., para. 61.

40 *Impregilo SpA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction dated April 22, 2005, available on the ICSID website: http://icsid.worldbank.org, paras. 198 and 211; see also para. 214: "the jurisdiction offer in this BIT does not extend to breaches of a contract to which an entity other than the State is a named Party".

This was notably the position taken by the *ad hoc* Committee in *Vivendi v. Argentina*[41] and the Tribunal in *SGS v. Philippines*.[42]

The most restrictive approach was adopted by the Tribunal in *SGS v. Pakistan*,[43] holding that a broad dispute resolution clause in an investment treaty does not provide sufficient basis for a treaty-based tribunal to have jurisdiction over purely contractual claims and that a treaty-based jurisdiction could cover alleged breaches of contract only where such breaches also constitute or amount to breaches of the substantive standards of the BIT.[44] Similarly, the Tribunal in *LESI-Dipenta v. Algeria* decided that contractual claims brought before a tribunal having jurisdiction on the basis of a treaty must also amount to a violation of the treaty standards.[45]

The question is therefore still unsettled as to whether, in the presence of a broadly phrased dispute settlement provision in an investment treaty, the investor must allege, in order to establish the jurisdiction of the treaty-based tribunal over its contractual claims, that the substantive standards of the treaty under which it is initiating the arbitration against the host State were violated or whether it is sufficient for the tribunal to rule on contractual breaches without being required to pass judgment on the substantive provisions of the treaty.[46]

2. The case law is as shifting and unpredictable in the different situation where the investment treaty under consideration contains an observance of undertakings clause (or "umbrella" clause). Under this type of provision, contracting States mutually undertake to ensure the observance of the commitments entered into with respect to the investments or the investors of the other Contracting Party. The question is therefore whether the breach of a contractual commitment amounts to a violation of the treaty under this type of provision. Although it creates a treaty standard of protection

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41 *Compañía de Aguas del Aconquija, S.A. et Compagnie Générale des Eaux (Vivendi Universal) v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision of the *ad hoc* Committee of July 3, 2002, 41 INTERNATIONAL LEGAL MATERIALS 1135 (2002); 6 ICSID REPORTS 340 (2004), para. 55 (the provision "does not use a narrower formulation, requiring that the investor's claim allege a breach of the BIT itself. Read literally, the requirements for arbitral jurisdiction in Article 8 do not necessitate that the Claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT").

42 *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction dated January 29, 2004, 19 MEALEY'S: INTERNATIONAL ARBITRATION REPORT C-1 (Feb. 2004) 8 ICSID REPORTS 518 (2005), para. 131 ("The term 'disputes with respect to investments' […] is not limited by reference to the legal classification of the claim that is made. A dispute about an alleged expropriation contrary to Article VI of the BIT would be a 'dispute with respect to investments'; so too would a dispute arising from an investment contract such as the CISS Agreement").

43 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of August 27, 2003, 18 ICSID REVIRW 307 (2003); 42 INTERNATIONAL LEGAL MATERIALS 1290 (2003).

44 *Id.*, paras. 161-162 ("We recognize that disputes arising from claims grounded on alleged violation of the BIT, and disputes arising from claims based wholly on supposed violations of the PSI Agreement, can both be described as 'disputes with respect to investments,' the phrase used in Article 9 of the BIT. That phrase, however, while descriptive of the *factual subject matter* of the disputes, does not relate to the *legal basis* of the claims, or the *cause of action* asserted in the claims. In other words, from that description alone, without more, we believe that no implication necessarily arises that both BIT and purely contract claims are intended to be covered by the Contracting Parties in Article 9. […] Thus, we do not see anything in Article 9 or in any other provision of the BIT that can be read as vesting this Tribunal with jurisdiction over claims resting *ex hypothesi* exclusively on contract. […] We conclude that the Tribunal has no jurisdiction with respect to claims submitted by SGS and based on alleged breaches of the PSI Agreement which do not also constitute or amount to breaches of the substantive standards of the BIT.")

45 *L.E.S.I.-Dipenta v. Algeria*, *supra* note 7, para. 25 ("[…] le fait que la Défenderesse ait donné son consentement écrit ne signifie pas encore nécessairement qu'il ait une portée générale et puisse donc fonder une compétence pour toute violation que la Demanderesse pourrait invoquer. Le consentement ne peut en effet valoir que dans la mesure où l'Accord bilatéral l'admet. […] le consentement n'est pas donné, de manière extensive, pour toutes les créances et les actions qui pourraient être liées à un investissement. Il est nécessaire que les mesures prises reviennent à une violation de l'Accord bilatéral, ce qui signifie en particulier qu'elles soient de nature injustifiée ou discriminatoire, en droit ou en fait. Ce n'est donc pas nécessairement le cas de toute violation d'un contrat.").

46 On this question, see E. Gaillard, *Investment Treaty Arbitration and Jurisdiction over Contractual Claims. The SGS Cases Considered*, INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW (Cameron May: London, 2005, T. Weiler, ed.), p. 325.

and thus it arguably embodies a substantive obligation, the observance of undertakings clause has been examined in arbitral case law as the jurisdictional basis on which an investor could invoke the host State's international responsibility for treaty violations constituted by breaches of contract.

The first decision rendered on this issue was in *SGS v. Pakistan*[47]. The Tribunal held that, in the absence of a "clear and convincing evidence that such was indeed the shared intent of the Contracting Parties" to the treaty,[48] the clause under consideration was not specific enough to transform contractual obligations undertaken by the respondent State with respect to investments into violations of the treaty:

> "Applying [the] familiar norms of customary international law on treaty interpretation, we do not find a convincing basis for accepting the Claimant's contention that Article 11 of the BIT has had the effect of entitling a Contracting Party's investor, like SGS, in the face of a valid forum selection contract clause, to 'elevate' its claim grounded solely in a contract with another Contracting Party, like the PSI Agreement, to claims grounded on the BIT, and accordingly to bring such contract claims to this Tribunal for resolution and decision."[49]

As a result, the Tribunal declined jurisdiction over the claimant's claims alleging a violation of the observance of undertakings provision, and retained its jurisdiction only over those claims alleging a violation of other BIT provisions such as fair and equitable treatment or the prohibition of expropriation measures without effective and adequate compensation.

The question of the meaning and scope of the observance of undertakings clause was raised again in *SGS v. Philippines*[50]. The Tribunal decided that such a clause "has to be construed as intended to be effective within [the framework of the BIT]"[51], and that the breach of a contractual commitment constitutes a breach of the observance of undertakings clause under the treaty. The Tribunal, however, also decided that its jurisdiction should not be exercised over claims asserted under this type of clause where the underlying contract contains a choice of forum mechanism:

> "To summarize the Tribunal's conclusions on this point, Article X(2) makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments. But it does not convert the issue of the *extent* or *content* of such obligations into an issue of international law. That issue (in the present case, the issue of how much is payable for services provided under the CISS Agreement) is still governed by the investment agreement."[52]

Accordingly, rather than determining itself the question of "the extent of the obligation" under the contract, the tribunal decided to stay the proceedings "pending a decision [by the Philippine courts] on the amount due but unpaid under the CISS Agreement, a matter which (if not agreed by the parties) is to be determined by the agreed contractual forum under Article 12 of the CISS Agreement"[53].

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47 *SGS v. Pakistan*, *supra* note 43, paras. 163-173.

48 *Id*., para. 167.

49 *Id*., para. 165; see more generally the Tribunal's reasoning at paras. 166-173. In the same vein, see *Joy Mining v. Egypt*, *supra* note 5, para. 81; *Salini v. Jordan*, *supra* note 32, paras. 126-127, and para. 96 ("[The dispute settlement procedures provided for in the Contract] cannot cover claims based on breaches of the BIT (*including breaches of those provisions of the BIT guaranteeing fulfillment of contracts signed with foreign investors*).", Emphasis added).

50 *SGS v. Philippines*, *supra* note 42, paras. 113–129.

51 *Id*., para. 115.

52 *Id*., para. 128.

53 *Id*., para. 177(c).

Following these two decisions, a number of other arbitral tribunals have upheld their jurisdiction to hear a claim arising out of the violation of an observance of undertakings clause finding its source in the breach of a contractual commitment.[54] Of special interest is the decision in *Noble Ventures v. Romania* where the Tribunal held that an observance of undertakings clause "introduces an exception to the general separation of States' obligations under municipal and under international law".[55] The expression "shall observe any obligation it may have entered into with regards to investments" in Article II(2)(c) of the U.S.A.-Romania BIT constituted, in the Tribunal's opinion, a direct formulation of the Contracting States' "aim to equate contractual obligations governed by municipal law to international treaty obligations as established in the BIT"[56].

Other tribunals, however, have reached the opposite result by applying a restrictive approach.[57] In particular, the reasoning of the Tribunal in *El Paso v. Argentina* was that, to give a "broad interpretation" to an observance of undertakings clause that refers to "any" obligation undertaken by the State, and not only "contractual" obligations, would have the effect of internationalizing all municipal law commitments of the State and "far-reaching consequences".[58] It therefore held that:

> "In conclusion, in this Tribunal's view, following the important precedents set by Tribunals presided by Judge Feliciano [in *SGS v. Pakistan*], Judge Guillaume [in *Salini v. Jordan*] and Professor Orrego Vicuña [in *Joy Machinery v. Egypt*], an umbrella clause cannot transform any contract claim into a treaty claim, as this would necessarily imply that any commitments of the State in respect to investments, even the most minor ones, would be transformed into treaty claims."[59]

Evidently, in light of such sharply diverging views taken by the various tribunals (and in legal writings), the question of the effect of an observance of undertakings clause is today a source of uncertainty in investor-State arbitrations. Interestingly, this question also illustrates the manner in which the different tribunals have given weight to the "precedents" of other tribunals—either to approve or to dispute a reasoning—a question that is becoming a new source of debate in investment arbitration.

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54 *Noble Ventures Inc. v. Romania*, ICSID Case No. ARB/01/11, Award dated October 12, 2005, available at http://ita.law.uvic.ca/, para. 62; *Eureko v. Poland, ad hoc* arbitration, Partial Award dated August 19, 2005, 12 ICSID REPORTS 331; *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Award dated October 3, 2006, 46(1) INTERNATIONAL LEGAL MATERIALS 40, and *Enron v. Argentina*, ICSID Case No. ARB/01/3, Award dated May 22, 2007, MEALEY'S: INTERNATIONAL ARBITRATION REPORT Document No. 05-070627-007A.

55 *Noble Ventures v. Romania, surpa* note 54, para. 55.

56 *Id.*, paras 46–62, in particular at para. 61. For a commentary of this decision, see in particular E. Gaillard, *Chronique de jurisprudence CIRDI*, JOURNAL DU DROIT INTERNATIONAL, 2007, at 288.

57 *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction dated April 27, 2006, 21(2) ICSID REVIEW 488 (2006); *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Jurisdiction dated July 27, 2006, available at http://ita.law.uvic.ca/.

58 *El Paso Energy v. Argentina, supra* note 57, para. 77; see also para. 82.

59 *Id.*, para. 82.

III. THE NOTION OF A "PRECEDENT" IN INVESTMENT ARBITRATION

Because increasingly arbitral tribunals constituted in investment matters refer in their decisions to awards rendered by other tribunals having dealt with the same issues, especially as regards similar issues arising under the same or similarly drafted treaty provisions, the question has arisen in practice whether the body of arbitral case law provides "precedents" for current or future arbitral tribunals.[60]

There exists a general agreement that no rule of precedent exists in international arbitration. No arbitral tribunal is bound to follow a prior decision by another arbitral tribunal on the same issue. This is illustrated by the diverging decisions on key issues referred to above. While one will often find that a tribunal refers to the decisions of prior tribunals, it will mostly be to find guidance or indicate their agreement or disagreement with the reasoning of such tribunal, and not in reliance on that decision as being binding. The discrepancies found in the arbitral case law, however, highlight the necessity of consistency on key legal issues that frequently feature in investment arbitration, as a consistent body of case law would improve the predictability of the outcome and contribute to legal certainty.[61] In the words of the Tribunal in *Saipem v. Bangladesh*:

> "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."[62]

There will always be a certain variability in the outcome of investment disputes, since the language of the applicable provisions and the intention of the parties will be the deciding factors in interpreting an investment treaty. Subject to this variability, the increased transparency of and accessibility to the international arbitration process[63] may, in time, contribute to the ironing out of many of the unresolved issues in investment arbitration.

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60 See, in this respect, the proceedings of the Conference organized in Paris by the International Arbitration Institute on December 14, 2007 on THE PRECEDENT IN INTERNATIONAL ARBITRATION, to be published by Juris Publishing as the IAI SERIES ON INTERNATIONAL ARBITRATION NO. 5, *forthcoming* 2008.

61 See in particular G. Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity, or Dream?*, 23 ARBITRATION INTERNATIONAL 357 (2007). See also A. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, to be published *in* INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE (Colin Picker, Isabella Bunn & Douglas Arner eds., Hart Publishing, *forthcoming* 2008).

62 *Saipem SpA v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction dated March 21, 2007, MEALEY'S: INTERNATIONAL ARBITRATION REPORT, vol. 22, Issue 4, at B-1, para. 67.

63 In this respect, it is worth noting that the wide publication of arbitral awards has greatly contributed to promoting the decisions in international investment arbitration. A large number of awards in the investment arbitration field are already published both in written and on-line publications. The newly added Rule 48(4) of the ICSID Arbitration Rules, which came into effect on April 10, 2006, also provides that "the Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publication experts of the legal reasoning of the Tribunal." On the question of the impact of the publication of awards, see the contribution by T. Wälde, *forthcoming in* IAI SERIES ON INTERNATIONAL ARBITRATION NO. 5, *supra* note 60.