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Consistency in the interpretation of substantive investment rules: is it achievable?

YAS BANIFATEMI

A. Introduction

With the accelerating pace of the development of international investment law, tension seems to be growing between the requirement that each dispute be resolved on the basis of the relevant investment treaty, whose application and interpretation is the duty of the arbitral tribunal constituted to settle that dispute, and the desire to achieve consistency in the interpretation of the law. In the words of the International Court of Justice (ICJ), 'justice of which equity is a manifestation ... should display consistency and a degree of predictability.'[1] At the same time, consistency can only be achieved within the ambit of the same or substantially the same substantive rules.

Indeed, there has been much ado about a perceived lack of consistency in the international investment law and arbitration regime. The phrase 'legitimacy crisis' is often heard.[2] Yet, much of the criticism and commentary seems not to take into consideration the structural framework of the regime (section B). Often the actual reasons for divergence are overlooked. So too are the points of convergence. This is not to say that unhappy instances of inconsistent case law do not exist. They do and merit consideration, to the extent, in particular, that they may reflect policy issues.

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[1] *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, ICJ Reports 1985, p.13, para. 45.

[2] See S. D. Franck, 'The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decisions', *Fordham Law Review* 73 (2004–2005), 1521–625. See also M. Waibel, A. Kaushal, K.-H. L. Chung and C. Balchin (eds.), *The Backlash Against Investment Arbitration* (Alphen aan den Rijn: Kluwer Law International, 2010).

Consistency and inconsistency should thus be viewed in context (section C). Yet again, signs of maturity of the regime can be seen in the instances of emerging *jurisprudence constante.* Greater consistency may be achieved, provided the reality of what can be achieved is discerned from the myth (section D). Each of these propositions will be addressed in turn.

B. Treaty interpretation by arbitral tribunals: the unavoidable framework

To the extent that it borrows from both international law and arbitration law, investment arbitration is subject to the substantive framework imposed by international law as regards the rules of treaty interpretation (section I below) and the structural framework imposed by arbitration as a decentralised system (section II below). It is against the background of these constraints that the question of consistency in investment arbitration must be viewed.

I. The substantive framework imposed by international law: the rules of treaty interpretation as codified in Article 31 of the Vienna Convention on the Law of Treaties (VCLT)

Arbitral tribunals refer almost systematically to the canons of treaty interpretation found in the VCLT, which largely reflect customary international law.[3] A recent empirical study shows that thirty-five of ninety-eight decisions by investor–state tribunals constituted under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) rendered from 1 January 1998 to 31 December 2006 made explicit reference to the VCLT, with 'an increase in references toward the end of the period examined'.[4]

Pursuant to Article 31 of the VCLT, the interpretation of international treaties, including investment treaties, centres on the text of the treaty, namely 'the ordinary meaning of the terms of the treaty in their context and in light of [the treaty's] object and purpose'. Only if such interpretation leaves the meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable, can one resort to the supplementary

[3] See, for example, *Tokios Tokelés* v. *Ukraine* (Decision on Jurisdiction), International Centre for Settlement of Investment Disputes (ICSID) Case No. ARB/02/18, 29 April 2004, para. 27.

[4] O. K. Fauchald, 'The legal reasoning of ICSID tribunals – an empirical analysis', *European Journal of International Law* 19(2) (2008), 301–64 at 314.

means of interpretation set forth at Article 32 of the VCLT, chiefly the preparatory works of the treaty and the circumstances of its conclusion.

If the primary rules of interpretation focus on the text, context, and object and purpose of a given treaty, one may assume that, by definition, the interpretation of each treaty will be individualised.[5] An additional factor of individualisation in treaty interpretation is that for each dispute a single arbitral tribunal is constituted ad hoc, with a degree of discretion in the interpretation exercise. In this context, why is consistency expected? Such an expectation seems to stem from the fact that different arbitral tribunals employ the same interpretative tools to interpret the same or similarly drafted substantive rules. Can there be an objective and right interpretation in every instance?

In addition to the substantive framework of the interpretation rules imposed by international law, the structural framework imposed by arbitration law also accounts for the varying (and some would say inconsistent) interpretation of similar or similarly drafted provisions in investment treaties.

II. The structural framework imposed by arbitration law: a decentralised system

Today the regime of international investment law consists of more than 3,000 international investment agreements, by far the greatest portion of which are bilateral investment treaties (BITs) concluded between two states and binding only on those states.

Each investor–state dispute arising out of a BIT or a multilateral investment agreement is decided by a different arbitral tribunal specifically constituted for the purpose of settling that particular dispute and composed of jurists coming from different legal cultures. While most BITs have very similar procedural and substantive provisions, an arbitral tribunal's interpretation of those provisions is binding only on the parties to

[5] The use of the VCLT's interpretation tools in the case of similar or similarly worded provisions may yield different results as a result of difference in context, object and purpose, preparatory works or subsequent party agreements or practice in the application of the respective treaties: see *Methanex Corporation* v. *United States of America* (Final Award under North American Free Trade Agreement (NAFTA) and United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules), 3 August 2005, para. 16 (citing the holding of the International Tribunal for the Law of the Sea (ITLOS) in the *Mox Plant Case*).

the dispute and only in respect of the particular case.[6] Thus, each arbitral tribunal engages in a one-off interpretation with no precedential value other than for the parties.

This is an inherent quality of the regime, much like that of the ICJ as set out in Article 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.' And while the ICJ is not bound by its own previous decisions, it often relies on and refers to them, seeking good cause when it is asked to do otherwise. As the ICJ noted in *Case Concerning Land and Maritime Boundary between Cameroon and Nigeria*:

> It is true that, in accordance with Article 59, the Court's judgments bind only the parties to and in respect of a particular case. There can be no question of holding Nigeria to decisions reached by the Court in previous cases. The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases.[7]

In investment arbitration, arbitral tribunals cannot search in their own jurisprudence for a previous interpretation of the same or a similarly drafted provision. An investment treaty tribunal has no previous jurisprudence of its own. However, despite the absence of a system of precedent in international arbitration,[8] the decisions of arbitral tribunals are replete with references to previous decisions of other arbitral tribunals. As the *El Paso* v. *Argentina* Tribunal noted, for example:

> It is, nonetheless, a reasonable assumption that international arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by other arbitration organs, especially those set by other international tribunals.[9]

[6] See, for example, NAFTA Article 1136(1) ('An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case'). See also *AES Corporation* v. *the Argentine Republic* (Decision on Jurisdiction), ICSID Case No. ARB/02/17, 26 April 2005, para. 23 (holding that a decision by an ICSID tribunal is only binding on the parties to the dispute and that there is no rule of precedent that applies in the ICSID system).

[7] *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon* v. *Nigeria*), Preliminary Objections (*Nigeria* v. *Cameroon*), Judgment, ICJ Reports 1999, p. 31, para. 28.

[8] On this question generally, see Y. Banifatemi (ed.), 'Precedent in International Arbitration', *IAI Series on International Arbitration No. 5* (Huntington: Juris Publishing, 2008).

[9] *El Paso Energy International Company* v. *the Argentine Republic* (Decision on Jurisdiction), ICSID Case No. ARB/03/15, 26 April 2007, para. 39. See also decisions referred to below under section D.III.

The structural framework of the international investment regime is thus marked by *a multiplicity of treaties*, which, while containing similar standards, or sometimes similarly drafted provisions, vary in wording; and *a multiplicity of arbitral tribunals*, constituted only for a specific case and whose decisions do not constitute a precedent, neither vis-à-vis subsequent decisions rendered pursuant to the same treaty nor vis-à-vis subsequent decisions rendered pursuant to a similar treaty. Importantly, there exists no standing judicial body of a higher instance to review the decisions of arbitral tribunals, and which, if need be, could harmonise the interpretation of investment treaty provisions or bring consistency to the body of international investment jurisprudence. There is no hierarchy of courts in international arbitration. In the ICSID system, arbitral awards are reviewed by ad hoc committees with limited review powers and which, like arbitral tribunals, are constituted only for the specific case at hand. Nor does such a higher instance exist outside the ICSID system, where limited review takes place before domestic courts.

The result, to borrow from James Crawford (in turn quoting Lord Tennyson), is that decisions in investor–state disputes are a true 'wilderness of single instances'.[10] It is perhaps a wilderness of single instances that are not unaware of each other.

It is only within this dual framework that one may raise the question of whether consistency and predictability may be achieved, or are even desirable.

C. Consistency and inconsistency in context

To better understand to what extent consistency may be achieved in the interpretation of investment treaties, it may be useful to review certain instances in which different tribunals have interpreted the same provision of the same treaty (section I below) and similarly drafted provisions or similar treaty mechanisms in different treaties (section II below).

I. Interpretation of the provisions of the same treaty by different tribunals: is consistency required?

With the conclusion of multilateral investment treaties such as the North American Free Trade Agreement (NAFTA), the Energy Charter

[10] J. Crawford, 'Similarity of Issues in Disputes Arising under the Same or Similarly Drafted Investment Treaties' in *IAI Series on International Arbitration* No. 5; Banifatemi, 'Precedent in International Arbitration', 99.

Treaty (ECT) and the Dominican Republic–Central America Free Trade Agreement (DR–CAFTA), the opportunities for different arbitral tribunals to provide their own interpretation of the same provision of the same treaty have increased. Article 17(1) of the ECT is an example.

In the case of BITs, those opportunities are understandably fewer, although certainly not non-existent, as the decisions by tribunals applying the same treaty provisions in cases with 'repeat' players, such as Argentina, amply show. Article XI of the United States–Argentina BIT provides an example.

Each example will be examined in turn.

1. Denial of Benefits

To date, four tribunals constituted under the ECT have tackled the 'Denial of Benefits' clause contained at Article 17(1). Significantly, when they have had to interpret the provision, all tribunals have provided a consistent interpretation.[11] One of these tribunals – *Petrobart* – did not in fact interpret this provision.

Article 17(1) ECT reads:

> Each Contracting Party reserves the right to deny the advantages of this Part [Part III] to:
>
> (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized ...;

In the cases where this provision came into play, the interpretative issues were: (i) whether under Article 17(1), Contracting Parties can only deny to investors the advantages of Part III of the ECT (the substantive investment protections) or whether they can also do so with respect to the advantages of Article 26 of Part V (the right to bring a dispute to arbitration); (ii) whether Article 17(1) operates as an automatic denial of certain treaty benefits when its conditions are met, or whether a Contracting Party must in fact exercise that right; (iii) whether the exercise of the right under Article 17(1) has prospective or retrospective effect; (iv) what a 'third state' for the purposes of Article 17(1) is; and (v) who bears the burden of establishing that an investor is 'own[ed]' or 'control[led]' by nationals or citizens of a third state.

[11] These are the *AMTO*, *Plama*, *Petrobart* and *Yukos*-related tribunals. For the purposes of this discussion the tribunals constituted in each of the three *Yukos*-related arbitrations are considered to be a single tribunal.

The tribunals that tackled the first four issues converged in deciding that: (i) Contracting Parties can only deny to investors the advantages of Part III of the ECT and not the advantages of Article 26 of Part V; (ii) Article 17(1) confers a reservation of right to the Contracting Parties, and such a right must be expressly exercised; (iii) an exercise of the right to deny benefits can only have prospective effect and not retrospective effect; and (iv) a 'third state' for the purposes of Article 17(1) is a state that is not a Contracting Party to the ECT.

For example, on the first issue, the tribunal constituted in the *Yukos*-related arbitrations referred explicitly to the holding in *Plama* and agreed:

> 440. However, insofar as those arguments are deemed to address the question of whether the Tribunal has jurisdiction to pass upon the merits of the claims of Claimant, they are not on point. That is because Article 17 specifies – as does the title of that Article – that it concerns denial of the advantages of 'this Part,' *i.e.*, Part III of the ECT. Provision for dispute settlement under the ECT is not found in 'this Part' but in Part V of the Treaty. Whether or not Claimant is entitled to the advantages of Part III is a question not of jurisdiction but of the merits. Since Article 17 relates not to the ECT as a whole, or to Part V, but exclusively to Part III, its interpretation for that reason cannot determine whether the Tribunal has jurisdiction to entertain the claims of Claimant.
>
> 441. The holding of the tribunal in *Plama* v. *Bulgaria* is on point:
>
> Article 26 provides a procedural remedy for a covered investor's claims; and it is not physically or juridically part of the ECT's substantive advantages enjoyed by that investor under Part III ... This limited exclusion from Part III for a covered investor, dependent on certain specific criteria, requires a procedure to resolve a dispute as to whether that exclusion applies in any particular case; and the object and purpose of the ECT, in the Tribunal's view, clearly requires Article 26 to be unaffected by the operation of Article 17(1).
>
> 442. This Tribunal finds the reasoning of the *Plama* tribunal on this point convincing and adopts it.[12]

On burden of proof, two tribunals diverged. The *Plama* Tribunal held that the burden of establishing ownership or control by a citizen or national of a third state falls on the claimant.[13] The *AMTO* Tribunal held that,

[12] *Hulley Enterprises Limited* v. *The Russian Federation* (Interim Award on Jurisdiction and Admissibility), Permanent Court of Arbitration (PCA) Case No. 225, 30 November 2009, paras. 440–442 (internal footnotes omitted).

[13] *Plama Consortium Limited* v. *Bulgaria* (Decision on Jurisdiction), ICSID Case No. ARB/03/24, 8 February 2005, para. 82.

following the *onus probandi actori incumbit* maxim, the burden of proof rests on the party advancing the allegation, which in the case of Article 17(1) was the respondent state.[14]

Bearing in mind that the last of these issues is not strictly a matter of interpreting the provision, but one of appropriate allocation of burden of proof, it is noteworthy that the existing case law on Article 17(1) ECT is a clear example of consistency. It remains to be seen if the identical interpretation achieved by the various ECT tribunals will be preserved.[15] Presumably, as the decisions of arbitral tribunals do not bind subsequent tribunals, future encounters with Article 17(1) may lead to divergent results. At the same time, one may consider that when a similar interpretation in relation to the same provision is achieved over and over again, subsequent tribunals would need compelling reasons to depart from such an interpretation. The unanimous call for consistency would indeed be unheard if this consistent reasoning were to be challenged in the future by the parties in other ECT cases.

2. Article XI of the USA–Argentina BIT

To date, in five cases brought against Argentina in the aftermath of its economic crisis, five tribunals constituted under the USA–Argentina BIT – the *CMS*, *LG&E*, *Enron*, *Sempra* and *Continental Casualty* Tribunals – faced Argentina's defence based on Article XI of that BIT. Article XI of the USA–Argentina BIT reads:

> This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

Essentially, Argentina claimed that Article XI allows it to take the measures of which the investors complained, even if those measures were otherwise inconsistent with the treaty. In their interpretation of this provision, and of the legal issues arising out of it, as well as its application to the facts, the findings of the five tribunals were consistent in relation to certain issues and divergent on others. Four of the five decisions were

[14] *Limited Liability Company AMTO* v. *the Ukraine* (Final Award), Stockholm Chamber of Commerce (SCC) Case No. 080/2005, 26 March 2008, paras. 64–65.

[15] For example, some authors have argued that the exercise of the right to deny benefits could have retrospective effect. See L. A. Mistelis and C. M. Baltag, 'Denial of benefits and Article 17 of the Energy Charter Treaty', *Penn State Law Review* 113 (2009), 1301–21 at 1320–21.

subject to annulment proceedings, with two being eventually annulled specifically in relation to their holdings on Article XI.

The principal issues that arose in relation to the interpretation of Article XI were: (i) whether Article XI is a self-judging clause; (ii) whether economic crises fall within the scope of Article XI; and (iii) whether Article XI precludes the application of the treaty to measures that fall within the scope of that provision or whether Article XI precludes the wrongfulness of such measures, and, in that context, what is the relationship between Article XI and the customary international law defence of necessity.

All five tribunals held that Article XI applies to economic crises, although there was disaccord as to the gravity of the crisis required to trigger the provision, *CMS* seemingly setting a very high threshold – a total collapse of the economy. Similarly, there was unanimity that Article XI is not a self-judging clause.

The third issue, however, gave rise to inconsistent interpretation. The *CMS*, *Enron* and *Sempra* Tribunals – all three chaired by the same president – first examined Argentina's defences under the rules of customary international law on necessity as arguably codified in Article 25 of the International Law Commission (ILC) Articles. All three tribunals held that the economic crisis in Argentina did not meet the high threshold of Article 25 and then cursorily dealt with Article XI of the BIT. After finding that Article XI was not a self-judging provision, the tribunals held that the analysis of the rules of customary international law on necessity applied to or informed the analysis of Article XI and, having already decided the issue previously, did not proceed any further (in *CMS* this was done implicitly). The result of the tribunals' conflating Article XI of the BIT and Article 25 of the ILC Articles was that the former, like the latter, would operate to preclude wrongfulness.

The *LG&E* Tribunal, on the other hand, started its analysis with Article XI, distinguishing it from customary international law and, without extensive legal analysis, decided that the Argentinean crisis met the standard. According to the Tribunal, Article XI excused Argentina from liability for the period of the crisis.[16] In further contrast to the previous decisions, in *Continental Casualty* the Tribunal held that if Article XI were triggered, it would in fact preclude the application of the

[16] *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc.* v. *the Argentine Republic* (Decision on Liability), ICSID Case No. ARB/02/1, 3 October 2006, paras. 226–261.

treaty to those measures falling within the scope of that provision; in other words, if Article XI applied, there would be no breach of the treaty (as opposed to there being an excuse from liability, i.e., a preclusion of wrongfulness).[17]

The *CMS*, *Enron* and *Sempra* awards drew criticism from the ad hoc committees constituted to review them. While the sections on Article XI in the decisions of the *Enron* and *Sempra* Tribunals are strikingly similar, and in bottom-line terms not different from that of the *CMS* decision, the three ad hoc committees adopted three different approaches in their analyses of those decisions. The *CMS* ad hoc committee stated that, given its limited powers of review, it could not find an annullable error in the Tribunal's application of the law (thus there being no manifest excess of powers under Article 52(1)(b) of the ICSID Convention). Yet it went out of its way to note that the Tribunal's interpretation of Article XI was 'erroneous'[18] and that Article XI of the BIT and Article 25 of the ILC Articles adopted different regimes:

> Article XI is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply. By contrast, Article 25 is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations.
>
> Furthermore Article XI and Article 25 are substantively different. The first covers measures necessary for the maintenance of public order or the protection of each Party's own essential security interests, without qualifying such measures. The second subordinates the state of necessity to four conditions. It requires for instance that the action taken 'does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole', a condition which is foreign to Article XI. In other terms the requirements under Article XI are not the same as those under customary international law as codified by Article 25, as the Parties in fact recognized during the hearing before the Committee.[19]

In contrast, the *Enron* ad hoc committee did not make any pronouncements on whether or not the Tribunal had accurately identified the law in relation to Article XI, but found annullable errors. According to the committee, the Tribunal had failed to properly apply customary international

[17] *Continental Casualty Company* v. *the Argentine Republic* (Award), ICSID Case No. ARB/03/9, 5 September 2008, paras. 163–164.

[18] *CMS Gas Transmission Company* v. *the Argentine Republic* (Decision of the ad hoc Committee on the Application for Annulment by the Argentine Republic), ICSID Case No. ARB/01/8, 25 September 2007, paras. 129–136.

[19] *Ibid.*, paras. 129–130.

law and, consequently, treaty law (since the Tribunal's findings in respect of the former were the basis of its findings in respect of the latter).[20]

Finally, the *Sempra* ad hoc committee took yet another view: it decided that, in conflating the analyses required under customary law and treaty law and then proceeding only with the former, the Tribunal had in fact failed to apply the applicable law, namely Article XI, which amounted to a manifest excess of powers within the meaning of Article 52(1)(b) of the ICSID Convention.[21]

Not only did the five tribunals interpret Article XI differently, but the three ad hoc committees took three different approaches to the findings in the three of those awards that followed largely the same analysis. This set of decisions elicited various reactions in the community, commentators hastening to condemn the system on account of what they perceived to be its inherent defect – an important lack of consistency. In that context, Argentina's protests were perhaps understandable, although they were voicing the political challenges Argentina was facing in complying with a decision that awarded more than one hundred million dollars to the investor and in which the ad hoc committee had been found to have erred on the law.[22] Leaving aside the politically charged context of the Argentinean economic crisis, from a purely legal perspective one may find some merit in the fact that the decision reached by the *CMS* Tribunal was not considered to be a precedent and that the varying (or inconsistent) decisions allowed a diverse case law putting into perspective the issues of international law as regards the distinction between Article XI as a clause precluding the application of the substantive obligations under the treaty and rules of customary international law in relation to the exoneration of state responsibility.

II. Interpretation of the same type of substantive protection or treaty mechanism: is consistency desirable?

More frequently, arbitral tribunals are asked to interpret provisions drafted similarly to provisions in other treaties that have already been

[20] *Enron Corporation Ponderosa Assets, L.P* v. *the Argentine Republic* (Decision on the Application for Annulment of the Argentine Republic), ICSID Case No. ARB/01/3, 30 July 2011, paras. 400–405.

[21] *Sempra Energy International* v. *the Argentine Republic* (Decision on the Argentine Republic's Application for Annulment of the Award), ICSID Case No. ARB/02/16, 29 July 2010, paras. 186–228.

[22] W. Burke-White, 'The Argentine financial crisis: state liability under BITs and the legitimacy of the ICSID system', *Asian Journal of WTO & International Health Law and Policy* 3 (2008), 199–234 at footnote 90.

interpreted by other tribunals. In this context, differences in wording, the manner in which parties argue their case, or the varying legal trend or more general context, have led to both convergent and inconsistent interpretation. Three examples are worthy of note: fair and equitable treatment provisions, most-favoured nation (MFN) clauses and umbrella clauses.

1. Fair and equitable treatment

While arbitral tribunals have uniformly recognised that the application of the fair and equitable treatment standard greatly depends on the wording of the relevant provision and on the facts of the specific case, the case law suggests that several 'sub-standards' or 'components' of the fair and equitable treatment standard have emerged.

The determination of the content of the fair and equitable treatment standard by the Tribunal in *Bayindir* v. *Pakistan* illustrates the point. The Tribunal first noted that 'customary international law and decisions of other tribunals may assist in the interpretation of this provision'. This was particularly pertinent in that case 'given that Article 4(2) of the [applicable treaty] simply state[d] a general obligation of fair and equitable treatment'.[23] The Tribunal then agreed with the claimant's identification of 'the different factors which emerge from decisions of investment tribunals as forming part of the FET standard'.[24] Referring to a number of previous decisions, it then enumerated some of these factors:

> the obligation to act transparently and grant due process, to refrain from taking arbitrary or discriminatory measures, from exercising coercion or from frustrating the investor's reasonable expectations with respect to the legal framework affecting the investment.[25]

Another area of convergence in arbitral case law is that bad faith on the part of the host state is not required for a finding of unfair and inequitable treatment. The *Siemens* Tribunal found that it emerged from a review of the case law that:

> except for *Genin*, none of the recent awards under NAFTA and *Tecmed* require bad faith or malicious intention of the recipient State as a necessary element in the failure to treat investment fairly and equitably, and that, to the extent that it has been an issue, the tribunals concur in that customary international law has evolved. More recently in *CMS*, the

[23] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S.* v. *Islamic Republic of Pakistan* (Award), ICSID Case No. ARB/03/29, 27 August 2009, para. 176.

[24] *Ibid.*, para. 178.

[25] *Ibid.* (footnotes omitted). See also *Biwater Gauff (Tanzania) Ltd.* v. *United Republic of Tanzania* (Award), ICSID Case No. ARB/05/22, 24 July 2008, para. 602.

> tribunal confirmed the objective nature of this standard 'unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question'. Of course, such intention and bad faith can aggravate the situation but are not an essential element of the standard.[26]

At the same time, possible divergence on some of the remaining issues is to be expected. For example, does the legitimate expectations component of the standard include reasonable reliance on implicit representations made by the host state? Does the standard require proactiveness on the part of the host state vis-à-vis the legal and business environment it accords to investments?[27]

On the whole, the jurisprudence on the fair and equitable standard 'shows a clear progression over time towards more exacting requirements imposed on the host state'.[28] Tribunals have done much to develop the law and have done so largely in agreement, despite (or perhaps because of) the high degree of malleability of the text in fair and equitable treatment provisions.

2. MFN treatment

The interpretation of the standard of MFN treatment, on the other hand, has given rise to a split between tribunals as to whether investors, through the MFN clause of the basic treaty, can avail themselves of the more favourable dispute resolution mechanisms contained in third-party treaties.

Two approaches have essentially emerged on this question: the *Maffezini* and the *Plama* approaches, although a closer look at these decisions shows that the two are not irreconcilable.[29] In *Maffezzini*, the Tribunal decided that the MFN treatment could extend to the dispute

[26] *Siemens A.G.* v. *Argentina* (Award), ICSID Case No. ARB/02/8), 6 February 2007, para. 299.

[27] See, for example, *MTD Equity Sdn Bhd. & MTD Chile S.A.* v. *Republic of Chile* (Decision on Annulment), ICSID Case No. ARB/01/7, 21 March 2007, paras. 65–71 (agreeing with some criticisms of the *Tecmed* Tribunal's interpretation of the fair and equitable treatment standard as requiring that the state pursue a variety of proactive measures and noting that 'the extent to which a State is obliged under the fair and equitable treatment standard to be pro-active is open to debate').

[28] G. Kaufman-Kohler, 'Arbitral precedent: dream, necessity or reality', *Arbitration International* 23(3) (2007), 357–78 at 372 (referring to the findings of a study by Professor C. Schreuer).

[29] See Y. Banifatemi, 'The Emerging Jurisprudence of the Most-Favored-Nation Treatment in Investment Arbitration' in A. Bjorklund, I. A. Laird and S. Ripinsky (eds.), *Investment Treaty Law: Current Issues III* (London: British Institute of International and Comparative Law (BIICL), 2009).

resolution mechanism, allowing the investor to circumvent the 18-month negotiation period, unless there exist 'policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question'.[30] The *Plama* Tribunal held that, unless the parties to a treaty specifically agreed that the MFN provision may extend to dispute resolution mechanisms, investors could benefit only from the more favourable substantive protections in other treaties.[31]

Thereafter, tribunals seem to have broadly followed one approach or the other, including in cases where investors have relied on the MFN provision in the basic treaty to benefit from the broader arbitration provision in a third treaty when the dispute resolution clause of the basic treaty is limited to the determination of the amount or mode of compensation in the event of an expropriation. An analysis of the case law shows that the divide is more specifically on the question whether the concept of 'treatment' includes access to arbitration, that is whether dispute resolution arrangements constitute a 'substantive' right that benefits from the MFN treatment or if it is a 'procedural' right excluded from such benefit.

The Tribunal in *Wintershall*, after reviewing what it termed 'a welter of inconsistent and confusing *dicta* of different tribunals, ("case-law")',[32] sided with *Plama* and its progeny to reject the applicability of the MFN clause to dispute settlement provisions.[33] Interestingly, a prior decision in *Siemens* based on the same treaty – a decision the *Wintershall* Tribunal was not only aware of, but which it explicitly analysed – had reached the opposite result.[34]

On the other hand, in *Renta 4* the Tribunal noted that an appraisal of the numerous decisions regarding the MFN treatment revealed that 'a *jurisprudence constante* of general applicability is not firmly established. It remains necessary to proceed BIT by BIT.'[35] While it considered that 'there is no ... legal rule to say that "treatment" does not encompass the

[30] *Emilio Agustín Maffezini* v. *Spain* (Decision on Objections to Jurisdiction), ICSID Case No. ARB/97/7, 25 January 2000, para. 62.

[31] *Plama Consortium Limited* v. *Bulgaria* (Decision on Jurisdiction), ICSID Case No. ARB/03/24, 8 February 2005, paras. 183–227.

[32] *Wintershall Aktiengesellschaft* v. *the Argentine Republic* (Award), ICSID Case No. ARB/04/14, 8 November 2008, para. 189.

[33] *Ibid.*, paras. 160–196.

[34] *Siemens A.G.* v. *Argentina* (Decision on Jurisdiction), ICSID Case No. ARB/02/8, 3 August 2004, paras. 102–103.

[35] *Renta 4 S.V.S.A et al.* v. *Russian Federation* (Award on Preliminary Objections), SCC Case No. 24/2007, 20 March 2009, para. 94.

host state's acceptance to international arbitration',[36] it found that by its terms the MFN treatment in that particular basic treaty did not extend to dispute settlement but was limited to fair and equitable treatment.

Going a step further on the basis of the broad formulation of the MFN clause at hand, the majority in *Impregilo* found that the term 'treatment' would be 'in itself wide enough to be applicable also to procedural matters such as dispute settlement'.[37] The majority reviewed the case law on the issue of whether MFN extended to dispute settlement and noted that it must 'attach special weight to the wording of the MFN clause, which extends its scope to "all other matters regulated by this Agreement"'.[38] It noted that in *Berschader*, the Tribunal had found that, 'despite the fact that the MFN clause covered "all matters", this [was] insufficient to make the clause applicable to dispute settlement'.[39] The majority concluded that it was:

> unfortunate if the assessment of these issues would in each case be dependent on the personal opinions of individual arbitrators. The best way to avoid such a result is to make the determination on the basis of case law whenever a clear case law can be discerned. It is true that, as stated above, the jurisprudence regarding the application of MFN clauses to settlement of disputes provisions is not fully consistent. Nevertheless, in cases where the MFN clause has referred to 'all matters' or 'any matter' regulated in the BIT, there has been near-unanimity in finding that the clause covered the dispute settlement rules. On this basis, the majority of the Tribunal reaches the conclusion that Impregilo is entitled to rely, in this respect, on the dispute settlement rules in the Argentina–US BIT and that the case cannot be dismissed for non-observance of the requirements in Article 8(2) and (3) of the Argentina–Italy BIT.[40]

[36] *Ibid.*, para. 101.

[37] *Impregilo S.p.A.* v. *Argentine Republic* (Award), ICSID Case No. ARB/07/17, 21 June 2011, para. 99. For a contrary view, in a situation in which the BIT did not cover 'all matters' and where the Tribunal found that 'treatment' as used in that BIT did not apply to dispute settlement, see *ICS Inspection and Control Services Limited (United Kingdom)* v. *The Republic of Argentina* (Award on Jurisdiction), PCA Case No. 2010–9, 10 February 2012.

[38] *Impregilo S.p.A.* v. *Argentine Republic* (Award), ICSID Case No. ARB/07/17, 21 June 2011, paras. 103–107.

[39] *Ibid.* para. 106.

[40] *Ibid.*, para. 108. Arbitrator Stern took exception to the majority's views and submitted a dissenting opinion 'to try to explain why, in principle, an MFN clause cannot import, in part or in toto, a dispute settlement mechanism from a third party BIT into the BIT which is the basic treaty applicable to the dispute'. She argued that an MFN clause could only apply to 'the rights that an investor can enjoy' and not to 'the fundamental conditions for the enjoyment of such rights, in other words, the insuperable conditions of access to the rights granted in the BIT', such as the requirement to attempt to have the case settled in

In light of this diverging case law and the strong views expressed in the various awards and dissenting opinions, one may wonder whether the debate merely reflects a technical divergence as regards the interpretation of the word 'treatment' or if, in reality, what is at stake is the views one may have as to the degree of protection that ought to be recognised for the investors in investment treaties and investment arbitration. In other words, the divergence in the case law on the effect of MFN clauses may more easily illustrate arbitral or doctrinal activism than difficulties in the textual interpretation of the relevant provisions.

3. Umbrella clauses

The effect of umbrella clauses has given rise to even more diverse interpretations. The split between the *SGS* v. *Pakistan* and the *SGS* v. *Philippines* Tribunals on the issue of whether, through the operation of an umbrella clause, arbitral tribunals may rule on breaches of contract as breaches of a treaty, is well known: the former denied that an umbrella clause may have that effect, restricting its application to exceptional circumstances only,[41] while the latter held that the host state's failure to observe 'binding commitments, including contractual commitments' would be in breach of the umbrella clause, and thus a breach of the treaty.[42]

Thereafter, a third and more restrictive approach emerged. After reviewing the prior case law, the *El Paso* Tribunal took the findings in *SGS* v. *Pakistan* as a basis, adding that an umbrella clause will only apply to contractual commitments into which the host state itself has entered in its sovereign capacity.[43] The Tribunal found support in the treaty's definition of an investment dispute, which included disputes relating to 'investment agreements' or 'investment authorizations', which, the Tribunal opined, was what the umbrella was referring to.[44] Another example is provided by the *BIVAC* decision. The Tribunal in that case noted that the *SGS* cases were 'irreconcilable' and decided to follow the reasoning of the *SGS* v. *Philippines* Tribunal. Curiously, even after it had found the two cases

the local courts for eighteen months: Concurring and Dissenting Opinion of Professor B. Stern, 21 June 2011, para. 16 and para. 47.

[41] *SGS Société Générale de Surveillance S.A.* v. *Islamic Republic of Pakistan* (Decision on Jurisdiction), ICSID Case No. ARB/01/13, 6 August 2003, paras. 163–174.

[42] *SGS Société Générale de Surveillance S.A.* v. *Republic of the Philippines* (Decision on Jurisdiction), ICSID Case No. ARB/02/6, 29 January 2004, paras. 113–129.

[43] *El Paso Energy International Company* v. *The Argentine Republic* (Decision on Jurisdiction), ICSID Case No. ARB/03/15, 27 April 2006, paras. 70–82.

[44] *Ibid.*, para. 81.

irreconcilable and followed *SGS* v. *Philippines*, the Tribunal in *BIVAC* attempted to distinguish the matter at hand from *SGS* v. *Pakistan* on the basis of the location of the umbrella clause in the treaty.[45]

Disagreement also exists as to whether, in a situation where the contract has been concluded by a legal entity separate from the host state, the lack of privity between the state and the investor (or the investment) operates to automatically defeat the claim under the umbrella clause, or if the customary rules of international law on attribution ought to be applied. The *Hamester* decision illustrates the divide in the case law while also providing an example where no attempt has been made to distinguish the two lines of cases. In that case, the Tribunal followed several decisions supporting that privity of contract is required. Noting the contrary view and maintaining its opposition without further analysis, the Tribunal held that even if the rules on attribution were to be applied, in that particular case the entity's execution of the contract was not attributable to the state.[46]

Today the state of the law on umbrella clauses is nothing less than scattered. Here too, in the same way as the effect of MFN clauses, the divergence is not simply a textual one in relation to the different texts whose interpretation has been provided; there are also clear divergences in opinion on the level of protection (or, conversely, level of responsibility for the host state) that investment treaties should ensure. As the *BIVAC* Tribunal noted:

> We recognise in particular that there is no *jurisprudence constante* on the effect of umbrella clauses, that the subject is one on which legal opinion is divided, that the relationship between commercial and sovereign acts of government is not free from difficulty, and that each particular clause falls to be interpreted and applied according to its precise wording and the context in which it is included in a BIT.[47]

It is therefore not surprising that issues such as the effect of an MFN clause or the effect of an umbrella clause have been at the heart of the recent debates in investment arbitration. These are the questions that

[45] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V.* v. *Republic of Paraguay* (Decision of the Tribunal on Objections to Jurisdiction), ICSID Case No. ARB/07/9, 29 May 2009, paras. 134–142.

[46] *Gustav F W Hamester GmbH & Co KG* v. *Republic of Ghana* (Award), ICSID Case No. ARB/07/24, 18 June 2010, paras. 342–348.

[47] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V.* v. *Republic of Paraguay* (Decision of the Tribunal on Objections to Jurisdiction), ICSID Case No. ARB/07/9, 29 May 2009, para. 141.

crystallise most effectively, in reference to state consent, the question of what limits, if any, should be assigned to the jurisdiction of arbitral tribunals in investment arbitration. Leaving aside doctrinal debates, however, and focusing on arbitral decisions as the sole determining element, the question is whether consistency in arbitral case law is achievable at all.

D. Achieving greater consistency: myth and reality

Various alternatives have been advanced in practice to promote greater consistency in investment arbitration:

- a centralised treaty interpretation mechanism (section I below);
- authentic treaty interpretation by the contracting parties to the treaty (section II below); and
- the development of a *jurisprudence constante* in investment treaty arbitration (section III below).

A closer look at these alternatives shows that, in reality, systemic consistency may not always be achievable or even desirable.

I. Centralised treaty interpretation: is it achievable or desirable?

One of the proposals aimed at promoting greater consistency in investment arbitration is the introduction of a centralised or institutionalised treaty interpretation mechanism. Examples include a model following the Free Trade Commission (FTC) of the NAFTA, the introduction of an appellate body and proposals for an evolving role to be played by the ICSID's ad hoc committees.

1. The NAFTA's FTC

The NAFTA's principal institution in charge, inter alia, of the application of the agreement is the FTC, a body comprising cabinet-level representatives of the NAFTA's contracting parties. The FTC also 'resolve[s] disputes that may arise regarding [the NAFTA's] interpretation or application' (Article 2001(2)(c)).

The FTC's interpretation of the treaty is binding on NAFTA tribunals (Article 1131(2)). In entrusting the FTC with authoritative interpretation of the treaty, the NAFTA contracting parties have arguably created a mechanism through which they can more conveniently control the development of the law in relation to that treaty.

An FTC-like mechanism may prove to be a powerful tool in achieving consistency – in line with the parties' intent – in the case law on a specific treaty. If at all achievable, the introduction of such a mechanism by parties contracting to a treaty could be more easily conceived in the multilateral than the bilateral setting. Arguably, it could conclusively resolve inconsistencies in the case law by binding prospective tribunals to a certain interpretation of a treaty.

However, the experience with the NAFTA's FTC has not been without controversy. In 2001, at a time when in at least one arbitration proceeding claims under Article 1105 (minimum standard of treatment) of the NAFTA were pending, the FTC issued an interpretation in which it provided an authoritative interpretation of that provision.[48] This interpretation caused an upheaval in the NAFTA community. In this respect, the opinion expressed by Sir Robert Jennings in the *Methanex* arbitration is worthy of mention as regards the propriety of an interpretation for purposes of a pending proceeding:

> It would be wrong to discuss these three-party 'interpretations' of what have become key words of this arbitration, without protesting the impropriety of the three governments making such an intervention well into the process of arbitration, not only after the benefit of seeing the written pleadings of the parties but also virtually prompted by them. In the present case, without asking for leave, one of the actual Parties to the arbitration has quite evidently organized a démarche intended to apply pressure on the tribunal to find in a certain direction by amending the treaty to curtail investor protections. This is surely against the most elementary rules of due process of justice.[49]

Sir Robert's words illustrate the difficulties arising out of an institutionalised interpretation in the context of pending proceedings when the outcome of the proceedings could be determined by that interpretation. At the same time, should this avenue be adopted in relation to specific treaties, it may not be realistic, given the proliferation of disputes in practice, to require that such interpretations be precluded while the cases in which the provision subject to interpretation is operative are pending. In addition, an interpretation provided by the contracting parties may be

[48] See Notes of Interpretation of Certain Chapter 11 Provisions (NAFTA Free Trade Commission, 31 July 2001), available at: www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en&view=d).

[49] *Methanex Corporation* v. *United States of America* (Second Opinion of Sir Robert Jennings), Arbitration under NAFTA and UNCITRAL Arbitration Rules, Q.C., 6 September 2001, 4–5.

relevant to the intention of those parties at the time when they entered into the treaty, provided, however, that certain procedural and due process safeguards are put in place to preserve the rights of all parties, including those of the investor.

2. The introduction of an appellate body

The establishment of an appellate body is an option advocated by some but mistrusted or even flatly dismissed by others. Having entertained the idea in 2004, when it considered amending its rules, the ICSID ended up not pursuing this option further.[50]

At first sight, a permanent appellate body composed of eminent jurists in the field could presumably serve to bring more consistency and predictability. The main criticism, however, is that this would almost inevitably turn investment treaty arbitration into a permanent two-tier process, much like that of the World Trade Organization (WTO), countering the essence of arbitration – finality of the award.[51]

In addition, there is no guarantee that an appellate body would always render decisions that are correct as a matter of law or are not subject to criticism. This is all the more so given that the structural framework of arbitration law would essentially remain unchanged, namely that the appellate body would provide interpretations in relation to different treaties in different cases, as opposed to a single repeat instrument, such as the WTO instruments. The question is then what the purpose and function of an appellate body is supposed to be: to provide the 'correct' interpretation of the law (even if the case law in its majority goes in a different direction), or to achieve a definitive response on debated issues when there is a split in the case law? Hardly any particulars have been provided on these difficult questions by those who advocate the creation of an appellate mechanism in investment arbitration. The same holds true for the practical impediments to the creation of an appellate body, which are overwhelming given the structure of the system as it stands, namely a decentralised system based essentially on a network of countless treaties setting bilateral relations and providing for the resolution of disputes by individual tribunals constituted for each individual dispute.

[50] See ICSID Secretariat, 'Possible Improvements of the Framework for ICSID Arbitration', Discussion Paper, American Society of International Law – Proceedings of the 103rd Annual ASIL Meeting, 22 October 2004, available at: https://icsid.worldbank.org.

[51] See Y. Banifatemi, 'Mapping the Future of Investment Treaty Arbitration as a System of Law – Remarks', American Society of International Law – Proceedings of the 103rd Annual ASIL Meeting (2010), 323.

3. Can there be a control function for ICSID ad hoc committees?

Lastly, commentators have looked into the possibility of having ICSID ad hoc committees play a role in the harmonisation of international investment law.[52]

Should ad hoc committees help harmonise international investment law? For example, was the *CMS* ad hoc committee correct to 'clarify certain points of substance on which, in its view, the Tribunal had made manifest errors of law'?[53] Arguably, the decision of the Tribunal in *Continental Casualty*, rendered after the *CMS* annulment decision, explicitly followed the approach preferred by the *CMS* ad hoc committee. However, is the role of an ad hoc committee to provide guidance for future tribunals in relation to questions of law, as also professed by the *CMS* ad hoc committee, or is it to exercise its review of the award in light of the limited and strict grounds provided at Article 52 of the Washington Convention?[54]

Alternatively, should ICSID appoint the same ad hoc committee members from a small pool of international law experts who will (explicitly or implicitly) be entrusted with the function of controlling the developments in the law and, accordingly, its consistency? Three limitations exist in this respect. First, the powers of the ad hoc committee members are too limited to perform such a function. Second, even if these bodies had broader competencies, the ad hoc nature of their decisions and the lack of precedent in the system are likely to lead to the same splits in jurisprudence as is the case for arbitral tribunals. The approach adopted by the ad hoc committees in the *CMS*, *Enron* and *Sempra* cases more than hint at this outcome. Finally, a number of investment treaty decisions are rendered outside the ICSID system, for which there is no equivalent review

[52] See C. Knahr, 'Annulment and its Role in the Context of Conflicting Awards' in M. Waibel, A. Kaushal, K.-H. L. Chung and C. Balchin (eds.), *The Backlash Against Investment Arbitration* (Alphen aan den Rijn: Kluwer Law International, 2010); M. Reisman, 'Reflections on the Control Mechanism of the ICSID' in E. Gaillard (ed.), *IAI Series on International Arbitration No. 6: The Review of International Arbitral Awards* (Huntington: Juris Publishing, 2010).

[53] *CMS Gas Transmission Company* v. *the Argentine Republic* (Decision of the *ad hoc* Committee on the Application for Annulment by the Argentine Republic), ICSID Case No. ARB/01/8, 25 September 2007, para. 45.

[54] For a critical view, see Y. Banifatemi 'Defending Investment Treaty Awards: Is There an ICSID Advantage?' in A. J. van den Berg (ed.), *50 Years of the New York Convention, ICCA Congress Series No. 14* (Dublin: Kluwer Law International, 2009). See also Reisman, 'Reflections on the Control Mechanism of the ICSID System'.

mechanism, and, consequently, about whose potential inconsistency the ICSID's ad hoc committees will be powerless to do anything.

II. Authentic treaty interpretation by contracting states: is it achievable or desirable?

Authentic treaty interpretation by the contracting parties to a treaty may be viewed as both a legitimate and a more practicable mechanism to achieve consistency in investment treaty interpretation. Two methods exist in this respect: recourse to the *travaux préparatoires* of a treaty, and the possible intervention of the investor's home state in the course of arbitration proceedings to provide its interpretation of the treaty under review.

1. Resorting to a treaty's drafting history

The drafting history of a treaty, when available, may provide a useful tool to the parties in relation to the interpretation of specific treaty provisions. In fact, the *travaux préparatoires* are more often than not referred to by the parties. As the *Malaysian Salvors* ad hoc committee stated:

> Courts and tribunals interpreting treaties regularly review the *travaux préparatoires* whenever they are brought to their attention; it is mythological to pretend that they do so only when they first conclude that the term requiring interpretation is ambiguous or obscure.[55]

This is especially true as regards the negotiating history of the Washington Convention, which is widely referred to by parties and tribunals alike.[56]

However, it must not be overlooked that the *travaux préparatoires* are a supplementary means of treaty interpretation and can only be resorted to if the conditions in Article 32 of the VCLT are met. In other words, there will be no need to venture beyond the primary rule of treaty interpretation in Article 31. In this respect, for example, the Tribunal in the *Yukos*-related arbitrations found no need to venture into the drafting history

[55] *Malaysian Historical Salvors, SDN, BHD* v. *The Government of Malaysia* (Decision on the Application for Annulment), ICSID Case No. ARB/05/10, 16 April 2009, para. 57. For a contrary view, see W. M. Reisman and M. H. Arsanjani, 'Interpreting treaties for the benefit of third parties: the "salvors' doctrine" and the use of legislative history in investment treaties', *American Journal of International Law* 104 (2010), 597–604.

[56] C. Schreuer, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration' in M. Fitzmaurice, O. Elias and P. Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Leiden: Martinus Nijhoff, 2010), p. 138.

of the ECT in relation to the interpretation of Article 45 of the treaty on provisional application:

> The Tribunal does not consider that its interpretation of Article 45 resulting from the application of the general rule of interpretation leads to a result which is manifestly absurd or unreasonable. Nor has the Tribunal found that its interpretation of Article 45 according to Article 31 of the VCLT 'leaves the meaning ambiguous or obscure'; quite the contrary. The Tribunal recognizes that, in practice, tribunals and other treaty interpreters may consider the *travaux préparatoires* whenever they are pleaded, whether or not the text is ambiguous or obscure or leads to a manifestly absurd or unreasonable result.[57]

Leaving aside the conditions in which the negotiating history of a treaty may be resorted to, it remains true that, where the negotiating history of a treaty is available, it may provide useful assistance to the tribunals in their interpretation task. However, three factors should be kept in mind. First, BITs rarely have published or even recorded workable *travaux préparatoires*.[58] Second, in the case of multilateral treaties, the treaty interpreters may be confronted with a bottomless record of unilateral statements evidencing the preference of one party, as opposed to the intent of all parties. In such cases, the negotiating history may be particularly informative when it reveals the position of a respondent state: even if the positions specifically taken by that state do not reflect the common intention of the drafting parties, it may reflect at the very least the intention of that particular state and be relevant to the tribunal when the position of that state is precisely what is at stake. The third factor is the tribunals' discretion to determine the evidentiary value of the evidence before them, and therefore to assess and determine the weight to be given to individual evidence related to the negotiating history of a treaty.

More generally, when the negotiating history sheds light on the meaning to be given to a specific provision, it is stating the obvious that the resulting interpretation will relate only to the treaty at hand. In other words, any consistency achieved through the negotiating history of a treaty, especially in the case of multilateral treaties, will bring about consistency in relation to that treaty only; it will not lead to systemic consistency, even

[57] *Hulley Enterprises Limited* v. *The Russian Federation* (Interim Award on Jurisdiction and Admissibility), PCA Case No. 225, 30 November 2009, para. 268.

[58] This was the case in the *Aguas del Tunari, S.A.* v. *Bolivia* arbitration. See *Aguas del Tunari, S.A.* v. *Bolivia* (Decision on Jurisdiction), ICSID Case No. ARB/02/3, 21 October 2005, para. 274.

if the provision being interpreted has a wording similar to that of a different treaty.

2. Intervention of the home state as *amicus curiae*

In addition to the drafting history of a treaty, another tool may be considered for the purposes of harmonised interpretation, particularly in the context of BITs, namely the juxtaposition of the contracting parties' views on the interpretation of a treaty in the course of a dispute.

Thus, when a respondent state offers its views on the manner in which a BIT provision ought to be construed, particularly when in doing so it resorts to its own materials evidencing the contracting parties' intent in relation to that provision, the tribunal may consider offering the investor's home state the opportunity to offer the other contracting party's views in the form of an *amicus curiae* brief.[59] This does not mean that the tribunal should be provided with yet another pleading on issues such as the state of the case law or the doctrine on the provision (the parties' pleadings ought to suffice for this purpose), but rather with the authentic view of the home state as to the contracting parties' intention, supported by contemporaneous documentation and/or witness testimony. The home state's views may be of particular significance when the documentation evidencing the intention of the contracting parties is not available to the investor.

This mechanism has been considered by United Nations Commission on International Trade Law (UNCITRAL) in its ongoing works on the formulation of a legal standard on transparency in investment arbitration. In particular, UNCITRAL has specifically looked into the issue of *amicus curiae* briefs provided by the investor's home state on issues of treaty interpretation. As highlighted by Working Group II:

> It was observed that two possible types of amicus curiae should be distinguished and perhaps considered differently. The first type could be any third party that would have an interest in contributing to the solution of the dispute. A second type could be another State party to the investment treaty at issue that was not a party to the dispute. It was noted that such State often had important information to provide, such as information on *travaux préparatoires*, thus preventing one-sided treaty interpretation.

[59] In that sense, the proposed mechanism is not unlike that provided for in Article 63 of the ICJ Statute, which in paragraph 1 provides that '[w]henever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith' and in paragraph 2 that '[e]very state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it'.

> In response, it was said that an intervention by a non-disputing State, of which the investor was a national, could raise issues of diplomatic protection and was to be given careful consideration. It was suggested that third parties who could contribute to the resolution of the dispute could be identified and invited by the arbitral tribunal to assist it. The home State of the investor could be one such third party.[60]
>
> At the fifty-third session of the Working Group, it was observed that a State Party to the investment treaty that was not a party to the dispute could also wish, be invited, or have a treaty right to make submissions. It was noted that such State(s) often had important information to provide, such as information on the travaux préparatoires, thus preventing one-sided treaty interpretation (A/CN.9/712, para. 49).[61]

The existence of such a mechanism, in particular if it is given as a power to the arbitral tribunal on its own motion, may prevent situations similar to that which arose in *SGS* v. *Pakistan* in the aftermath of the decision on jurisdiction in relation to the effect of an umbrella clause. In that case, Switzerland, the investor's home state, wrote to ICSID, noting the Tribunal's decision with 'a great deal of concern' and asking why its view had not been sought during the proceedings. Switzerland further clarified its intention in relation to the umbrella clause at the time of the treaty's conclusion, namely that this type of provision is 'intended to cover commitments that a host state has entered into with regard to specific investments of an investor or investment of a specific investor, which played a significant role in the investor's decision to invest or to substantially change an existing investment'.[62] However, by then Switzerland's intervention could achieve nothing more than airing the state's disgruntlement at the decision, whereas an intervention in the course of the proceedings may have shed some light on the Tribunal's consideration of the meaning and *raison d'être* of the umbrella clause in the Switzerland–Pakistan BIT.

[60] UNCITRAL, Forty-Fourth Session, 'Report of Working Group II (Arbitration and Conciliation) on the Work of its Fifty-third Session (Vienna, 4–8 October 2010)', UN Doc. A/CN.9/712, para. 49.

[61] UNCITRAL, Forty-Fourth Session, 'Report of Working Group II (Arbitration and Conciliation) on the Work of its Fifty-fifth Session (Vienna, 3–7 October 2011)', UN Doc. A/CN.9/736, para. 78.

[62] Note on the Interpretation of Article 11 of the BIT between Switzerland and Pakistan in the light of the Decision of the Tribunal on Objections to Jurisdiction of ICSID in Case No. ARB/01/13 *SGS Société Générale de Surveillance S.A.* v. *Islamic Republic of Pakistan*, attached to the Letter of the Swiss Secretariat for Economic Affairs to the ICSID Deputy-Secretary General dated 1 October 2003, published in 19 *Mealey's International Arbitration Report* E3 (February 2004).

Thus, the possibility of inviting the investor's home state to air its views in relation to an interpretation unilaterally provided by the host state (also the respondent state in the arbitration) may assist tribunals in determining the common intention of both parties at the time of conclusion of the bilateral treaty in relation to a specific provision whose interpretation is sought. In terms of propriety, this mechanism arguably does not raise the same issues as those raised by Sir Robert Jennings in relation to the interpretation provided by the FTC: the home state's intervention would serve the purpose of providing contemporaneous evidence on the negotiation of the treaty, which by definition is available to the respondent state but not to the investor, and, as highlighted by the works of UNCITRAL, avoiding 'one-sided treaty interpretation'.

Here too, however, the intervention of the investor's home state cannot assist arbitral tribunals beyond the specifics of a particular treaty, and would thus potentially serve to bring consistency in respect of the jurisprudence in relation to a particular BIT only.

III. Arbitral tribunals' reliance on 'precedents': the development of a jurisprudence constante *in investment treaty arbitration*

As already emphasised, the structural design of the system, namely its decentralisation, is an inescapable impediment to systemic consistency. The tools for achieving consistency are thus largely treaty-specific. At the same time, the system is not blind to harmonisation and uniformity. Certain other factors must be taken into account.

The age of the system must not be overlooked: investment arbitration is still in its adolescence. While, since the 1950s, multiple generations of investment arbitrations have succeeded, the case law until the late 1990s was scarce. The beginning of the twenty-first century, however, has witnessed a veritable flood of investment treaty decisions, in parallel with an exponential growth of the community of investment arbitration practitioners and commentators. Awareness of the law in this field has never been more acute. As a result, the system is maturing by the day – parts of it at a slower pace. In that context, some inconsistency is inevitable.

Inconsistency is also part of the system because that may be what the parties wish. While commentators and other observers call for consistency as a manner to predict the law, investors and host states, when they are parties to an arbitration, may wish to safeguard their opportunity to fully argue their case, even if this means arguing their case differently

from the solutions that have been adopted in practice. This is inherent to the absence of precedent in international arbitration. The example of Argentina, which could argue *de novo* – and win – its case in *Continental Casualty* in relation to Article XI of the USA–Argentina BIT, following the *CMS* decisions, perfectly illustrates this point. In this context, inconsistency may in fact help the development of the law.

Against this background, it is worthwhile remembering that arbitral tribunals generally view their function as entailing the development of the law. The Tribunal in *SGS* v. *Philippines* noted in this respect:

> In the Tribunal's view, although different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State. Moreover there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision. There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals. It must be initially for the control mechanisms provided for under the BIT and the ICSID Convention, and *in the longer term for the development of a common legal opinion or* jurisprudence constante, *to resolve the difficult legal questions* discussed by the *SGS* v. *Pakistan* Tribunal and also in the present decision.[63]

The *ADC* v. *Hungary* Tribunal was of the same view:

> It is true that arbitral awards do not constitute binding precedent. It is also true that a number of cases are fact-driven and that the findings in those cases cannot be transposed in and of themselves to other cases. It is further true that a number of cases are based on treaties that differ from the present BIT in certain respects. However, *cautious reliance on certain principles developed in a number of those cases, as persuasive authority, may advance the body of law, which in turn may serve predictability in the interest of both investors and host states.*[64]

The Tribunal in *Saipem* v. *Bangladesh*, later followed by the *Pey Casado* Tribunal, similarly held that:

> it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a

[63] *SGS Société Générale de Surveillance S.A.* v. *Republic of the Philippines* (Decision on Jurisdiction), ICSID Case No. ARB/02/6, 29 January 2004, para. 97, emphasis added.

[64] *ADC Affiliate Limited and ADC & ADMC Management Limited* v. *Republic of Hungary* (Award), ICSID Case No. ARB/03/16, 2 October 2006, para. 293, emphasis added.

> 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.[65]

In other words, it is in the arbitral tribunals' 'duty to seek to contribute to the harmonious development of investment law' and it is in their development of a *jurisprudence constante* that one may find the main tool to address inconsistency in investment arbitration.[66]

Thus, it is to be hoped that what will *not* be followed are analyses – no matter how persuasive and no matter how distinguished the jurists making them – of treaties whose structure, wording and context, while at first glance similar, are materially different from the structure, wording and context of the treaties being interpreted. It is also to be hoped that arbitrators will not forget that their primary duty is that of settling the dispute at hand (as argued) between the parties, and that they will not flirt with the audience at large with superfluous *dicta* or dissenting opinions designed at 'making law'.

Ultimately, consistency and predictability may be nothing more than the result of what can be called a 'Darwinian approach': an expectation that, over time, poor attempts to develop and harmonise the law will be less influential and will not be followed up, and that high-quality interpretations and reasoning will have longer lines of progeny.

[65] *Saipem S.p.A.* v. *The People's Republic of Bangladesh* (Decision on Jurisdiction and Recommendation on Provisional Measures), ICSID Case No. ARB/05/07, 21 March 2007, para. 67. See also *Victor Pey Casado and President Allende Foundation* v. *Republic of Chile* (Award), ICSID Case No. ARB/98/2, 8 May 2008, para. 119 ('Avant de procéder à l'examen de ces conditions, le Tribunal tient à préciser qu'il n'est pas lié par les décisions et les sentences CIRDI rendues antérieurement. Le présent Tribunal estime toutefois qu'il se doit de prendre en considération les décisions des tribunaux internationaux et de s'inspirer, en l'absence de justification impérieuse en sens contraire, des solutions résultant d'une jurisprudence arbitrale établie. Tout en tenant compte des particularités du traité applicable et des faits de l'espèce, le Tribunal estime aussi devoir s'efforcer de contribuer au développement harmonieux du droit des investissements et, ce faisant, de satisfaire à l'attente légitime de la communauté des Etats et des investisseurs quant à la prévisibilité du droit en la matière').

[66] On *jurisprudence constante*, see A. K. Bjorklund 'Investment Treaty Arbitral Decisions as *Jurisprudence Constante*' in C. Picker, I. Bunn and D. Arner (eds.), *International Economic Law: the State and Future of the Discipline* (Oxford: Hart, 2008), p. 265. See also Banifatemi, *IAI Series on International Arbitration No. 5*.