Effecting Consistency in Investor-State Dispute Settlement Through the Introduction of Precedent in a Multilateral Investment Court

(The *why* and the *how*)

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Abstract

In recent years, the current Investor-State Dispute Settlement (ISDS) system has been a subject of reform discussions triggered by several factors, amongst which includes the lack of consistency in ISDS decisions commonly rendered by arbitration tribunals. This undesirable fact places the current ISDS system in conflict with essential rule of law values such as stability, reliability, predictability, and equality –

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which inevitably diminish the legitimacy of the current system. Undeniably, the uniform investment treaties underlying ISDS decisions is a valid justification for divergent outcomes, however, the recognition that a majority of investment treaties share similar if not identical legal standards also makes the argument for consistent ISDS decisions legitimate and in fact necessary to foster the harmonious development of investment law across the network of identical treaty standards. To this end, the use of "precedent" is critical in achieving the aforesaid goal. Notably, albeit informally, the use of precedent is already a recognised practice in ISDS, yet inconsistent decisions persist. As a turning point, this article advocates that consistency in ISDS decisions can be best achieved through the "formal introduction of a system of precedent", in "a Multilateral Investment Court (MIC)", which is possible without jeopardizing the inherent differences contained in International Investment Agreements (IIA).

Keywords: Consistency, Investor-State Dispute Settlement, Investor-State Arbitration, Binding Precedent, Persuasive Precedent, Jurisprudence Constante, Multilateral Investment Court, International Investment Agreements

A. Introduction

Long before the advent of what is known today as the Investor-State Dispute Settlement procedure, the protection of foreign investors and their investments was secured through the process of diplomatic protection.[1] However, given the ineffectiveness of such a system in protecting foreign investments against unlawful host state conduct, states began to negotiate and enter into Bilateral Investment Treaties (BITs) to protect their nationals' investments abroad.[2] Through the BITs, contracting states commit to offering certain standards of protection to foreign investors within their territory and most significantly consent to an ISDS mechanism. This mechanism offers private investors direct recourse against a host state before an investment arbitration tribunal to enforce the guaranteed rights and protections afforded under the relevant BIT. Today, this ISDS mechanism is not only a common feature in BITs, but now also features in plurilateral investment agreements between states.[3]

Despite the positive approval enjoyed in the past, growing concern and criticism in recent years has triggered a call for a reform of the traditional ISDS system.[4] Chief among these concerns to stakeholders in the international investment community is arguably the "lack of consistency in investor-state arbitration decisions",

1 *Choudhury,* L&C. L. Rev. 2013/2, p. 486.
2 *Howard*, Fordham Int'l L.J. 2017/1, p. 7.
3 See Art. 26 (3) Energy Charter Treaty; Art. 8.18 EU-Canada CETA.
4 See regarding these concerns, *Kaufmann-Kohler, Potesta,* Reform of ISDS: Matching Concerns and Solutions, available at: https://www.ejiltalk.org (28/4/2021).

creating an un-uniformed jurisprudence in the ISDS regime.[5] The non-uniformed jurisprudence creates a dilemma for both states and private actors as it limits the predictability of the legal environment necessary to foster investment growth. With an unpredictable legal regime induced by inconsistent decisions comes the inability to plan, resulting in a higher cost of doing business, which ultimately dampens Foreign Direct Investment (FDI) flows – a direct opposite of what ISDS is set out to achieve.[6] Hence, the need for consistency in ISDS decisions is a matter of interest to both states and private actors, to properly guide their actions in investor-state relationships.

Instructively, consistency of ISDS decisions as analysed in this work relates to "uniformity" in the interpretation of the rules (substantive and procedural) that govern the protection of foreign investments as provided under the relevant treaties or rules of international law. This conception is grounded in the idea that "a rule, whatever its content, be applied uniformly in every similar or applicable instance".[7]

Importantly, a consistency driven ISDS regime must be understood in context. Particularly, this contribution does not suggest that consistency with past ISDS decisions should be pursued at all costs at the expense of the adjudicator's independent judgment about the "right" interpretation or application of the law. Given that the ISDS procedure is derived from multiple IIAs, these different IIAs may warrant different outcomes notwithstanding their similarities.[8] As observed by the United Nations Commission on International Trade Law (UNCITRAL) "Working Group (WG) III" currently saddled with the responsibility of leading the ISDS reform discussions, the mere existence of divergent outcomes or interpretation of similar treaty provisions is not in itself a concern, as there could be justifiable reasons for this.[9] Such justifiable reasons may arise within the context of a treaty interpretation in harmony with Article 31–33 of the Vienna Convention on the Law of Treaties, or justified by the relevant facts and evidence before a tribunal.[10] Primarily, the lack of consistency becomes a problem when the same treaty standard or same rule of customary international law is interpreted differently without a justifiable ground.[11] Additionally, consistency in treaty interpretation is equally desirable where there

5 *UNCITRAL*, Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and related matters Note by the Secretariat of 28/8/2018, UN Doc. A/CN.9/WG.III/WP.150, para. 5.

6 *Arato et al.*, Lack of Consistency and Coherence in the Interpretation of Legal Issues (Preliminary draft, 30 January 2019), para. 4, available at: https://www.cids.ch (22/7/2021).

7 *Franck*, Fordham L. Rev. 2005/4, p. 1585.

8 *Alschner*, Ensuring Correctness or Promoting Consistency? Tracking Policy Priorities in Investment Arbitration Through Largescale Citation Analysis, p. 2, available at: https://papers.ssrn.com/ (22/7/2021).

9 See in this regard, *UNCITRAL*, Report of Working Group III (Investor-State Dispute Settlement Reform) of 35th Session, 23–27 April 2018, New York, A/CN.9/935, para. 21.

10 *UNCITRAL*, Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and related matters Note by the Secretariat of 28/8/2018, UN Doc. A/CN.9/WG.III/WP.150, para. 6.

11 *UNCITRAL*, fn. 9, para. 21.

are different treaties but with similar treaty standards. Noteworthy is that the differences in treaty language have been noted at the UNCITRAL WG III discussions as being quite exaggerated, as "the vast majority of investment treaties contained very similar if not identical language".[12]

Today, several investment cases have generated diverging interpretations of identical or similar treaty standards.[13] Undeniably, the diverse legal sources interpreted by diverse *ad hoc* tribunals is the main catalyst for inconsistent decisions in ISDS. Therefore, it can be said that inconsistent decisions are a natural result of how the system has been formed by states, which should not come as a surprise. However, this argument does not negate the fact that any civilised legal system is inherently formed to promote the rule of law, and consistency of the law is critical in fulfilling this duty. Further, the interpretation and application of the law must necessarily be consistent for its legitimacy to be duly affirmed by the people governed by it.

Against this background, this article illustrates in the following sections why consistency of ISDS decisions is highly desirable within the context of promoting the rule of law and enhancing its public legitimacy (section B). This is followed by an analysis of the role played by the "use of precedent" in achieving consistency (section C). Then the contribution advocates for effecting precedent in ISDS through a standing Multilateral Investment Court rather than the current one-off tribunals, and how precedent should be applied in the MIC (section D). Finally, a conclusion is drawn from an overall assessment of the topic in discussion (section E).

12 *UNCITRAL*, Report of Working Group III (Investor-State Dispute Settlement Reform) of 34th Session, 27 November – 1 December 2017, Vienna, A/CN.9/930, para. 27.

13 See, for example, tribunals reaching divergent conclusions on the content of FET, on one hand (interpreting FET broadly): *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000; *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015; on the other hand, (interpreting FET narrowly), see: *Waste Management Inc. v United Mexican States* ("Number 2"), ICSID Case No. ARB(AF)/00/3, Award 30 April 2004; *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006; *Invesmart v. Czech Republic*, UNCITRAL, Award, 26 June 2009; or see regarding divergent interpretation on the "Umbrella Clause", on one hand (broad interpretation): *Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, 10 February 2012; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. The Republic of Argentina*, ICSID Case No. ARB/03/23, Award, 11 June 2012; on the other hand, (interpreting the umbrella clause narrowly, see: *SGS Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003; *SGS Societe Generale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004; *Bureau Veritas, Inspection, Valuation, Assessment and Control*, *BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009; See further on this, *UNCITRAL*, fn. 5, paras. 15 ff; *Montineri*, in: Hobe/Scheu (eds.), p. 165 ff.

B. Reasons Necessitating the Consistency of ISDS Decisions

As indicated above, inconsistency of ISDS decisions is largely due to systemic reasons. This prompts the question of whether there is even any merit in criticising the current system for inconsistency if it flows as a natural result of the system adopted by states.[14] Nevertheless, given that ISDS decisions are not only relevant to the disputing parties and their particular case but also bear public relevance in equal measure,[15] its public perception must be equally checked under public values including the "demands of the rule of law", and "public legitimacy".

I. Demands of the Rule of Law

Historically, there are several theoretical formulations on the notion of the rule of law which can be narrowed down to two basic categories i.e. "formal" and "substantive" versions.[16] The aim of this article is not to go into the distinction between these two branches or evaluate all the values associated with the notion of the "rule of law", which is quite extensive.[17] What is important to stress for the purpose of this study is that the rule of law notion, whether "formal or substantive", includes three important values: stability, reliability and equality,[18] all of which are undermined by the current lack of consistency in ISDS.

1. Stability

Stability is a state of affairs whereby the content of the law of a particular country is settled over a considerable period of time.[19] In this regard, the time duration itself is not of most relevance, but the degree to which a particular rule or law has been interpreted and applied consistently over several cases so that it is considered as settled law. As such, any departure from settled case law must be accompanied by a well-reasoned justification. As observed by legal philosopher *Matthew Kramer*, "any viable legal system must be characterised by a substantial degree of settledness […]".[20] Consequently, a legal system that does not promote settledness would be an example of a "lawless (…) state of affairs, and not of a regime of law".[21] As a result, in furtherance of this rule of law value, ISDS tribunals must strive to offer stability on what the law entails to actors in the international investment community. For ex-

14 See in this regard, *Diel-Gligor*, p. 127.
15 *UNCITRAL*, Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and related matters Note by the Secretariat of 28/8/2018, UN Doc. A/CN.9/WG.III/WP.150, para. 41.
16 See on the "formal" and substantive versions of the rule of law, *Tamanaha*, pp. 91 ff; *Craig*, P.L. 1997, pp. 467–487.
17 See in general, *Tamanaha*, pp. 91 ff; *Craig*, P.L. 1997, pp. 467–487.
18 *Lewis*, Ox. JLS 2021, p. 9.
19 Ibid.
20 *Kramer*, p. 142.
21 *Diel-Gligor*, p. 119.

ample, a situation whereby the interpretation of what constitutes an investment, or the application of the most-favoured-nation (MFN) clause, or what constitutes an indirect expropriation unjustly conflicts with other decisions under identical or similar treaty standards cannot foster such desired stability in the investment environment.[22] On the other hand, a consistent interpretation of identical or similar treaty standards would help enhance the much-needed stability of the overall investment framework.[23]

2. Reliability/Predictability

When a law achieves the status of stability as described above, it creates other values, such as the value of reliability and predictability. When people are certain about the content of the law, to the point of having a settled knowledge on what to expect from a particular law, this births the people's confidence to rely on the law in shaping their everyday actions and decisions in anticipation of a predictable outcome thanks to their settled understanding of what the law has to offer. In the ISDS context, this predictability ensures that states can shape their investment policies in accordance with their international obligations based on their reliable understanding of what this is, while investors on the other hand can assess whether certain treatments they have received conformed with the host states' treaty obligations.[24]

In order to attain and sustain this level of reliability and predictability, the interpretation and application of the law cannot afford to lack consistency and this goes without prejudice to the ability of an adjudicator to be an independent umpire in each particular case notwithstanding the prior case-law on a matter before it. This simply leans towards the theory that an adjudicator in adopting an interpretation should attempt to make it fit with prior interpretation,[25] but this does not mean that it will fit all the time. With this approach, it simply guarantees that every interpretation adopted would have at least been tested on the scale of jurisprudence to determine whether the scale is tipped in favour of following existing jurisprudence or justifiably tipped in favour of setting a new one. This is how a legal system can appear steady and reliable to the people governed by it as demanded under the rule of law.

22 See on this, *UNCITRAL*, Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and related matters Note by the Secretariat of 28/8/2018, UN Doc. A/CN.9/WG.III/WP.150, para. 14.

23 See in this regard, *UNCITRAL*, Report of Working Group III (Investor-State Dispute Settlement Reform) of 34th Session, 27 November – 1 December 2017, Vienna, A/CN.9/930, para. 14.

24 Ibid., para. 15.

25 *Diel-Gligor*, p. 118.

3. Equality

Concerning "equality", this is another rule of law value that needs to be reflected in the ISDS environment. While there are diverse angles from which the issue of equality in ISDS could be addressed, for instance, the critic that ISDS procedure only grants standing to foreign investors, thus posing a challenge to the principle of democratic equality for excluding domestic investors,[26] the focus here is particularly on how inconsistent ISDS decisions further undermine the notion of equality under the rule of law as required in any democratic society. According to *Hart*, one of the essential elements of the concept of justice (which is *sine qua non* to the rule of law) is the principle of treating like cases alike.[27] Further, as per *Perelman*, to "act justly is to provide the same treatment to those individuals who come under the same category, or in other words to those who are equal from that point of view".[28] Applying this understanding to the current ISDS system, it cannot be said that a system whereby like cases in terms of identical facts and/or investment treaty standards producing diametrically opposing results fosters the much-needed equality as required under the rule of law, if anything, it undeniably constitutes a threat to the international legal order and the continued existence of investment treaties,[29] and in particular ISDS. As stated by *Nigel Blackaby* "[a]ny system where diametrically opposed decisions can legally coexist cannot last long. It shocks the sense of rule of law or fairness."[30]

Instructively, while the above submission on equality demands that "like cases be treated alike", the principle of equality can also be seen from a reverse angle which demands that "different cases be treated differently".[31] This reverse conception of equality mutes any concern that pursuing equality could erode the competence of an adjudicator to decide a case based on an independent mind of what the correct decision is per case. Ultimately, what is required of an adjudicator in furtherance of equality is the ability to determine whether a case is alike to past decisions and treat it alike, or determine whether it is different from past decisions and thus treat it differently. In either event, a well-reasoned justification for the decision is required. This way, neither the rule of law value of equal enforcement of the law nor having an independent adjudicator is unjustly traversed.[32]

The lack of consistency in ISDS jurisprudence undeniably undermines the above-discussed values of the rule of law, a striking paradox since investment treaties and

26 *Schill*, JIEL 2017/3, p. 656.
27 *Hart*, HARV. L. Rv. 1958/4, p. 624.
28 *Winston*, CLR 1974/1, p. 6.
29 *Franck,* Fordham L. Rev. 2005/4, p. 1583.
30 *Goldhaber*, TDM 2004/3, p. 1.
31 *Winston*, CLR 1974/1, p. 5.
32 See Report of the Secretary General, 'Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels', UN Doc. A/66/749, 16 March 2012, para 2, (observing that the rule of law *inter alia* is: "a principle of governance in which all persons…, are accountable to laws…equally enforced and independently adjudicated).

investment arbitration can fairly be understood as an expression of the rule of law given their objectives.[33]

II. Public Legitimacy

The growth of investment treaties and the exponential increase in the use of ISDS over the years has resulted in a higher level of public scrutiny as to the benefits and justification of this special regime for foreign investors.[34] In other words, the public legitimacy of ISDS is currently under scrutiny like never before. Legitimacy in this sense is the acceptance of a legal order or willingness to use it by the people who live within it because they find it good and just for them.[35] Notably, when there is a lack of consistency in the interpretation and application of the rules as prevalent in ISDS jurisprudence today, there is a "detrimental impact upon those governed by the rules and their willingness and ability to adhere to such rules, which can lead to a crisis of legitimacy."[36] Today, one of the main criticisms against the current ISDS system is the lack of legitimacy, which in this context is brought about *inter alia* by "conflicting and inconsistent interpretations by arbitral tribunals of standard principles of investment protection, not only under different treaties, but also in virtually identical cases brought under the same treaty."[37] Important to note that this criticism is not limited to individual decisions rendered by ISDS tribunals, but concerns the ISDS as a system.[38] Hence, it is cognizable that the legitimacy concern regarding ISDS goes beyond disputing parties per case but focuses on how the entire system can work harmoniously leading to the legitimate approval of not just some but all the stakeholders in the international investment community.

In this quest, a legal system that promotes consistency as noted by UNCITRAL WG III will "support the rule of law, enhance confidence in the stability of the investment environment and further bring legitimacy to the regime."[39] Otherwise, a system that lacks consistency cannot enhance the rule of law to the satisfaction or reasonable expectation of its users and therefore risks losing its reputation as a proper and legitimate legal regime.[40]

The above discussion makes evident that the need for consistency in ISDS decisions cannot be overemphasized for the purpose of validating its public legitimacy

33 *Schill*, "International Investment Law and the Rule of Law." ACIL Research Paper 2017-15, p. 5, available at: https://papers.ssrn.com/sol3/ (22/7/2021).
34 Ibid., p. 2.
35 *Hurst*, Okla. L. Rev. 1971/2, p. 224; See also *Brower/Schill*, Chi. J. Int'l L. 2009/2, p. 471.
36 *Franck,* Fordham L. Rev. 2005/4, p. 1584.
37 *Schill*, Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward, p. 2, available at: https://e15initiative.org/wp-content (22/7/2021).
38 Ibid.
39 *UNCITRAL*, Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and related matters Note by the Secretariat of 28/8/2018, UN Doc. A/CN.9/WG.III/WP.150, para. 5.
40 *Diel-Gligor*, p. 122.

and compatibility with the rule of law values that are the bedrock to any truly democratic society. The following section will now articulate the critical role played by precedent in achieving consistency and how this can be adapted in ISDS.

C. Use of Precedent in Achieving Consistency

I. The Notion of Precedent

A "precedent" is a decided case that furnishes the basis for determining later cases involving similar facts or issues.[41] Thus, by application, the use of precedent provides a degree of predictability on the outcome of a case that is related in facts or issues to a prior decided case. Even though the approach or degree to which it is applied may vary, virtually all legal systems accord a degree of importance to prior judicial decisions i.e. "precedent".[42] For this discussion, the common law doctrine of *stare decisis* (binding precedent)[43] and the civil law doctrine of *jurisprudence constante*[44] is worth mentioning.

Following the common law rule of "*stare decisis*", judicial decisions are regarded as settled law and judges are obliged to first defer to the settled case-law (if any) regarding a legal issue and follow it, unless it can be shown that departing from such precedent is supported by some special justification.[45] Although there are substantial historical and conceptual differences in the practice of precedent between countries of common and civil law traditions,[46] civil law systems likewise treat previous judicial decisions in ways that is broadly similar to that found in common law jurisdictions.[47] However, in contrast to the common law rule of *stare decisis*, civil law systems accord precedential value not to individual cases, but on a series or group of cases creating a practice,[48] a doctrinal practise widely known as "*jurisprudence constante*".[49] This civil law doctrine requires a court to take past decisions into account in a matter where there exists sufficient uniformity in the previous case laws.[50]

Despite their distinction, the aforementioned two major domestic legal systems in the world today agree that judicial decisions be rendered consistently with past decisions unless there is a justifiable reason not to do so. The reason for this can be attributed to the role played by precedent in promoting the rule of law values earlier

41 *Yusuf/Yusuf*, in: Kinnear/Fischer/Almeida et al. (eds.), p. 71; *Garner,* Black's law dictionary (9th ed.), p. 1295. (Hereinafter referred to as *Black's law dictionary*).
42 *Born*, p. 3810.
43 See, *Parisi/Fon*, Chapter 8.
44 Ibid.
45 United States Supreme Court, in *Dickerson v. United States*, 530 U.S. 428 (2000), para. 428.
46 *Fon/Parisi*, Int'l Rev of law and Eco. 2006/4, p. 521.
47 *Born*, p. 3815.
48 *Goodhart*, L. Q. Rev. 1934/1, p. 42; Also see *Bell*, Cornell L. Rev. 1996–1997/5, p. 1257: "[…] the civilian approach typically gives greater weight to a line of authority (lajurisprudence constante) than to an individual decision.".
49 *Henry,* American Bar Ass. J. 1929/1, p. 11.
50 *Fon/Parisi*, Int'l Rev of law and Eco. 2006/4, p. 522.

discussed, conferring public legitimacy on a judicial system. Since the acceptability of a judicial system depends on the public perception towards it,[51] decisions rendered consistently with precedent ensure that the law can be perceived as stable, reliable, and equally applied by the judicature – which ultimately promotes the judicature's legitimacy to the public.

As already noted, deference to precedent in judicial decision making is not absolute. Even a common-law court that is bound by the strict rule of *stare decisis* can override its precedent where there is a special justification to do so, like decisions reached *per incuriam*,[52] including cases where the precedent has been undermined by a subsequent change or development in the law, or where it proves to be unworkable, or would become an obstacle to the realization of objectives embodied in other laws.[53] Another recognized method often employed by common law judges to limit or ignore precedent is to "distinguish" between the circumstances surrounding a prior decision of the court and a new case before it, thereby justifying a different outcome on minor differences in facts.[54]

When a court rightly departs from precedent under any of the aforementioned circumstances, this does not threaten the consistency or legitimacy of the judicial regime, if anything, it only affirms three factors that are essential for the public legitimacy of a judicial system: *first*, that the system is well aware of its responsibility to foster the development of the law by being able to adapt to the changing needs of the society; *second*, that the system can correct itself when it has set a bad precedent through a wrong decision; *third*, that the system can recognise decisions that should be accepted as constituting the law from those that should be rejected for being improperly decided.[55] With this understanding, the use of precedent can be seen as an instrument that fosters the "law" rather than one that interdicts it.

II. Use of Precedent in ISDS

As a general background, the doctrine of precedent does not exist when it comes to dispute settlement under international law. For example, the statute of the International Court of Justice (ICJ) unequivocally states that "the decision of the Court has no binding force except between the parties and in respect of that particular case".[56] This provision has often been read to mean the exclusion of the formal doctrine of precedent from the judicial practice of ICJ judges.[57] Likewise in the World Trade Organization (WTO), there is "no disagreement that binding precedent is not creat-

51 See *Hurst*, Okla. L. Rev. 1971/2, p. 224; See also *Brower/Schill*, Chi. J. Int'l L. 2009/2, p. 471.
52 *Valentine*, Modern. L.R. 6 1955, p. 602.
53 United States Supreme Court, in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), pp. 171–175.
54 *Field*, Fed. Cir. B.J. 1999, p. 208.
55 *Cheng*, Fordham Int'l LJ 2006/4, pp. 1019 ff.
56 Art. 59 Statute of the International Court of Justice (26 June 1945) 33 UNTS 993.
57 *Kaufmann-Kohler,* Arb. Int'l. 2007/3, p. 361; See further *Reinisch*, Law & Prac. Int'l Cts. & Tribs. 2004/1, p. 47.

ed through WTO dispute settlement proceedings."[58] However, the mere fact that international judicial bodies are not bound to accord deference to precedent does not mean that such deference does not exist in practice. *De facto*, the use of precedent plays a significant role in the administration of justice both at the ICJ[59] and the WTO,[60] albeit a practice that has drawn heavy criticism, particularly in the WTO.[61]

Equally, there is no recognition of binding precedent or *stare decisis* rule in ISDS proceedings.[62] For example, the often-used centre for ISDS proceedings is the International Centre for Settlement of Investment Dispute (ICSID),[63] and its Convention explicitly limits the binding nature of decisions on the parties.[64] Likewise, decisions rendered under the UNCITRAL Arbitration Rules, often used as a substitute for ICSID based proceedings, produces an equivalent result.[65] Based on this premise, it is said that the limited scope of an investment arbitration award by implication excludes the rule of a binding precedent in investor-state arbitration.[66]

Today, however, even though the lack of the rule of binding precedent is well acknowledged in investment arbitration,[67] the prevailing practice in evidence suggests that indeed investment arbitration tribunals defer to earlier decisions which they

58 See Informal Process On Matters Related to the Functioning of the Appellate Body – Report by The Facilitator, H.E. Dr. David Walker (New Zealand), WTO DOC JOB/GC/217, 7 May 2019, para. 1.31.

59 See *Pellet*, in: Zimmermann/Tomuschat (eds.), Art. 38 SICJ, para. 302, ("The reference to Art. 59 of the Statute in para. 1 (d) of Art. 38 sounds like a warning. The Court is not bound by the common law rule of stare decisis […], At the same time this reference clearly encourages the Court to take into account its own case law as a privileged means of determining the rules of law to be applied in a particular case"); See also ICJ, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria),* Preliminary Objections, Judgment, [1998] ICJ Rep, p. 275, 292, para. 28; Also see: ICJ, *Legality of Use of Force (Serbia and Montenegro v Portugal)*, Preliminary Objections, Judgment, [2004] ICJ Rep, p. 1160, 1199, para. 100.

60 See WTO Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, (4 October 1996), p. 14, ("Adopted panel reports are an important part of the GATT acquis. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute"); WTO Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures On Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R (29 November 2004), para. 188, (opined that "following the Appellate Body's conclusions in earlier disputes is not only appropriate but is what would be expected from panels, especially where the issues are the same").

61 See in this regard *Sacerdoti*, LPICT 2020/3, pp. 497 ff.; *Bhala*, in: Chang-fa Lo/Nakagawa/Chen (eds.), pp. 111; *De Andrade*, JIDS 2020/2, pp. 262 ff.

62 See, *Schreuer/Weiniger*, in: Muchlinski/Ortino/Schreuer (eds.), pp. 1188 ff.; *Bjorklund*, in: Picker/Bunn/Arner (eds.), pp. 265 ff.

63 *Schill,* German L.J. 2011, p. 1084.

64 Art. 53(1) ICSID Convention, (providing *inter alia* that "[…] the award shall be binding on the parties").

65 Art. 34(2) UNCITRAL Arbitration Rules, as revised 6 December 2010, (provides awards "[…] shall be final and binding on the parties").

66 *Kolse-Patil*, Indian J. Int'l Econ. L. 2010, p. 47.

67 See *Lee-Chin v. Dominican Republic*, ICSID, Partial Award on Jurisdiction, 15 July 2020, para. 80, ("[…]Tribunal cannot but recall that there is no stare decisis doctrine in international law"); See also in this regard, *Micula v. Romania* (II) ICSID, Award, 5 March 2020,

consider as decisive authorities in resolving a dispute before them, subject to the specificities of the case. For example, as recently observed by the ICSID Tribunal in *Eurus Energy v. Spain*:

> As a general matter, investment tribunals (like other international tribunals) are not bound by a strict doctrine of precedent but are charged to make their own appreciations based on the evidence and arguments presented to them. In practice, tribunals regularly cite previous, publicly available awards and pay careful attention to them.[68]

In a similar vein, the Kaufmann-Kohler chaired tribunal in *Griffin v. Poland* acknowledged that:

> while it is not bound by previous decisions of international tribunals, in its judgment, it should pay due consideration to such decisions and, subject to compelling contrary grounds, it should seek to give effect to principles that are applicable and generally established in a series of clear and consistent cases.[69]

The above examples, amongst several others,[70] clarify that despite the absence of a formal rule of precedent in investment arbitration, arbitrators do consider earlier decisions of other international tribunals (even outside ISDS).[71] Lawyers also often do cite decisions in earlier cases in support of their client's position.[72] This favourable approach towards precedent despite the lack of a formal obligation confirms tribunals acknowledge that, subject to the specifics of a treaty and peculiarities of a case, there is a duty to seek and contribute to the harmonious development of investment law to meet the legitimate expectations of legal certainty for states and

para.352; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules) – 5 Mar 2009, para. 94.

68 *Eurus Energy v. Spain*, ICSID, Decision on Jurisdiction and Liability, 17 March 2021, para. 239.

69 *Griffin Group v. Poland*, SCC Case No. 2014/168, Final Award, 29 April 2020, para. 214.

70 See further on this *Gosling and others v. Mauritius*, ICSID Case No. ARB/16/32, Award, 18 February 2020, para. 276; *Consutel v. Algeria*, PCA Case No. 2017-33, Final Award, 3 February 2020, para. 290; *Watkins Holdings v. Spain*, ICSID Case No. ARB/15/44, Award, 21 January 2020, para. 204; *Grace and others / Oro Negro v. Mexico*, ICSID Case No. UNCT/18/4, Procedural Order No. 6 (Decision on the Claimants' Application for Interim Measures) – 19 Dec 2019, para. 56; *Poštová banka and Istrokapital v. Greece*, ICSID Case No. ARB/13/8, Decision on Partial Annulment – 29 Sept 2016, para. 126.

71 See *Methanex v. USA* (Ad-hoc UNCITRAL Arbitration), Final Award of the Tribunal on Jurisdiction and Merits, 3 Aug 2005, para. 6, ("[…] in the instant case Article 1102, the Tribunal may derive guidance from the way in which a similar phrase in the GATT has been interpreted in the past. Whilst such interpretations cannot be treated by this Tribunal as binding precedents, the Tribunal may remain open to persuasion based on legal reasoning developed in GATT and WTO jurisprudence").

72 *Weidemaier*, WM. & Mary L. Rev. 2010/5, p. 1940.

investors.[73] The desirability of the harmonious development of investment law was again echoed in a recent decision by the ICSID tribunal in *Carrizosa v. Colombia*.[74] In achieving this goal, the use of precedent cannot be dispensed with. A precedential system facilitates harmony in the law's development by providing a "uniform method through which judges may reach judicial decisions that adjust the law in an evolutionary fashion to avoid triggering dramatic instabilities".[75]

Regarding the harmonious development of investment law, arguably this was not the concern of states at the inception of investment protection treaties incorporating ISDS. Indeed, the un-uniform regime was intentional to make room for investment protection policies that took into consideration the foreign economic and trade policy, as well as development strategies of states.[76] Hence it has been noted that the divergence in ISDS outcomes today is a reflection of the different approaches and the peculiarities of investment protection as adopted by states which should not be overridden in the pursuit of consistency.[77] However, while the harmonious development of investment law may not be warranted given the current system's structure, an harmonious development is arguably warranted in two instances i.e. *first*, necessary within a single treaty; and *second*, desirable within identical or similar provisions in different treaties. Particularly with the latter, despite the multiplicity of investment treaties, "many treaties feature identical or largely similar wording with non-material and hence insignificant variation".[78] Thus, the argument against the harmonious development of investment law under different IIAs becomes irrelevant since most of the treaties do raise similar interpretative questions.[79] Therefore, the preponderant similarity of the rights enshrined in IIAs makes it desirable to clarify and harmonize the development of investment standards,[80] which can be achieved

73 See *De Sutter and others v. Madagascar (II)*, ICSID Case No. ARB/17/18, Award, 17 April 2020, para. 134; Also see, *Lighthouse v. Timor-Leste*, ICSID Case No. ARB/15/2, Award 22 December 2017, para. 111; *JSW Solar v. Czech Republic*, PCA Case No. 2014-03, Final Award, 11 October 2017, para. 181; *Vestey v. Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, para. 113; *Saipem S.P.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para. 67.

74 *Carrizosa v. Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021, para. 22, ("[…] subject to the text of the treaty or to compelling grounds to the contrary, it should adopt legal solutions firmly established in a series of consistent cases, thereby contributing to the harmonious development of international").

75 See further in this regard, *Cheng*, Fordham Int'l LJ 2006/4, p. 1020.

76 See in this regard *UNCITRAL*, Report of Working Group III (Investor-State Dispute Settlement Reform) of 34th Session, 27 November – 1 December 2017, Vienna, A/CN.9/930, para. 18.

77 Ibid., para. 19.

78 *Diel-Gligor*, p. 141; See also *UNCITRAL*, Report of Working Group III (Investor-State Dispute Settlement Reform) of 34th Session, 27 November – 1 December 2017, Vienna, A/CN.9/930, para. 27. (noting that "[…] differences in treaty language had been exaggerated and that the vast majority of investment treaties contained very similar if not identical language").

79 *Diel-Gligor*, p. 141.

80 *Franck*, Fordham L. Rev. 2005/4, p. 1619.

through the "constructive use" of precedent, without forfeiting the duty to respect the relative distinctions and peculiarities of each investment treaty.

D. Effecting Precedent in ISDS through an MIC

I. Why the MIC?

As evident in the preceding discussions, the use of precedent is already a recognized practice in the ISDS community. However, it should be noted that other tribunals have maintained their autonomy to decide a case without taking into account previous case law, even when an influential or persuasive one exists.[81] Thus, owing to the fragmented nature of ISDS tribunals, there is no uniform approach to the use of precedent necessary to foster consistent decisions within the system.

While undeniable that the fragmented body of investment laws is also a major cause of inconsistent decisions in ISDS, the introduction of an MIC could at the least ensure that one fraction of the cause of inconsistent decisions in ISDS would have been addressed. A centralized standing court at a multilateral level is arguably better positioned to promote greater uniformity in judicial reasoning than the current one-off tribunals.[82] Most importantly in this regard, identical or similar treaty claims that go before different tribunals which heighten the chances of conflicting decisions are now prevented, as such identical or similar claims could now be brought before a single forum inherently obligated to accord deference to its earlier decisions. This possibility potentially makes the MIC stand out from the traditional ISDS system where tribunals have no legal obligation to accord deference to past decisions. This point is further developed below.

II. Effecting Precedent in the MIC

As a starting point, it should be emphasized that the primary duty of an MIC judge remains the interpretation and application of the law chosen by the parties in accordance with the customary rules of treaty interpretation as codified in Article 31-33 of the Vienna Convention on the Law of Treaties. However, in executing this sacrosanct duty, the court's procedure could be formally guided by certain principles that help promote a consistent interpretation of the law. An example of this is already

81 See in this regard *Muhammet Çap v. Turkmenistan*, ICSID Case No. ARB/12/6, Decision on Respondent's Objection to Jurisdiction under Article VII(2), 13 February 2015, para. 275; Also see, *Eskosol v. Italy*, ICSID Case No. ARB/15/50, Award, 4 September 2020, para 278; *Kilic v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, 2 July 2013, para. 7.1.3; *Teinver v. Argentina*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, para. 167.

82 Report by the IBA Arbitration Subcommittee on Investment Treaty Arbitration: Consistency, efficiency, and transparency in investment treaty arbitration, November 2018, p. 32, available at: https://uncitral.un.org/sites/uncitral (24/7/2021).

conceived in a "Draft Statute of the MIC" proposed by *Bungenberg and Reinisch*, which provides:

> […] By performing their duties, the judges of the MIC shall…
> (d) secure uniform and consistent interpretation of the law, taking into consideration previous decisions without establishing a doctrine of precedent, particularly where there exists sufficient uniformity in previous case law.[83]

It is worth noting that no other multilateral instrument relevant to ISDS, e.g. either under ICSID or UNCITRAL, includes a similar provision. Hence, through an MIC, there could be for the first time a formal recognition of the use of precedent in achieving consistent interpretation.

While it is obvious that the above draft proposal does not foresee the creation of the common law *stare decisis* in the court, it nevertheless formally obligates the judges to pursue the uniform interpretation of the law by taking into account previous decisions, especially when there is sufficient uniformity in previous case law. This is a precedential approach consistent with the civil law doctrine of *jurisprudence constante* which is already a recognised practice in ISDS.[84] However, unlike before, the MIC will include a legally binding obligation requiring adjudicators to consider interpreting the law consistently with an existing line of case law when it fits. This will ensure that adjudicators are "duty-bound" to give a well-reasoned justification for either following or departing from existing jurisprudence. Such possibility can thus be a game-changer as it will change the current status quo whereby adjudicators have no formal duty to take past decisions into account. This will further improve the quality of reasoning in ISDS awards, adding to its credibility.

Hence, from the preceding discussion, the use of precedent in the MIC should be understood not in the common law sense of binding precedent, but rather in the civil law sense of "*jurisprudence constante*".[85] As opined by *Bjorklund*, "*jurisprudence constant*" is an appealing analogy for developing coherence and a respected body of jurisprudence in investment arbitration since it essentially retains the language of the code (the statute) as the starting point for any legal analysis, however, judicial decisions interpreting the code still bear significant influence on the courts as it represents an accepted interpretation of the statute.[86]

83 Art. 28(1)(d), *Bungenberg/Reinisch*, Draft Statute of the Multilateral Investment Court, available at: https://www.nomos-elibrary (24/7/2021).

84 On ISDS tribunals that have acknowledged the duty to adopt principles established in a series of consistent cases, see: *Iberdrola Energía, S.A. v. Republic of Guatemala (II)*, PCA Case No. 2017-41, Final Award, 24 Aug 2020, para. 229; *Griffin Group v. Poland*, SCC Case No. 2014/168, Final Award, 29 April 2020, para. 214; *AES Solar and others (PV Investors) v. Spain*, PCA Case No. 2012-14, Concurring and Dissenting Opinion of Charles N. Brower, 28 February 2020, para. 16; *Swissbourgh and others v. Lesotho*, PCA Case No. 2013-29, Judgment of the High Court of Singapore on the Set Aside Application [2017] SGHC 195 – 14 Aug 2017, para. 103; also see in general, *Bjorklund*, in: Picker/Bunn/Arner (eds.).

85 See earlier on "*jurisprudence constant*" (section C.I).

86 *Bjorklund,* in: Picker/Bunn/Arner (eds.), p. 272.

Yet important in this discussion on effecting precedent in the MIC towards achieving the goal of consistency in ISDS is how this can be achieved given the multiplicity of investment treaties warranting different judicial conclusions. Indeed, proper consistency of judicial decisions may not fully materialize until a multilateralization of the substantive laws on which the decisions are based.[87] However, if the focus, for the time being, is not really on the multiplicity of investment treaties but rather on the commonalities that these treaties inherently share, then adopting *jurisprudence constante* as an obligatory duty in the MIC judicial practice to foster the harmonious development of investment law will not be out of place even given the diversity,[88] especially since it has been noted that a vast majority of IIAs share similar if not identical standards.[89]

In addition, to ensure that the MIC primarily remains a court of law and not a court of precedent, it is important that deference to precedent is not done prematurely simply based on the fact that there exists a consistent line of reasoning on a particular matter. This is particularly important to ensure that the primary focus of a tribunal remains the interpretation of the treaty before it per case. Essentially, a tribunal should seize each case as an opportunity to enter into a dialogue with past decisions, examining how a case fits into a broader discussion, actively debating potential solutions, and, where the circumstances permit, offer more general reasoning to advance the dialogue.[90] Such practice of advance dialogue with past decisions could be adopted by the MIC. This way, a genuine consensus on the legal interpretation of identical or similar treaty standards (e.g. MFN or FET standard) will emerge from these robust dialogues that have been advanced by different MIC tribunals over time. Fundamentally, at the core of this dialogue should be the balancing of the competing interest between predictability, accuracy, and legitimacy. In lieu of deferring to past decisions simply due to a consistent line of decisions, tribunals should rather calibrate their deference to past decisions based on a balancing of predictability, accuracy, and legitimacy concerns.[91] While there is a compelling ground for a tribunal to favour a common interpretation as the correct position of the law to foster predictability, a predictable but inaccurate decision on the law will ultimately lack legitimacy. This is so especially since the applicable statutes remain the primary source of interpreting the legal rights and liabilities of disputing parties.[92]

Therefore, though a future MIC will certainly seek to offer predictability to its members through consistent decisions, it must with the same vigour pursue accuracy in the interpretation of the different treaties that come under its judicial scope. An MIC that engages in a contentious dialogue with precedent, in order to balance the predictability and accuracy concerns arising from each case (notwithstanding

87 *Bungenberg/Reinisch,* From Bilateral Arbitral Tribunals, para. 53.
88 See earlier on the "harmonious development of investment law" (section C.II).
89 *UNCITRAL*, fn. 12.
90 *Chen*, Harv. Int'l L.J. 2019/1, p. 68.
91 Ibid. p. 72.
92 Ibid. p. 73.

the identical or similar nature of investment treaties), will retain credibility and legitimacy amongst its contracting members.

E. Conclusion

This contribution has summarily articulated why consistency in ISDS is necessary given the demands of the rule of law and public legitimacy. Although the multiplicity of investment treaties challenges the merit of pursuing consistency in ISDS, this is countered by the fact that the majority of investment treaties are known to share similar if not identical legal standards, therefore the harmonious development of investment law, through these diverse treaties, can still be envisaged.

However, to achieve this consistency, the use of precedent could be "formally" entrenched into the ISDS system through a standing court that centralizes investor-state dispute to one single forum i.e. an MIC.[93] Importantly, the formal recognition of precedent in an MIC, particularly "taking into account past decisions", does not necessarily mean that the court must follow it as there are several factors that can justify not following precedent.[94] Essentially, and unlike before, the MIC statute will legally oblige adjudicators to consider interpreting the law consistently with existing lines of case law on a matter when it fits. As a result, adjudicators are "duty-bound" to give a well-reasoned justification for either following or departing from existing jurisprudence, especially when there is sufficient uniformity in previous case law. Further to following the civil law approach of "*jurisprudence constante*", the application of precedent in an MIC should be complemented by a robust judicial dialogue, balancing the competing interest between predictability, accuracy and legitimacy, before deciding whether or not to follow precedent per case.

Overall, with the current fragmentation of the system, consistency of ISDS decisions is arguably best achieved with a new approach whereby investor-state disputes are settled before a single MIC, formally obliged to apply precedent in the manner as described in this article. As observed by UNCTAD:

> A standing investment court would be an institutional public good that serves the interest of states, investors and other stakeholders. […], it would go a long way to ensure the legitimacy and transparency of the system, facilitate consisten-

93 On a possible design of the MIC – *see*, *Bungenberg, Reinisch,* From Bilateral Arbitral Tribunals, pp. 29 ff; *Bungenberg/Reinisch*, fn. 83; Also see in this regard: *Kaufmann-Kohler/Potesta,* The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards, available at: https://papers.ssrn.com/ (24/7/2021); *Howse*, Y.B of Eur. Law 2017/1, pp. 209 ff.

94 *UNCITRAL*, Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and related matters Note by the Secretariat of 28/8/2018, UN Doc. A/CN.9/WG.III/WP.150, para. 6; *See* earlier on "Notion of Precedent" (section C.I).

cy and accuracy of decisions and ensure independence and impartiality of investors. […].[95]

However, the future holds the answer as to whether this will become a reality or not.

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