

Towards a Doctrine of Jurisprudence in Treaty-Based Investment Arbitration

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Abstract

Arbitral jurisprudence and the role of arbitral precedents in investment arbitration have triggered considerable debate. This debate is due to the fact that investment arbitration awards contain numerous citations of others awards in order to imitate or reject them as being inapplicable or wrong. This has resulted in a practice where arbitral precedents are systematically used by the parties to argue their claims and absorb much of the discussions and motivation of the award. This article discusses these concepts and seeks to clarify the role and process of arbitral jurisprudence in international investment law.

Résumé

La jurisprudence arbitrale et le rôle du précédent arbitral dans l'arbitrage d'investissement ont suscité un grand débat. La polémique découle du fait que dans l'arbitrage d'investissement, bien que relativement récent, les sentences arbitrales contiennent de nombreuses références à d'autres sentences arbitrales pour imiter leurs décisions ou pour rejeter les critères précédemment suivis car ils ne sont pas pertinents ou corrects. Ainsi, une pratique a émergé dans l'arbitrage d'investissement, où le précédent arbitral est systématiquement utilisé par les parties pour fonder leurs prétentions et, par conséquent, absorbe une grande partie des discussions et de la motivation de la sentence. Cet article décrit ces concepts et cherche à clarifier le rôle et le processus de la jurisprudence arbitrale dans l'arbitrage des investissements internationaux.

Key Words: Arbitral jurisprudence, arbitral precedent, developing investment arbitration jurisprudence, *jurisprudence constante*, previous arbitral decisions, arbitral law-making, arbitral norm-making.

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I. INTRODUCTION

While there is no system of *stare decisis* or binding jurisprudence in international investment arbitration, precedent and its consistent line are almost invariably invoked by the parties to defend their positions, by legal experts to give content to abstract legal norms and by arbitrators to imitate or reject them in their decisions in law. Arbitral precedents have acquired an important role in investment arbitration becoming an essential legal language in the settlement of legal disputes.² This practice has created a dialogue between independent arbitral tribunals on how to apply international investment law. There are divergences but also coherences, agreements on how to decide a generality of cases. This dialogue has triggered a hot debate on the existence, value and making process of a doctrine of jurisprudence in investment arbitration.³

² Commission, 'Precedent in Investment Treaty Arbitration. A Citation Analysis of a Developing Jurisprudence', 24 (2) *Journal of International Arbitration* (2007) 129.

³ Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' 23, (3) *Arbitration International* (2007) 357; Béguin, 'The Rule of Precedent in International Arbitration', (5) *Jusletter* (2009) 2; Bjorklund, 'Investment Treaty Arbitral Decisions as Jurisprudence Constante', in Picker *et al.* (eds), *International Economic Law: The State and Future of the Discipline* (2008); Bockstiegel, 'Introductory Remarks', in E. Gaillard and Y. Banifatemi (eds), *Precedent in International Arbitration* (2007) 17-24; Cheng, 'Precedent and Control in Investment Treaty Arbitration', 30 *Fordham Int'L L J* (2006-2007) 1014; Commission, 'Precedent'; Crawford, 'Similarity of Issues in Disputes Arising under the Same or Similarly Drafted Investment Treaties', in E. Gaillard and Y. Banifatemi (eds), *Precedent in International Arbitration* (2007) 97-103; Di Pietro, 'The Use of Precedents in ICSID Arbitration: Regularity or Certainty?' (3) *International Arbitration Law Review* (2007) 92; Gibson and Drahozal, 'Iran-United States Claims Tribunal Precedent in Investor-State Arbitration', 23 *Journal of International Arbitration* (2006) 521; Guillaume, 'Can Arbitral Awards Constitute a Source of International Law under Article 38 of the Statute of the International Court of Justice?' in Banifatemi and Gaillard (eds), *Precedent in International Arbitration* (2008) 105; Jacquet, 'Avons-nous besoin de jurisprudence arbitrale?' *Revue de l'arbitrage* (2010); Jouannet, 'La notion de la jurisprudence internationale en question,' in *La Juridictionnalisation du Droit International*, ed. S.F.D.I. International (2003); Kaufmann-Kohler, 'Is Consistency a Myth?' in Banifatemi and Gaillard (eds), *Precedent in International Arbitration* (2008) 137-148; Knahr, 'Annulment and Its Role in the Context of Conflicting Awards', in Wible and Kaushal (eds), *The Backlash against Investment Arbitration* (2010) 151; Larroumet, 'A propos de la jurisprudence arbitrale', *Gazette du Palais* (2006) 5; Legum, 'The Definitions of Precedent in International Arbitration', in Banifatemi and Gaillard (eds), *Precedent in International Arbitration* (2008) 5; Mourre, 'Precedent and Confidentiality in International Commercial Arbitration: The Case for the Publication of Arbitral Awards', in Banifatemi and Gaillard (eds), *Precedent in International Arbitration* (2008) 39; Paulsson, 'International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law', in van den Berg (ed), *International Arbitration 2006: Back to Basics* (2007) 879-889; Perret, 'Is There a Need for Consistency in International Commercial Arbitration?' in Banifatemi and Gaillard (eds), *Precedent in International Arbitration* (2008) 25; Reinisch, 'The Role of Precedent in ICSID Arbitration', in Klausegger and Klein (eds), *Austrian Arbitration Yearbook* (2008); Rigo Sureda, 'Precedent in Investment Treaty Arbitration', in C. Binder *et al.* (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009); Schill, *The multilateralization of*

A. DEFINITION OF JURISPRUDENCE

Jurisprudence is most commonly understood as legal theory.⁴ It may be used also to refer to judicial precedents considered collectively.⁵ In this latter meaning jurisprudence represents a set of judicial norms. The notion is linked, however, to the common law tradition of *stare decisis*, in which binding precedents are considered the norms themselves (which are, thus, directly created by the judge).⁶ Quite differently, in continental legal systems, judicial norms are created by their repetition and consistency.⁷ In this case, the judicial precedent is not a norm but an element through which jurisprudence is created. This method is referred to as *jurisprudencia* in Spanish, *jurisprudence* in French or *Wertjurisprudenz* in German, but there is no exact word to refer to that notion in English.⁸ Some authors and arbitrators refer to *jurisprudence constante*, settled jurisprudence, developing jurisprudence, system of case law.⁹ Given that there is no suitable word in English to refer to the continental law doctrine, I will use the English word jurisprudence as encompassing any type of it (be it that of precedent or continental jurisprudence).

international investment law, Cambridge International Trade and Economic Law (2009); Schreuer and Weiniger, 'Conversation Across Cases - Is there a Doctrine of Precedent in Investment Arbitration?' (2007); Schreuer and Weiniger, 'A Doctrine of Precedent?' in Muchlinski *et al.* (eds), *The Oxford Handbook of International Investment Law* (2008); Spoorenberg and Vinuales, 'Conflicting Decisions in International Arbitration', 8 *The Law and Practice of International Courts and Tribunals* (2009) 91; Vadi, 'Towards Arbitral Path Coherence & Judicial. Borrowing: Persuasive Precedent in Investment Arbitration', 5 (3) *Transnational Dispute Management* (2008); Walde, 'Confidential Awards as Precedent in Arbitration: Dynamics and Implication of Award Publication', in Banifatemi and Gaillard (eds), *Precedent in International Arbitration* (2008) 113; Wälde, 'The Specific Nature of Investment Arbitration', in Wälde *et al.* (ed), *Les aspects nouveaux du droit des investissements internationaux / New Aspects of International Investment Law* (2007).

⁴ 'Black's Law Dictionary,' (2009), 'Jurisprudence'.

⁵ *Ibid.*

⁶ Aguiló Regla, *Teoría general de las fuentes del derecho:(y del orden jurídico)* (2000), at 116-117.

⁷ *Ibid.*

⁸ In spanish the Diccionario de la Real Academia defines it as « Criteria on a legal problem established by a set of coherent judicial decisions'; http://buscon.rae.es/draeI/SrvltConsulta?TIPO_BUS=3&LEMA=jurisprudencia. In French, « Jurisprudence » has a similar meaning. 'Cornu, 'Vocabulaire juridique quadrige,' (2009) 530.

⁹ *AES Corporation v. Argentina, Decision on jurisdiction*, ICSID Case No ARB/02/17 2005, at § 33; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v. Paraguay, Decision on Objection to Jurisdiction*, ICSID Case No ARB/07/9 2009, at § 141; *Enron Corporation and Ponderosa Assets LP v. Argentina*, ICSID Case No ARB/01/3, *Decision on Application for Annulment*, 30 July 2010, 2010, at § 65; *Helnan International Hotels AS v. Egypt, Decision on the Application for Annulment*, ICSID Case No ARB/05/19, at § 48; *MCI Power Group LC and New Turbine Inc v. Ecuador, Decision on Annulment*, ICSID Case No ARB/03/6 2009, at § 24; *Renta 4 SVSA and ors v. Russian Federation, Award on Preliminary Objections*, SCC Case No 24/2007, signed 20 March 2009, IIC 369 2009, at § 16; *SGS Société Générale de Surveillance SA v. Philippines*, ICSID Case No ARB/02/6, *Decision on Objections to Jurisdiction and Separate Declaration*, 29 January 2004 2004, at § 97; *Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No ARB/04/14; *Award*, 8 November 2008, IIC 357 2008, at § 178.

Taking into account these differences, and for didactic purposes only, in domestic law we may find two types of jurisprudence: one binding and another persuasive.

The first one concerns the case of the doctrine of *stare decisis* in common law countries where precedents of higher court decisions (such as the House of Lords in England or the U.S. Supreme Court) are binding on lower courts and on themselves unless it is unreasonable or inappropriate; or it conflicts with another decision of a court of the same hierarchy.¹⁰ In civil law countries, although they are based on a system of codified law, in some cases higher courts can impose a consistent jurisprudence. This is the case of Mexico regarding 3 consecutive decisions of the Supreme Court of Justice¹¹ or of Guatemala regarding 5 consecutive decisions of the Supreme Court of Justice¹². This type of jurisprudence is considered a source of positive law and binding on other courts.

On the other hand, there is an informal and imprecise method developed by lower courts in relation to each other. This is often referred to as the *de facto* precedent in common law countries, and general jurisprudence - a set of coherent solutions resulting from voluntary imitation- in civil law countries. These mechanisms exist with regard to decisions of lower courts, which even if they are not binding, are imitated and cited. From their systematization give rise informally and in a rather fuzzy way to general principles and solutions.¹³

B. EXISTENCE AND SPECIFICITY OF THE ARBITRAL JURISPRUDENCE

It could be argued that the lack of permanence of arbitral tribunals, as their existence and power result from a particular agreement to settle a particular dispute in respect of a particular bilateral investment treaty (BIT), are obstacles to the existence of any type of jurisprudence. Arbitral tribunals are independent amongst themselves and each BIT is a different treaty. Then, how is it possible to share a common experience?

The lack of permanence of the arbitral tribunal is not fatal. These tribunals operate in an environment, which favors their harmonization and the development of arbitration as a professional unit and a specialized field.¹⁴ The legalization and standardization of contemporary arbitration set out the conditions for the homogeneity of these tribunals allowing that the experience of one tribunal is useful to others. This was achieved under certain international conventions, soft law

¹⁰ Sprecher, 'The Development of the Doctrine of Stare Decisis and the Extent to Which It Should be Applied', 31 *ABAJ* (1945) 468, at 502.

¹¹ Art. 192, of the *Ley de Amparo, Reglamentario de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos*.

¹² Código Procesal Civil y Mercantil of Guatemala, Arts. 621-627.

¹³ Zenati, *La jurisprudence, Méthodes du droit* (1991), at 177.

¹⁴ Regarding the impact especialization produces in the way we see the world, see Kuhn, *The Structure of Scientific Revolutions* (1966), at 50-51.

instruments of harmonization and the creation of certain arbitral institutions and arbitration rules.¹⁵

In addition, homogeneity also exists in relation to the claims and the applicable BITs. These treaties generally share the same structure since they are often drafted on the basis of model treaties. They usually contain provisions on the scope of application, conditions of admission of foreign investments, absolute and relative standards of protection, money transfers, operational conditions of the investment, protection against expropriation, compensation for damages and dispute resolution.¹⁶ These sample treaties gave rise to the existence of identical clauses in different treaties in force, allowing arbitral tribunals to imitate others in the settlement of the disputes relating to these treaties.¹⁷

Arguably even with this homogeneity, it is difficult to expect that arbitrators will imitate each other. Arbitrators belong to different nationalities, different professions and different traditions. In a permanent tribunal, judges are the same for long periods of time and it is logical to expect that a judge will be consistent with himself.¹⁸ If we think of investment arbitration, given its plural and atomized nature we might tend to think the contrary. Still, even if arbitration is plural, pluralism produces cultural neutrality and arbitration becomes a hybrid with elements of different legal traditions.¹⁹ This makes arbitration plural but specific. As Thomas Wälde explains, arbitration is less determined by specific cultures or domestic legal traditions and arbitration rules tend to express a synthesis or cohabitation of the two models (common and civil law).²⁰ In fact, arbitrators usually belong to a particular profession, law (sometimes due to the ICSID Convention)²¹, and a professional specialization, International Arbitration. Arbitrators and parties' attorneys (which

¹⁵ With the Hague Conferences of 1899 and 1907, the New York Convention of 1958, the ICSID Convention, as the UNCITRAL Arbitration Model Law and the UNCITRAL Arbitration rules and a series of arbitration institutions, such as the International Chamber of Commerce (ICC) and the Permanent Court of Arbitration (PCA). Crawford, 'Continuity and Discontinuity in International Dispute Settlement: An Inaugural Lecture', 1 (1) *Journal of International Dispute Settlement* (2010) 3, at 10.

¹⁶ McNair, *The Development of International Justice* (1954), at 15; Parra, 'Applicable Substantive Law in ICSID Arbitrations Initiated Under Investment Treaties', 14 *ICSID Rev* (1999) 299; Salacuse, 'Towards a Global Treaty on Foreign Investment: The Search for a Grand Bargain', in Horn (ed), *Arbitrating Foreign Investment Disputes* (2004) 61; Rubins, 'The Evolution of Investment Arbitration in the U.S. FTAs with Singapore and Chile', 1 (3) *Transnational Dispute Management* (2004), at 3.

¹⁷ Crawford, 'Similarity of Issues in Disputes Arising under the Same or Similarly Drafted Investment Treaties', at 100.

¹⁸ Gerhardt, 'The Limited Path Dependency of Precedent', 7 *U Pa J Const L* (2004-2005) 903, at 952.

¹⁹ Gaillard (ed), *Towards a uniform international arbitration law? : YAP Seminars, Paris - March 28, 2003; Geneva - March 26, 2004* iai series (2004), at 1 ff.

²⁰ Wälde, 'The Specific Nature of Investment Arbitration', at 52.

²¹ Art. 14 (1) of the ICSID Convention establishes 'Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.'

are often appointed arbitrators) generally belong to the specialized departments of law firms named Arbitration or International Arbitration or to specialized academics fields. This allows conceiving international arbitration as a professional community, plural, but with some specificity. A community in which arbitrators share the same experience and influence each other.²² On the other hand, one cannot ignore the fact that arbitration is monopolized by a homogeneous group of arbitrators. These are in majority specialized practitioners and academics belonging to a small elite of western origin. As Jeffery Commission's study demonstrates, most investment cases are decided by a reduced group of arbitrators of the ICSID list, many of which have been appointed more than once.²³

Finally, independent arbitral tribunals could only share their experience if they have access to this experience, if they can know what others have decided. In investment arbitration, a large number of awards are in the public domain. One can often find a copy of an award with a simple Google search on the day that it is dispatched to the parties. Although, in investment arbitration, as in commercial arbitration, publicity of awards depends on parties' consent²⁴, the parties usually do not object to their publication²⁵ and arbitration centers²⁶, specialized legal journals²⁷, as well as attorneys publish them²⁸. The interest in publishing these awards lays in the fact that investment arbitration awards are less technical, of greater public interest and, do not generally contain sensitive or secret information.²⁹ This practice of disclosure has allowed the cross-application of arbitral precedents and finally, the creation of settled solutions or principles, which I will analyze below.

In fact these alleged obstacles to the emergence of arbitral jurisprudence, are but elements that make its specificity. They are at the core of the distinction between arbitral jurisprudence and other jurisprudences and, as will be seen after these lines it explains its particular value and making process.

²² Commission, 'Precedent', at 136. (*Their backgrounds, qualifications, experiences in international law and their regular interactions, both professionally and otherwise, have contributed to the development of an esprit de corps amongst ICSID and other investment treaty arbitrators.*)

²³ Such as the case of Kauffman Kohler and Fortier with more than 10 appointments in relation to the pending cases as of 2006. Ibid., at 140.

²⁴ See: Art. 48(5) of the ICSID Convention and Art. 48(4) of the ICSID Arbitration Rules, and Art. 34.5 of UNCITRAL Arbitration rules (as of 2010).

²⁵ Walde, 'Confidential Awards as Precedent in Arbitration. Dynamics and Implication of Award Publication', in E. Gaillard and Y. Banifatemi (eds), *Precedent in International Arbitration* (2007) 113-135, at 123.

²⁶ This is the case of ICSID which publishes ICSID awards in the official web site (<http://icsid.worldbank.org/ICSID/Index.jsp>) and of ICC which publishes extracts of the awards in *Collection of ICC Awards*, *Recueil des sentences arbitrales de la ICC* y *Collection of Procedural Decisions in ICC Arbitration*.

²⁷ For example: *International Law Materials*, *International Law Reports*, *TDM*, www.ita.law.uvic.ca, *JDI*, *ICA Yearbook*.

²⁸ Who publish for professional reputation. Walde, 'Confidential Awards as Precedent in Arbitration. Dynamics and Implication of Award Publication', at 122.

²⁹ Ibid., at 126.

II. VALUE OF ARBITRAL JURISPRUDENCE

Investment arbitral tribunals give different value to arbitral precedents and to the solutions established in a consistent line of cases.³⁰ From an analysis of investments awards in recent years, both ICSID and *ad hoc* tribunals, three main approaches can be drawn on the value of arbitral jurisprudence. According to the first approach, arbitrators have the power to follow arbitral precedents but this activity would not consist in or create arbitral jurisprudence. Quite differently, according to the second approach, arbitrators have a duty to develop and respect arbitral jurisprudence. Finally, the third approach prohibits arbitral jurisprudence.

A. IRRELEVANT FACULTY

According to the first theory, the arbitrator has the faculty to imitate other arbitral tribunals, but there is no arbitral jurisprudence as such. This position is stated in *AES v. Argentina*³¹ and *SGS v. Philippines*³², where both arbitral tribunals declared that the limited mission of the arbitrator does not stop him to follow earlier decisions. However, imitation amongst arbitral tribunals would not generate a relevant set of general norms given that tribunals are independent and that there are no institutional hierarchies. For this position, however, certain mechanisms of control of the award under the ICSID Convention, may, in the future, generate arbitral jurisprudence. In *AES v. Argentina*, and similarly in *SGS v. Philippines*³³, after giving mere illustrative value to arbitral precedents, the tribunal declared that annulment

³⁰ *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, Decision on Jurisdiction ICSID Case No ARB/08/5 2010, at § 100; *Amco Asia and others v. Republic of Indonesia*, Annulment decision, ICSID Case No ARB/81/1, at § 44; *Liberian Eastern Timber Corp. (LETCO) v. Government of the Republic of Liberia*, ICSID Case No. ARB/83/1, Award of March 31, 1986, 89 ILR 1994, at 323; *El Paso Energy International Co. v. Argentine Republic*, Decision on jurisdiction, ICSID Case No ARB/03/15 2006, at § 39; *Jan de Nul NV and Dredging International NV v. Egypt*, Decision on jurisdiction, ICSID Case No ARB/04/13 2006, at § 63; *Pan American Energy LLC and BP Argentina Exploration Co. v. Argentine Republic*, Decision on jurisdiction, ICSID Case No ARB/03/13 2006, at § 42; *Grand River Enterprises Six Nations, Ltd., et Al. v. United States of America*, Decision on Objections to Jurisdiction, NAFTA / UNCITRAL Arbitration 2006, at § 36; *ADC Affiliate Ltd and ADC & ADMC Management Ltd v. Hungary*, Final award on jurisdiction, merits and damages, ICSID Case No ARB/03/16 2006, at § 293; *AES v. Argentina*, at § 17-32; *Bayindir Insaat Turizm Ticaret ve Sanayi A Ş v. Pakistan*, Decision on Jurisdiction, ICSID Case at § 73-76; *SGS v. Philippines*, at § 97; *BP America Production Co. and others v. Argentine Republic*, Decision on jurisdiction, 27 July 2006, ICSID Case No ARB/04/8 2006, at § 42; *Austrian Airlines v. Slovakia*, Final Award, Ad hoc—UNCITRAL Arbitration Rules 2009, at § 83-84; *Wintershall v. Argentina*, at § 177-178; *RosInvest Co UK Ltd v. Russian Federation*, SCC Case No Vo79/2005, Jurisdiction award, 5 October 2007, 2007, at § 49; *Renta 4*, at § 16; *Enron Annulment*, at § 63-66; *MCI Annulment*, at § 24-25; *Bureau Veritas v. Paraguay*, at § 141.

³¹ *AES v. Argentina*.

³² *SGS v. Philippines*, at § 97.

³³ *Bureau Veritas v. Paraguay*. § 141, footnote 33.

committees may develop an arbitral *jurisprudence constante*.³⁴ Ergo, only annulment committees would be entitled to produce jurisprudence, similarly to domestic courts of appeal, while the decisions of arbitral tribunals would not have that effect.³⁵

The thesis is questionable in two aspects. In the first place, the approach ignores a reality in investment arbitration. There is a great dialogue going on between arbitral tribunals on how to decide legal issues. This dialogue results in general coherent solutions: agreements on how to apply (and complete) investment law. Can we close our eyes to this reality because there are no institutional hierarchies? Hierarchies are used effectively to provide coherence to the various divergent court decisions, which naturally tend to be divergent. But institutional hierarchy is one method for unifying divergent jurisprudences and it is not the only one.³⁶ It is just the most obvious.³⁷ The absence of institutional hierarchies does not exclude hierarchies of other nature. As will be seen below there are rational, social and professional hierarchies which, to a lesser extent, achieve unified decisions.³⁸ In domestic law, institutional hierarchies are an essential element for binding precedent or binding jurisprudence, given that this type of jurisprudence has the same role as law: legal certainty and equality. However, as I mentioned above, in domestic courts there is a second type of jurisprudence, a persuasive one, which is flexible and informal and does not depend on institutional hierarchies or a specific mandate. Arbitral jurisprudence has a different, more modest, but not less relevant, role. As mentioned before, arbitral precedents became in investment arbitration the language of the arbitral process and its imitation resulted in agreements on how to apply investment law and give content to its abstract categories, rules, and standards. This is one very important reason to recognize its relevance and existence.

Secondly, control mechanisms of arbitral awards are not sufficient to produce arbitral jurisprudence. Unlike domestic courts of appeal, ICSID annulment

³⁴ *AES v. Argentina*. ('33. From a more general point of view, one can hardly deny that the institutional dimension of the control mechanisms provided for under the ICSID Convention might well be a factor, in the longer term, for contributing to the development of a common legal opinion or *jurisprudence constante*, to resolve some difficult legal issues discussed in many cases, inasmuch as these issues share the same substantial features.')

³⁵ *SGS v. Philippines*, at § 97.('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.')

³⁶ Jouannet, 'La notion de la jurisprudence internationale en question', 366.

³⁷ *Ibid.*, 370.

³⁸ In a wider context, see: Romano, 'Deciphering the Grammar of the International Jurisprudential Dialogue', *N Y U Journal of International Law and Politics* (2009) 755, at 759.

committees may not review whether the application of the law to the case is correct.³⁹ It is exactly here, in this activity, in the application of the law, where jurisprudence exists. Therefore, it is difficult to see how annulment committees could ever play a role similar to domestic courts. The committees themselves, such as *MCI* and *Enron*, have rejected such a role.⁴⁰ This does not mean, however, that annulment committees are prevented from following precedents of other committees and generating a consistent jurisprudence on annulment proceedings.⁴¹ This jurisprudence is identical to that of arbitral tribunals: created among peers. Non-ICSID arbitrations are subject to annulment and enforcement proceedings before national courts, the latter usually under the 1958 New York Convention. These tribunals usually do not either have the power to review the merits of the case and whether the application of the law is correct, with the limited exception of the international public policy exception.⁴² Moreover, the judgments of these courts, in general, have a limited effect to the territory of the State where they were issued.⁴³ These courts produce jurisprudence, yet which is not arbitral but a domestic judicial jurisprudence on international

³⁹ *MCI Annulment*, at § 24. *Enron Annulment*, at 66-63.; ver también: Bjorklund, 'Investment Treaty Arbitral Decisions as Jurisprudence Constante', at 271.

⁴⁰ *MCI Annulment*. §24 ('An ICSID award is not subject to any appeal or to any other remedy except those provided for in the ICSID Convention. In annulment proceedings under Article 52 of the ICSID Convention, an ad hoc committee is thus not a court of appeal, and cannot consider the substance of the dispute, but can only determine whether the award should be annulled on one of the grounds in Article 52(1)') *Enron Annulment*, at 63-66.; Bjorklund, 'Investment Treaty Arbitral Decisions as Jurisprudence Constante', at 271.

⁴¹ *Enron Annulment*. ('66. Notwithstanding this, in relation to matters which fall within the competence of an ad hoc committee to decide, it is in the Committee's view to be expected that the ad hoc committee will have regard to relevant previous ICSID awards and decisions, including other annulment decisions, as well as to other relevant persuasive authorities. Although there is no doctrine of binding precedent in the ICSID arbitration system, the Committee considers that in the longer term there should develop a *jurisprudence constante* in relation to annulment proceedings.') *MCI Annulment*, at 24-25.

⁴² In relation to enforcement of the award, see Art. V of the New York Convention. Also refer to Arts. 34 (annulment) and 36 (enforcement) of the UNCITRAL Model Law which has been followed in more than 50 countries (http://www.uncitral.org/uncitral/es/uncitral_texts/arbitration/1985Model_arbitration_stat_us.html). Bjorklund, 'Investment Treaty Arbitral Decisions as Jurisprudence Constante', at 271; Pinna, 'La spécificité de la jurisprudence arbitrale', (16) *Jusletter* (2006).

⁴³ In France (Cour de cassation, 1re civ., 23 mars 1994, *Société Hilmarton Ltd. v. Société Omnium de traitement et de valorisation (OTV)*, JDI, 1994, p. 701, spéc. p. 702; Cour d'appel de Paris, 14 janvier 1997, *République arabe d'Egypte v. Société Chromalloy Aero Services*, JDI, 1998, p.750; Cour d'appel de Paris, 10 juin 2004, *Société Barges Agro Industries v. Société Young Pecan Company*, *Rev. arb.*, 2006, p. 154; Cour d'appel de Paris, 18 janvier 2007, *La société S.A. Lesbats et fils v. Monsieur Volker le docteur Grub*, inédit). In USA even if in *Chromalloy* it an award annuled at the place of the arbitration was recognized, the trend is more restrictive since the cases *Baker Marine, Spier y TermoRio. Chromalloy Aeroservices v. Arab Republic of Egypt*, 31 juillet 1996, 939 F. Supp. 907 (DDC 1996) ; *Rev. arb.*, 1997, p. 439; *Baker Marine (Nig.) Ltd v. Chevron (Nig.) Ltd*, 12 août 1999, 191 F. 3d 194 (2d cir. 1999); *Rev. arb.*, 2000, p. 135, note E. Gaillard; *Spier v. Calzaturificio Tecnica, S.p.A.*, 22 octobre 1999, 71 F. Supp. 2d 279 (SDNY 1999).; *TermoRio S.A. E.S.P. et al. v. Electrificadora Del Atlantico S.A. E.S.P. et al.*, 17 mars 2006, 421 F. Supp. 2d 87 ; *Rev. arb.*, 2006, p. 786, note J. Paulsson; Cour d'appel du district de Columbia, *TermoRio S.A. E.S.P. et LeaseCo Group LLC v. Electranta S.P. et al.*, 25 mai 2007, 487 F. 3d 928; *Rev. arb.*, 2007, p. 553, note J. Paulsson.)

arbitration. This does not mean that domestic jurisprudences on international arbitration are irrelevant to arbitrators. As analyzed below, these judgments are factors that may affect the authority of the arbitral precedent.

B. DUTY

Under the second approach the arbitrator has the duty to follow arbitral precedents, in particular, the solutions established in a series of consistent cases (jurisprudence) in order to develop investment law and promote legal certainty. This position appears in a large number of decisions of tribunals generally chaired by the same arbitrator, such as *Austrian Airlines*, *Bayindir*, *Saipem* and *Burlington Resources*.⁴⁴ All these cases contain a similar paragraph which after the title: 'Relevance of previous awards and decisions of other tribunals' reads:

The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.⁴⁵

Other courts and ICSID annulment committees share the same stance. In the decision of the *ad hoc* committee in *MCI* (which was repeated by the *ad hoc* committee in *Enron*)⁴⁶, after mentioning the limited role of *ad hoc* committees, stated that 'the responsibility for ensuring consistency in the jurisprudence and for building a coherent body of law rests primarily with the investment tribunals. They are assisted in their task by the development of a common legal opinion and the progressive emergence of "une jurisprudence constante"'.⁴⁷

Here, although jurisprudence is assumed to be persuasive rather than binding,

⁴⁴ *Burlington Resources*, at § 100. *Austrian Airlines v. Slovakia*, at § 84; *Bayindir v. Pakistan*. *Saipem SpA v. Bangladesh*, ICSID Case No ARB/05/07; IIC 280 (2007), *Decision on jurisdiction and recommendation on provisional measures*, signed 21 March 2007, 2007, at 67. All chaired by Prof. Gabrielle Kaufmann-Kohler.

⁴⁵ *Austrian Airlines v. Slovakia*, at § 84.

⁴⁶ *Enron Annulment*, at § 65.

⁴⁷ *MCI Annulment*, at 24-25. See also *ADC v. Hungary*. ('293... 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.'). El tribunal estaba presidido por Neil Kaplan e integrado con Charles N Brower y Albert Jan van den Berg.

since the duty of the arbitrator would be moral and not legal,⁴⁸ from an operational standpoint, it works similarly to *stare decisis* or binding jurisprudence, because the arbitrator must follow the solution unless there are compelling reasons to the contrary. Moreover, from the point of view of the objectives of arbitral jurisprudence (predictability and security) these are the objectives of binding precedent and law.⁴⁹ As in civil law countries this task was entrusted to legislators through codes, in Anglo-Saxon countries it was entrusted to judges through the system of binding precedent.⁵⁰ Binding precedents and law are two methods of making binding norms that provide legal certainty. By virtue of their normative power, only a small elite, such as higher courts and parliaments, subject to transparency, participation control, review mechanisms and accountability, are entitled to make it. It is hard to imagine that similar objectives can be achieved in international arbitration.

The arbitrator's role is to decide the dispute submitted to it, 'no less but no more.'⁵¹ The power of the arbitrator, its *jurisdictio*, is based on a specific agreement to settle a particular dispute and which disappears after the issuance of the decision. International law making by the arbitrator is not only unlikely, as it would go against the principle of State sovereignty,⁵² but highly undesirable.⁵³ The jurisdictional function of the arbitrator derives from two parties (one State and an investor). What legitimacy could ever achieve an arbitrator under these conditions?⁵⁴ It is difficult to see how the arbitrator can have a duty to develop international law and provide legal certainty. I will analyze the issue on legal certainty in more detail below, but it is noteworthy to mention that in *Austrian Airlines*, the award declares one arbitrator's disagreement in relation to the above mentioned paragraph,⁵⁵ and in the recent case

⁴⁸ The president of these arbitrations explains it in an article: Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' at 374.

⁴⁹ Sprecher, 'The Development of the Doctrine of Stare Decisis and the Extent to Which It Should be Applied', at 505. Commission, 'Precedent', at 134; Zander, *The Law Making Process* 6th ed. (2004), at 215, 302–3. Zenati, *La jurisprudence*, at 178.

⁵⁰ Henry, 'Jurisprudence constante and stare decisis contrasted', 15 *ABAJ* (1929) 11; Sprecher, 'The Development of the Doctrine of Stare Decisis and the Extent to Which It Should be Applied', at 505.

⁵¹ Bockstiegel, 'Introductory Remarks', at 19. Jacquet, 'Avons-nous besoin de jurisprudence arbitrale?'

⁵² Bastid Burdeau, 'Le pouvoir créateur de la jurisprudence internationale à l'épreuve de la dispersion des juridictions', *La création du droit par le juge* (2007), at 394.

⁵³ *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentina, Decision on Argentina's Request for Annulment of the Award*, ICSID Case No ARB/97/3 2010. Additional Opinion of Professor JH Dalhuisen under Article 48(4) of the ICSID Convention ('It may be recalled that in international law, there has never been a rule of binding precedent and this is so for very good reasons')

⁵⁴ Terré, 'Un juge créateur de droit ? Non merci !', in *La création du droit par le juge* (2007), at 305-309.

⁵⁵ *Burlington Resources*, at § 100. ('The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. The majority believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law,

Chemtura, which was also chaired by the same arbitrator as the other cases cited above, the paragraph has been substantially amended. It omits the phrase about the arbitrator's duty to contribute to the development of international law and instead of saying that the arbitrator has the 'duty' to follow a consistent line of cases, says that the tribunal 'ought' to follow it.⁵⁶

C. PROHIBITION

Finally, under the third approach, arbitral jurisprudence is prohibited because it involves the creation of unauthorized international law. This is the position of certain respondent States who claim that the use of arbitral precedent would constitute a violation of the obligations of the arbitrator, an abuse of its power. The arbitrator has the duty to decide a dispute in an independent and autonomous way under the arbitration clause. Given the specificity of BITs, the arbitrator would be exceeding its power by applying transversally the interpretation of one treaty to another. This would create a multilateralization of various BITs in violation to the principle of State consent.⁵⁷ In *AES v. Argentina*, Argentina argued that the use of precedents regarding other treaties is contrary to the principle of consent (in which is based arbitration and international law itself) given the unique nature of each treaty as *lex specialis*.⁵⁸ However, the tribunal rejected the argument stating that although the use of precedents must be made with caution, the tribunal is not precluded from considering previous arbitral decisions in similar cases.⁵⁹ The problem of Argentina's position is that it ignores the specificity of arbitral jurisprudence and conceives it as

and thereby to meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law. Arbitrator Stern does not analyze the arbitrator's role in the same manner, as she considers it her duty to decide each case on its own merits, independently of any apparent jurisprudential trend.').

⁵⁶ *Chemtura Corporation v. Canada, Ad hoc—UNCITRAL Arbitration Rules; Award, signed 02 August 2010*, IIC 451 2010, at 109. ('The Tribunal is not bound by previous decisions of NAFTA or other international tribunals. At the same time, it is of the opinion that it should pay due regard to earlier decisions of such tribunals.⁹ The Tribunal is further of the view that, unless there are compelling reasons to the contrary, it ought to follow solutions established in a series of consistent cases, comparable to the case at hand, but subject of course to the specifics of a given treaty and of the circumstances of the actual case.'). Perhaps this change is due to the presence of James Crawford as an arbitrator, who has a more restricted view regarding the role of the arbitrator. Crawford, 'Similarity of Issues in Disputes Arising under the Same or Similarly Drafted Investment Treaties'.

⁵⁷ Schill, *The multilateralization of international investment law*.

⁵⁸ *AES v. Argentina*, at § 22-23.

⁵⁹ *Ibid.* ('27. Under the benefit of the foregoing observations, the Tribunal would nevertheless reject the excessive assertion which would consist in pretending that, due to the specificity of each case and the identity of each decision on jurisdiction or award, absolutely no consideration might be given to other decisions on jurisdiction or awards delivered by other tribunals in similar cases. 28. In particular, if the basis of jurisdiction for these other tribunals and/or the underlying legal dispute in analysis present either a high level of similarity or, even more, an identity with those met in the present case, this Tribunal does not consider that it is barred, as a matter of principle, from considering the position taken or the opinion expressed by these other tribunals.')

binding. If the norms created by the arbitrators are binding, these norms are clearly prohibited. But the confusion lies in the assimilation of international law and arbitral jurisprudence. Arbitral tribunals are not multilateralizing or modifying a conventional rule, but they are imitating others in its interpretation and application. Law adjudication operates on a different level than that of applicable law: it takes place in the sphere of freedom of the arbitrator, in his decision-making power. The application of law is not a mechanical activity and it is exercised within a framework of ideological freedom.⁶⁰ This is why it may result in different decisions, even contradictory.⁶¹ For example, if a BIT includes shares in its definition of investment, are indirect shares protected? The answer is not categorical, one might think that because the treaty did not mention them, they are excluded; on the other hand, given that the object and purpose of a treaty is to promote and protect investments, an indirect shareholder deserves protection. The same is true with identically worded provisions that led to inconsistent awards. Such is the case of the most-favored nation clause (MFN) drafted in general terms. Are procedural rights included? Arbitral tribunals have given contradictory responses. This is the case of *Maffezini* and *Renta 4*, where both tribunals reached, regarding an almost identical provision, to opposed decisions, one including procedural rights and the other excluding them.⁶² What is the correct interpretation? There is no 'correct' interpretation in the abstract. It depends on historical, social, ontological and diverse other factors. The divergence does not exist because there are good and bad arbitrators, but because there are social differences that are translated into irreconcilable legal criteria. Further, these ambiguities are not only due to the indeterminacy of the text but also because the BIT clauses operate in a complex system (environmental standards, human rights, trade, etc). Divergences in law application are not an anomaly of adjudication; they are their natural result. They result from the freedom enjoyed by the arbitrator to decide a case based on law (with its indeterminacy). The discretion

⁶⁰ Kennedy, *A Critique of Adjudication (fin de siècle)* (1998).

⁶¹ Spoorenberg and Vinuales, 'Conflicting Decisions in International Arbitration'.

⁶² In *Renta 4* the MFN clause read: '1. Each Party shall guarantee fair and equitable treatment within its territory for the investments made by investors of the other Party ... 4. In addition to the provisions of paragraph 2 above, each Party shall, in accordance with its national legislation, accord investments made by investors of the other Party treatment no less favourable than that granted to its own investors.' *Renta 4*, at § 68. In *Maffezini*, Art. IV of the Argentina- Spain BIT provided an almost exact clause: 'Cada Parte garantizará en su territorio un tratamiento justo y equitativo a las inversiones realizadas por inversores de la otra Parte....5. Además de las disposiciones del párrafo 2 del presente artículo, cada Parte aplicará, con arreglo a su legislación nacional, a las inversiones de los inversores de la otra parte un tratamiento no menos favorable que el otorgado a sus propios inversores.' In *Renta 4* the tribunal considered that given that the clause was included in a FET provision, it excluded procedural rights (§ 103-119). On the other hand, in *Maffezini*, the tribunal extended the application of the clause to procedural rights (*Emilio Agustín Maffezini v. Spain (ICSID Case No ARB/97/7)*, Award November 11, 2000, at § 38-64.)

however is not arbitrary, it is legal science⁶³.

As divergences are a natural result of the power of the arbitrator to decide a case, coherences are as well. In the exercise of this freedom, the arbitrator might also converge with the others. Arbitrators can all decide in the same way. There is no mystical reason. They converge because they imitate each other. This is the case for example in relation to the interpretation of the word shares I just mentioned. Tribunals imitated others so much that they came to the point of a settled interpretation on the inclusion of indirect shares in the broad category shares.⁶⁴ But the arbitrator is not replacing the applicable law. She follows another tribunal in the exercise of that professional freedom; the freedom to interpret the category shares as including indirect or not. Jurisprudence should not be equated to international law or any applicable law. It has an identifiable object distinct from law, in terms of form (creation process), normative value (bindingness) and function (different but complementary to law).⁶⁵ For these reasons, arbitral tribunals usually recognize that they have the power to consider and imitate previous decisions.⁶⁶

III. ARBITRAL NORM MAKING

A. ACT (PRECEDENT) OR FACT (JURISPRUDENCE)?

As I mentioned above, in domestic legal systems there are two major methods of jurisdictional norm making. There is the doctrine of precedent, on the one hand, where the judicial norm is the precedent itself, and there is the continental law jurisprudence, on the other hand, where the judicial norm emerges from imitation among tribunals. What about investment arbitration? It is common practice that investment arbitral awards refer to the terms in French: '*jurisprudence constante*', terms in English 'system of case law', 'developing jurisprudence', 'settled jurisprudence' or 'consistent line of cases'.⁶⁷ This has led some authors to consider

⁶³ Puig Brutau *et al.*, *La jurisprudencia como fuente de derecho. Interpretación creadora y arbitrio judicial*, 2nd ed., Edición Homenaje a D José Puig Brutau (2006), at 27; Zenati, *La jurisprudence*, at 145.

⁶⁴ Bentolila, 'Shareholders' action to claim for indirect damages', 2, (1) *Trade, Law & Development* (2010) 87.

⁶⁵ However, said autonomy is merely theoretical since the jurisprudential solution operates within the law, in its application.

⁶⁶ *El Paso v. Argentina*; *Dredging International N.V. v. Arab Republic of Egypt*, Decision on jurisdiction, ICSID Case No ARB/04/13 2006; *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on jurisdiction, 2006; *Pan American Energy LLC and BP Argentina Exploration Co. v. Argentine Republic*, Decision on jurisdiction; *BP v. Argentina*; *AES v. Argentina*. ; *Bayindir v. Pakistan*, at § 76; *Burlington Resources*, at § 100; *Enron Annulment*, at § 66; *MCI Annulment*, at § 24; *Renta 4 SVSA and ors v. Russian Federation*, SCC Case No 24/2007, Award on Preliminary Objections, 20 March 2009, at § 16.

⁶⁷ *AES v. Argentina*, at § 33; *Bureau Veritas v. Paraguay*, at § 141; *Enron Annulment*, at § 65; *Helnan International Hotels AS v. Egypt*, Decision on the Application for Annulment, at §

that arbitral norm making in this field should better be assimilated to continental law jurisprudence.⁶⁸ This is due to the lack of permanence of the arbitral tribunal and the absence of institutional hierarchies. It is difficult to see the creation of general norms individually and directly by an arbitral tribunal.⁶⁹ Given that in investment arbitration the type of arbitral norm making would be in any case persuasive, the following question arises: persuasive precedents or settled solutions? Persuasive precedents are not sufficient to bring order to such an atomized phenomenon which is arbitration. Persuasive precedents are elements by which jurisprudence is made but jurisprudence is more than a single persuasive precedent. Jurisprudence, by its imitation and acceptance by other independent tribunals, represents a point of agreement between these on how to apply the law in a particular issue. This generality and consensus of the solution enables to complete the law in its universality and rationality. A persuasive precedent, not enjoying such consistency and consensus appears as a mere interpretative option.⁷⁰ For this reason, most writings of scholars on the issue consider that a better analogy is with the *jurisprudence constante* of the French tradition.⁷¹ While I agree with the stance, I think the term is misleading since *jurisprudence constante* would evoke only part of the phenomenon ignoring the process and those blurry situations, which I will call developing arbitral norms.

Arbitral jurisprudence is, thus, developed through imitation of precedents. Arbitral precedent is the technical means by which tribunals create settled solutions.⁷² It is a principle or criterion (in investment arbitration usually an interpretation of a BIT clause or the ICSID Convention) applied by the arbitrator in his decision. While the decision is concrete, it can be reproduced in similar cases. With imitation and repetition of that decision the concrete becomes general; i.e. applicable to a generality of cases, since the decisions in respect of A also apply with respect to B. Moreover, this generalization is achieved with the consent of other arbitrators who by imitation give their stamp of approval. Imitation is an act of acceptance.⁷³ It may be

48; *MCI Annulment*, at § 24; *Renta 4*, at § 16; *SGS v. Philippines*, at § 97; *Wintershall v. Argentina*, at § 178.

⁶⁸ Bjorklund, 'Investment Treaty Arbitral Decisions as Jurisprudence Constante', at 270.

⁶⁹ *Ibid.*, at 272.

⁷⁰ In a more radical position, Thomas Wälde explains that at the lowest level there is a previous decision that offers a good illustration; at the following level, decision is persuasive and requires citation and justification for not following it; and finally, there is cristalized jurisprudence 'staendige rechtsprechung' or 'jurisprudence constante' which means that jurisprudence is equated to applicable law and its not application could qualify as an abuse of power. Walde, 'Confidential Awards as Precedent in Arbitration: Dynamics and Implication of Award Publication', at 115.

⁷¹ Bjorklund, 'Investment Treaty Arbitral Decisions as Jurisprudence Constante', at 272; Crawford, 'Similarity of Issues in Disputes Arising under the Same or Similarly Drafted Investment Treaties', at 102. Wälde, 'The Specific Nature of Investment Arbitration', at 47.; McLachlan *et al.*, *International Investment Arbitration. Substantive Principles*, Oxford International Arbitration Series, at 71 (§3.86).

⁷² Jacquet, 'Avons-nous besoin de jurisprudence arbitrale?'

⁷³ *Ibid.*

explicit, by citing precedents or implied, when tribunals adopt the same solution.⁷⁴ Implicit imitation includes 'acculturation', this is the process by which actors adopt, even unconsciously, beliefs and behavior patterns of a culture environment.⁷⁵

In addition to this practice, to a lesser extent, there is an arbitral dialogue which also contributes to the development of settled solutions. This practice is that of rejecting to follow previous decisions by distinguishing the case to that of the precedent or by erasing it because it is not persuasive. While the application of the arbitral precedent is reduced, new information is available to future arbitrators. This creates an ongoing dialogue among tribunals which might lead to convergences. Recognizing that consensus often depends on extra legal factors (social, economic, political, etc.) the single 'practice of citation' distinguishing and criticizing the decision (as a dialectical process), will incorporate new elements to the process since it will provide further information and details on the positions of the parties and in face of new thesis, new anti-thesis and new synthesis.⁷⁶ As J. Paulsson says 'good awards will chase the bad.'⁷⁷

B. WHY DO ARBITRAL TRIBUNALS IMITATE OTHERS?

The fact that precedent is not binding does not mean that it has no authority. Arbitral precedents, though not binding, are almost invariably followed by arbitrators and are at the origin of their decisions. This has led some authors to refer to the persuasive value of arbitral precedent.⁷⁸ Arbitral precedent has authority, though it does not depend on a threat of a sanction by a hierarchical tribunal but on other practical, rational, professional and social factors, that I proceed to explain.

a) Because the arbitral precedent is an example of a good decision

Investment arbitral tribunals often justify the use of precedent on its illustrative value or because it is instructive,⁷⁹ useful,⁸⁰ or because it offers guidance,⁸¹

⁷⁴ Allard, 'Le dialogue des juges dans la mondialisation', *Le dialogue des juges Actes du colloque organisé le 28 avril 2006 à l'Université de Bruxelles* (2007) 77, at 83.

⁷⁵ Romano, 'Deciphering The Grammar of the International Jurisprudential Dialogue', at 772.

⁷⁶ Cheng, 'Precedent and Control in Investment Treaty Arbitration', at 1037.

⁷⁷ Paulsson, 'International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law', at 889.

⁷⁸ Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' at 358; Bjorklund, 'Investment Treaty Arbitral Decisions as Jurisprudence Constante', at 270; Paulsson, 'The Role of Precedent in Investment Arbitration', in Yannaca-Small (ed), *Arbitration Under International Investment Agreements A Guide to the Key Issues* (2010) 699, at 710; Reinisch, 'The Role of Precedent in ICSID Arbitration', at 499.

⁷⁹ *LETCO v. Liberia*, at 232.

⁸⁰ *Azurix Corp v. Argentina*, ICSID Case No ARB/01/12, Award, 23 June 2006 2006, at § 391.

⁸¹ *Marvin Roy Feldman v. United Mexican States*, (ICSID Case No ARB(AF)/99/1) 2002, at § 107.

inspiration⁸² or sheds light⁸³. The jurisdictional function is not easy. 'Legal decisions are not deductively solid arguments based on indisputable facts but merely defensible interpretations of conflicting factual and legal claims.'⁸⁴ It is the result of the difficult task of counterbalancing legal arguments in a particular social and economic environment. Thus, every decision becomes a valuable experience to other arbitrators in similar cases. Arbitrators, though not bound by precedents can and want to imitate them. Why waste such a valuable experience? Imitation is convenient, expeditious and economic.

Obviously not all arbitral decisions are on an equal footing; there are good decisions and bad decisions. Persuasive arbitral precedents represent the good ones, the result of diligent decision-making. The persuasiveness of precedent will depend on its content, the process followed for its adoption and the person of the arbitrator.

First, an arbitral precedent is persuasive when the decision represents a coherent, credible and fair decision in the eyes of the arbitrator. This will not only depend on its technical quality or logic reasoning, but on extra-legal issues, such as policy and values. Law's actualization is not arbitrary; it is limited by moral, economic, and ontological presuppositions.⁸⁵ These presuppositions will constitute the basis of consensus among the arbitral audience or community of interpreters to which I shall refer shortly. Only those interpretations, which are based on shared values, will successfully become persuasive.

Second, the decision, as any arbitral decision, has authority of giving the result of an adversarial process. The process ensures that the claims of both parties are heard and considered. These procedural safeguards to assure the parties that their claims are judged with care and caution, not only in knowledge of the facts and the assessment of evidence, but on finding the right solution to the dispute.⁸⁶ In this sense, the arbitral precedent has the authority to have been adopted in a diligent process.⁸⁷

Finally, in this type of dispute settlement, where the parties appoint the arbitrators, the person of the arbitrator is key. The mission of the arbitrator as well as the legal relationship she has with the parties is *intuitu personae*.⁸⁸ In general, arbitrators are chosen for their personal qualities, be they moral (sense of justice,

⁸² *AES v. Argentina*, at § 31.

⁸³ *Grand River Enterprises Six Nations, Ltd., et Al. v. United States of America, Decision on Objections to Jurisdiction*; *RosInvest v. Russia* at § 49.

⁸⁴ Cole, 'Authority and Contemporary International Arbitration', 70 *Louisiana Law Review* (2010) 802, at 810.

⁸⁵ Said notion was very well developed by Stanley Fish, though I do not share the position of the author who considers that the adjudicator is absolutely constrained by those presuppositions. Fish, *There's No Such Thing as Free Speech. And it's a Good Thing Too* (1994), at 173.

⁸⁶ Zenati, *La jurisprudence*, at 94.

⁸⁷ These authority for Tony Cole only exists when the process is well adapted to the needs of the parties. Arbitration rules do not always achieve such traits. Cole, 'Authority', at 851.

⁸⁸ Clay, *L'arbitre*, Nouvelle Bibliothèque de Thèses (2001), at 505 (§632).

values), technical (expertise) or reputational⁸⁹. It should be highlighted that some of the arbitrators of investment cases are former judges of the International Court of Justice⁹⁰, former members of the appellate body of the WTO⁹¹, the former president of the Security Council of the United Nations⁹², a rapporteur of the International Law Commission⁹³ and presidents of arbitral institutions⁹⁴. A decision of these arbitrators will have considerable impact.

b) Because they want to be consistent with the past

As mentioned above (section II. A), some awards evoke the idea that the arbitrator must be consistent with a line of cases in order to provide legal certainty. True, arbitrators cite precedents to be consistent. But this is not because the arbitrator is the guardian of the international legal order. These functions, as mentioned above, exceed considerably the function of arbitrators. Moreover, legal certainty is not a trait of arbitral jurisprudence. Legal certainty implies the existence of objective (accessibility) and subjective (legitimate expectations) certainty.⁹⁵ 'Accessibility concerns publicity and clarity of the law, predictability requires that laws are calculable and reliable. Legal certainty however also requires that laws can be executed and maintained'.⁹⁶ On the other hand, legitimate expectations are the certainty a person has about the realization of its own expectations and what legal consequences will follow from its actions.⁹⁷ None of these elements seems to exist in investment arbitration. First, there is no accessibility since while there is some calculation the dispersion of arbitral tribunals prevents to establish 'clearly' the content of the rule and its consequences. Given that arbitral precedent is not the rule itself, it is unlikely that these norms inform the subjects covered by them that they are 'subject' to such standards of conduct and understand clearly enough their content and consequences.⁹⁸ For such understanding, precedents need to be systematized and considered with such normativity.⁹⁹ Moreover, legitimate expectations to a large extent depend on the existence of objective legal certainty and the weaker objective certainty is the less protected legitimate expectations will be.¹⁰⁰

⁸⁹ Arbitration has a lot to do with reputation. Wälde, 'The Specific Nature of Investment Arbitration', at 51.

⁹⁰ Higgins, Schwebel, Bedjaoui and Guillaume. Paulsson, 'International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law', at 882.

⁹¹ Feliciano, Abi Saab.

⁹² Fortier.

⁹³ Crawford.

⁹⁴ Tercier and Briner.

⁹⁵ *Ryabykh v. Russia* (App no 52854/98), IX EHRR 2003; Popelier, 'Five Paradoxes on Legal Certainty and the Law Maker', II (1) *Legisprudence* 47, at 48.

⁹⁶ Popelier, 'Five Paradoxes on Legal Certainty and the Law Maker', at 48.

⁹⁷ *Ibid.*, at 64.

⁹⁸ Popelier, 'Legal Certainty and Principles of Proper Law Making', 2 (3) *European Journal of Law Reform* (2000) 321, at 330.

⁹⁹ Zenati, *La jurisprudence*, at 106.

¹⁰⁰ Popelier, 'Five Paradoxes on Legal Certainty and the Law Maker', at 64.

Further, arbitrators are appointed by the parties to settle a particular dispute in its specificity.¹⁰¹ This does not mean that arbitral jurisprudence does not contribute to provide predictability and that it might be proof of a *status quo*. But legal certainty is neither its object nor its natural result.

But arbitrators want to be consistent. Why? It is useful to analyze the question under the economic theory of rational choice applied to law.¹⁰² This theory interprets the phenomenon of imitation among arbitrators from assumptions derived from economic principles, in particular, the maximization of utilities or benefits.¹⁰³ The behavior of arbitrators can be assimilated to that of market players, tending to maximize their utility and profits and reduce costs and risks.¹⁰⁴ The arbitrator as any individual prefers more of the good and less of the bad. This rationale has to do with some intuition that leads individuals to optimize and improve their conditions. Normally, arbitrators are going to strive for prestige, promoting the public interest, satisfying the parties or having more reputation. In particular, given the non-permanence of arbitral tribunals, the arbitrator will want to work in the future (which will depend, as opposed to permanent tribunals, on the parties that nominate them). Consistency and maintenance of the *status quo* are elements that will allow the arbitrator to maximize these benefits. The reason is simple. As explained previously, the application of law is not mechanical and indeterminacy of the law allows the arbitrator to reach a series of possible interpretations. At the same time, the law claims to be rational and universal¹⁰⁵ and, therefore, the demands of motivation

¹⁰¹ Redfern, 'The 2003 Freshfields - Lecture Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly', 20 (3) *International Arbitration* (2004) 223, at 236. (The purpose of an arbitration is to arrive at a decision. It is the *decision* which matters; and it matters *not* as a guide to the opinions of a particular arbitrator, or as an indication of the future development of the law, but because it resolves the particular dispute that divides the parties; and it resolves that dispute as part of a private, not public, dispute resolution process that the parties themselves have chosen. When an award is issued, the first action that the parties and their lawyers will usually take is to turn to the end of the document, to find out whether they have won or lost. For the parties and their lawyers, it is the decision that is important. Yet, in all that is written or said about arbitration – and nowadays a great deal is written or said – there is very little about how a tribunal of arbitrators goes about reaching its decision.). Vadi, 'Towards Arbitral Path Coherence & Judicial. Borrowing: Persuasive Precedent in Investment Arbitration', at 14.

¹⁰² Murphy, *Courts, Judges, and Politics*, 5th ed. (2002); Posner, 'Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship', 67 *U Chi L Rev* (2000) 573; Landes and Posner, 'Legal Precedent: A Theoretical and Empirical Analysis', 19 *Journal of Law and Economics* (1976) 249; Gerhardt, 'The Limited Path Dependency of Precedent'.

¹⁰³ Thompson, 'Applying Rational Choice Theory to International Law: The Promise and Pitfalls', XXXI *Journal of Legal Studies* (2002) S285, at S285.

¹⁰⁴ Posner, 'Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship'; Vadi, 'Towards Arbitral Path Coherence & Judicial. Borrowing: Persuasive Precedent in Investment Arbitration'.

¹⁰⁵ Fish, *There is No Such Thing as Free Speech*, at 143. ('Formalism's appeal ... provides the law with a palpable manifestation of its basic claim to be perdurable and general; that is, not shifting and changing, but standing as a point of reference in relation to which change can be assessed and controlled; it enables the law to hold contending substantive agendas at bay by

require the arbitrator not only to show that his decision is one of the many permissible by law but that it is 'the' correct one.¹⁰⁶ For some scholars this can be called a false 'cosmopolitan dream'¹⁰⁷ or false illusion¹⁰⁸, but the fact is that actors expect the law to be rational and coherent. Any reversal or change involves a great risk to the arbitrator. First, it implies a modification of the *status quo*. Second, the decision will hardly be persuasive on the parties (and future clients) and their colleagues - who decided differently on the same matter. Third, it can jeopardize arbitrators legitimacy and the fact that instead of settling disputes based on law they are doing politics and, thus, being arbitrary. For this reason, restricting and eliminating arbitral precedents have a great cost and any arbitrator will try to minimize any tendency to diverge, preserving the appearance of continuity and stability.¹⁰⁹

c) Because the parties define their claims in terms of arbitral precedents

A very frequently mentioned reason to cite precedents by arbitral tribunals is that the parties have referred to them.¹¹⁰ Actually, it is common practice for the parties and their lawyers to do so.¹¹¹ The arbitral precedent becomes the language in which the parties will defend their claims in the process. A very important aspect of arbitration is that it operates in a tunnel created and illuminated primarily by the lawyers of both parties to the dispute.¹¹² The parties not only determine the matter in dispute (*litis*), but they build the conceptual and factual framework under which the tribunal operates.¹¹³ In practice, arbitration tends to be directed by the parties, moderated and monitored by the arbitral tribunal. The use of arbitral precedent as a language to define the claims of the parties not only enhances imitation of arbitral precedents among arbitrators, but it legitimizes any imitation.

In *Renta 4*, the tribunal went further on and said that arbitrators 'are bound to do so (be attentive to prior decisions) as part of their basic duty to consider the Parties' arguments.'¹¹⁴ Here, it seems that the fact that the parties refer to arbitral precedents gives the arbitral precedent a strength similar to that of a binding precedent since it is

establishing threshold requirements of procedure that force those agendas to assume a shape the system will recognize')

¹⁰⁶ Aguiló Regla, *Teoría general de las fuentes del derecho: (y del orden jurídico)*, at 121. Fish, *There is No Such Thing as Free Speech*, at 143.

¹⁰⁷ Kennedy, 'One, Two, Three Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream', 31 *New York University Review of Law and Social Change* (2007) 641, at 646.

¹⁰⁸ This is the case of the mouvement so called Critical Legal Studies. Kennedy, *A Critique of Adjudication (fin de siècle)*; Kennedy, 'Critical Theory, Structuralism and Contemporary Legal Scholarship', *New Eng L Rev* (1985-6) 209.

¹⁰⁹ Posner, *How Judges Think* (2008), at 39.

¹¹⁰ *El Paso v. Argentina*, at § 39; *Bayindir v. Pakistan*, at § 73; *Renta 4*, at § 16.

¹¹¹ *BP v. Argentina*, at § 42.

¹¹² Wälde, 'The Specific Nature of Investment Arbitration', at 52.

¹¹³ *Ibid.*

¹¹⁴ *Renta 4*, at § 16.

related with the arbitrator's obligation of due process. However, considering that the principle *jura novit curia* is generally applicable to arbitration¹¹⁵, the arbitrator is free to follow or not the content that the parties intend to give to the law through arbitral precedents. It is difficult to see whether an omission of the arbitral tribunal in this regard may constitute grounds for annulment under the mechanism of the ICSID Convention (manifest abuse of power, serious departure from a fundamental rule of procedure or lack to state the reasons). While some authors have spoken favorably about that possibility¹¹⁶, the truth is that since the jurisprudential rule operates on a different level than that of applicable law it is difficult to configure one of those grounds. At worst, such a decision of the arbitrator may constitute a manifest error of law. This is exactly what an annulment tribunal cannot review. This is without prejudice to the extensive view on the grounds of annulment in the *Sempra* and *Enron* annulments, where interpretations that distort the rule are considered as a failure to apply the law and thus a manifest abuse of powers.¹¹⁷

d) Because it represents a consensus

Consensus is derived from the coherence and consistency of solutions adopted by arbitral tribunals. As explained above, imitation implies acceptance and reception of the decision-making criteria. Thus, when such acceptance is repeated by several tribunals and there is a coherent approach to decide a dispute, the solution becomes universal and can complement, complete, the law in a given time.¹¹⁸

Following Chaim Perelman, we can say that the arbitrator in relation to its peers acts as if he was in an auditorium, with a universal audience.¹¹⁹ This leads to assess their views, which will be discussed by the audience, from the point of view of others in order to acquire the persuasive value the arbitrator wants.¹²⁰ The universal audience (also referred to as interpretive or epistemic community)¹²¹ assesses feelings

¹¹⁵ Giovannini, 'International Arbitration and Jura Novit Curia - Towards Harmonization', in Fernández *et al.* (eds), *Liber Amicorum Bernardo Cremades* (2010) 495, at 495 y s.

¹¹⁶ Commission, 'Precedent', at 156; Schreuer, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration', 3 (2) *Transnational Dispute Management* (2006), at 15.

¹¹⁷ *Sempra Energy International v. Argentina*, ICSID Case No ARB/02/16; *Decision on Argentina's Application for Annulment of the Award, signed 10 June 2010 despatched 29 June 2010*, IIC 438 2010, at § 162-163. ('As Argentina itself recognises, a serious error of law is not in itself a ground for annulment under Article 52(1) of the ICSID Convention. It is instead Argentina's contention that a serious error of law may, in certain circumstances, constitute a manifest excess of powers (and therefore be annulable on that ground). 163. It is correct — as also pointed out by Argentina — that certain ad hoc committees have dealt with this issue and opined, for instance, that incorrect application of law might constitute a manifest excess of powers if 'it amounts to effective disregard of the applicable law'.')

¹¹⁸ Puig Brutau *et al.*, *La jurisprudencia como fuente de derecho. Interpretación creadora y arbitrio judicial*.

¹¹⁹ Perelman and Obrechts-Tyteca, *La nouvelle rhétorique. Traité de l'argumentation*, Editions de l'Université de Bruxelles (1992).

¹²⁰ Allard, 'Le dialogue des juges dans la mondialisation', at 86-87.

¹²¹ Kaufmann-Kohler, 'Soft Law in International Arbitration: Codification and Normativity', 1, (2) *Journal of International Dispute Settlement* (2010) 283; Fish, *There is No Such Thing as*

about what others may say about it. Therefore, the audience is a constraint for the award, which will only be universalized by acquiring the necessary persuasive authority for the audience. Arbitral tribunals constitute this audience (who though independent consider themselves as equal to each other). But part of the audience are also the parties and their lawyers, as well as a wider network¹²² of national tribunals, *ad hoc* committees, scholars and arbitration institutions.

First, the authority of precedent will depend on the acceptance by its peers.¹²³ As I mentioned above, imitation represents the acceptance of other colleagues, a consensus. As such, it works as a constraint to change the *status quo* given that an interpretation of an interpretative community tend to marginalize other possible interpretations.¹²⁴ At the same time, if an arbitral precedent is cited in order to be reversed, its force will necessarily be weakened, since the divergence will give freedom to the arbitrator to decide either way, or in a third way.

Second, the value of precedent will depend on the decisions of ICSID *ad hoc* committees and national courts in the proceedings for annulment, and enforcement, in the case of the latter, of arbitral awards. An overturned decision cannot be compared to one that was not. In the ICSID annulment committees it is standard practice to review the quality of arbitrators' decisions in *obiter dicta* despite the fact that they do not qualify as grounds for annulment. This is the case for example of *CMS* where the *ad hoc* committee while dealing with necessity considered that the tribunal had committed a manifest error in law.¹²⁵ Although, the award was not annulled on that account, the authority of the award itself and the precedent on necessity weakened a lot. This might explain why in two recent decisions, *Sempra* and *Enron*, the annulment committees considered that that manifest error in law was so flagrant that it accounted for non-application of the law and, thus an abuse of the powers of the arbitrators.¹²⁶

Doctrine, though in a different task, scrutinizes the quality of awards, criticizes the bad ones and performs a task of systematization of arbitral precedents, making them easy to use. The task of systematization becomes critical for the lawyer who will use it to argue its case, as well as the arbitral tribunal in order to understand a legal issue in more detail. The higher the amount of awards the more necessary doctrine will become. At the same time, scholars will participate in the process performing the role of legal experts. As to arbitral institutions, in certain cases they carry a great weight given that in many cases they prepare drafts of the awards and systematize the

Free Speech, at 167-73. Bianchi, 'Looking ahead: international law's main challenges', in D. Armstrong (ed), *Routledge Handbook of International Law* (2009) 392-409, at 404-405.

¹²² Romano, 'Deciphering The Grammar of the International Jurisprudential Dialogue', at 757. Wellman and Berkowitz, *Social Structures: A Network Approach* (1988), at 4.

¹²³ Jacquet, 'Avons-nous besoin de jurisprudence arbitrale?'

¹²⁴ Bianchi, 'Looking ahead: international law's main challenges', at 404.

¹²⁵ *CMS Gas Transmission Company v. Argentina*, ICSID Case No ARB/01/8; *Decision on Application for Annulment*, signed 21 August 2007, IIC 303 2007, at § 130.

¹²⁶ *Enron Annulment*, at § 319 ff.; *Sempra Annulment*.

decisions they pick. Though arbitrators are free to follow or not these drafts, they provide an easy to use systematization of precedents.

C. STANDARDS FOR IMITATING ARBITRAL PRECEDENTS

While imitation is informal and thus not regulated, arbitral practice might shed light on certain patterns of imitation. I will call them standards of imitation of arbitral precedents. The boundaries of imitation of arbitral precedents would naturally be the powers and obligations of the arbitrator. Though, it is difficult to see how arbitrary imitation could violate these obligations. The limit will lie on the blurry distinction between manifest error in law and non-application of the law which I have just mentioned.¹²⁷

a) Similar hypothesis

Given that imitation of precedents is based on an analogical method, the proper application of precedent is the one that relates alike situations.¹²⁸ The traditional way to determine the relevance of precedent and its application is the one that analyzes the similarities and differences in terms of context, scope and effect of the norms, remedies, procedures, objectives and actors involved.¹²⁹ This does not mean that both the facts and law need to be identical or very similar. It may happen that the facts are not similar, but the clause of the BIT to interpret is. In this case, arbitral tribunals imitate precedents. The issue is of particular concern in doctrine and case law, as mentioned by the tribunal in *AES v. Argentina*:

'25. This is in particular the case if one considers that striking similarities in the wording of many BITs often dissimulate real differences in the definition of some key concepts, as it may be the case, in particular, for the determination of 'investments' or for the precise definition of rights and obligations for each party. '¹³⁰

The tribunal stated that the cases and the treaty provisions should be the same or of a 'high' degree of similarity.¹³¹ The arbitrator should keep in mind the object and purpose of the treaty, and the systemic interpretation of the clause in light of other

¹²⁷ According to the stance in *Sempra. Sempra Annulment*, at § 62-63.

¹²⁸ Gibson and Drahozal, 'Iran-United States Claims Tribunal Precedent', at 531.

¹²⁹ Wälde, 'The Specific Nature of Investment Arbitration', at 110.

¹³⁰ *AES v. Argentina*, at § 25.

¹³¹ *Ibid.*, at § 24, 25, 28.

provisions or the applicable law in general¹³².

While BITs do not frequently have objects other than the protection and promotion of investments, there are certain treaties that explicitly declare promoting other objectives such as economic integration, environmental protection, labor, and other goals of 'good-governance.'¹³³ These objectives might change the interpretation of a clause, one in a treaty with broader goals and one in a BIT with pure investment objectives. Consider the scope of the expropriation clause and the doctrine of police powers in a treaty with environmental objectives and in a classic BIT. However, in practice, the arbitral awards that have interpreted the expropriation clause in a flexible manner making room to the doctrine of police powers include both NAFTA cases, as *Chemtura* and *Methanex*, and cases based on traditional BITs, such as *Saluka*.¹³⁴

In addition, other provisions of the treaty may change the meaning of the clause. This is for example the case of the MFN clause (written in general terms) included in the part where substantive rights are dealt with in the BIT. In *Renta 4* the fact that the MFN clause was in the same provision of fair and equitable treatment was a decisive element to interpret narrowly the MFN clause as limited to substantive rights, excluding procedural.¹³⁵

It can also happen that tribunals imitate themselves when the facts are similar but not the BIT. Such is the case of the large number of arbitrations against Argentina triggered by the 2001 economic crisis where arbitral tribunals imitated the others on the definition of the fair and equitable standard even if the clauses were different. The reason is that fair and equitable treatment being a standard, its implementation requires tribunals to assess the concrete situation of the case at issue in order to determine its consequences.¹³⁶ 'Standards ... are models or prototypes of reasonable conduct prescribed by reference to a source of knowledge outside the norm.'¹³⁷ These prototypes require the arbitrator taking a decision about what justice demands in the light of the circumstances of the case.¹³⁸ This connection to the facts in the application of standards allows imitation in cases where BITs' clauses are different

¹³² Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law', in Dupuy *et al.* (eds), *Human Rights in International Investment Law and Arbitration* (2009) 45-63(19).

¹³³ See those treaties concluded by the EU, including the Europe Agreements with the East European States accession countries and the Cotonou agreement with the ACP countries. Wälde, 'The Specific Nature of Investment Arbitration', at 108.

¹³⁴ *Methanex Corporation v. United States, Ad hoc—UNCITRAL Arbitration Rules, Final Award on Jurisdiction and Merits, signed 03 August 2005*, IIC 167 2005, at Part IV, Chap. D, § 7., *Chemtura v. Canada*, at § 266.266, *Saluka Investments BV v. Czech Republic, PCA—UNCITRAL Arbitration Rules, Partial Award, signed 17 March 2006*, IIC 210 2006, at § 263.263

¹³⁵ *Renta 4*, at § 68 y s.

¹³⁶ Stone, 'Interpretations of Modern Legal Philosophies', at 708.

¹³⁷ Puig Brutau *et al.*, *La jurisprudencia como fuente de derecho. Interpretación creadora y arbitrio judicial*, at 234.

¹³⁸ In respect of judges see *Ibid.*, at 235.

but the facts are the same or very similar.

b) Persuasive precedent

As mentioned above, an arbitral tribunal will only imitate those decisions that are persuasive to him due to its content, process and the arbitrators. Some scholars and arbitral decisions go beyond and require that imitation should be limited to constant and unanimous decisions.¹³⁹ Nevertheless, in practice arbitral tribunals imitate precedents which are not consistent or unanimous. These are factors or elements that will affect the authority of the arbitral precedent, but their absence does not prevent imitation. As mentioned earlier, the jurisprudential rule is created through imitation of precedents, a phenomenon similar to customary law. Such imitation is free, is part of the arbitrator's jurisdictional function. For this reason he can imitate precedents that are not constant or which are very few. Emerging precedents make constant ones.

Finally, according to some scholars, decisions must be unanimous.¹⁴⁰ This is taken from an analogy with some domestic systems where decisions of higher courts are binding only when there is a qualified majority.¹⁴¹ To the extent that the arbitral tribunal is collegial, chosen by the parties and that decisions are taken by majority, dissent will exist! At the same time, the decision, although a majority one, is the same as a unanimous decision: an arbitral award which may be good or bad. Therefore, there is no obstacle to cite a majority precedent as long as it is persuasive. In investment arbitration tribunals often imitate awards that were not unanimous, such as *Tokios Tokeles*¹⁴². However, the unanimity of the decision affects the social authority of the precedent. I refer the reader to the analysis on the award *Tokios Tokeles* on dissenting opinions below (Section III D).

¹³⁹ Di Pietro, 'The Use of Precedents in ICSID Arbitration: Regularity or Certainty?' at 96. *Bureau Veritas v. Paraguay*, at 141. *Helnan International Hotels AS v. Egypt*, Decision on the Application for Annulment, at 49.

¹⁴⁰ Di Pietro, 'The Use of Precedents in ICSID Arbitration: Regularity or Certainty?'

¹⁴¹ According to Guatemalan law, the judgments of the Supreme Court, who have that value should have been adopted by the affirmative vote of at least 4 judges. Arts. 621 y 627 del Código Procesal Civil y Mercantil). 'Final Report on Dissenting and Separate Opinions,' (ICC, 1991), 33 (§5).

¹⁴² *Wena Hotels Ltd v. Egypt*, ICSID Case No ARB/98/4; IIC 273 (2000); Award signed 08 December 2000, 41 ILM 896 2002, at § 38 ff.; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16 (Turkey-Kazakhstan BIT), Award, 29 July 2008; *Rompetrol Group NV v. Romania*, ICSID Case No ARB/06/3; Decision on Preliminary Objections, signed 18 April 2008, IIC 322 (2008) 2008, at § 82; *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008., 2008, at § 100; *Saluka v. Czech Republic*, at § 240; *Yukos Universal Ltd v. Russian Federation*, PCA Case No AA 227, Interim Award on Jurisdiction and Admissibility, signed 30 November 2009, IIC 416 2009, at § 416-417; *Plama Consortium Limited v. Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction, signed 08 February 2005, IIC 189 2005, at § 128.

c) *Final precedent*

In relation to whether the arbitral award need to be final in order for it to have precedential value, the answer is no. In practice tribunals imitate decisions which are in process of annulment.¹⁴³ This is consistent with the fact that annulment proceedings are not a true appeal. This also applies in respect of annulment proceedings before domestic tribunals, outside ICSID arbitration, which, as I mentioned above, have a limited impact.

d) *Ratio decidendi and obiter dicta*

Some authors and arbitral tribunals have held that the use of precedent in investment arbitration should be limited, as in the doctrine of *stare decisis*, to the *ratio decidendi*.¹⁴⁴ According to this principle 'the authority of a decision is attached, not to the words used, nor to all the reasons given, but to the principle or principles necessary for the decision of the case'.¹⁴⁵ Accordingly, *obiter dicta*, i.e. those statements on the facts and law that are not necessary to decide the case, discussions on general situations, and dissenting opinions would be excluded. In common law, however, *obiter dicta* have persuasive value. As noted by the *Amco Asia* annulment committee, since in arbitration the *ratio decidendi* is only persuasive, the distinction is worthless.¹⁴⁶ In practice, arbitral tribunals do not make the distinction and stick to the words and reasoning. This can be seen at *Enron* where the ad hoc committee devoted a couple of pages to cite the reasoning of the annulment committee in *Azurix*.¹⁴⁷ Excessive reliance on the obiter dicta, however, goes against the principle of procedural economy.¹⁴⁸

D. THE VALUE OF DISSENTING OPINIONS

Detrimental to the secrecy of deliberations, it is very common practice in investment arbitration that arbitrators issue a dissenting opinion which is published

¹⁴³ That is the case of the CMS award in relation to the umbrella clause, before it was annulled, which was imitated in *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, 2004, at § 64-82; *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 3 October 2006, 2004, at § 164-165; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 06 February 2007, at § 192-212.

¹⁴⁴ *Renta 4*, at § 91.

¹⁴⁵ Sprecher, 'The Development of the Doctrine of Stare Decisis and the Extent to Which It Should be Applied', at 503.

¹⁴⁶ *Amco Asia Annulment* at § 44.

¹⁴⁷ See for example the decision of the annulment committee in *Enron* about MTD in relation to the value of arbitral jurisprudence (§ 63-67) and in relation to shareholders standing to claim for indirect damages where the ad hoc committee cited pages of the decision of the ad hoc committee in *Azurix*. *Enron Annulment*.

¹⁴⁸ Kovacs, 'Développement et Limites de la Jurisprudence en Droit International,' in *La juridictionnalisation du droit international* (Lille: 2003), 329.

jointly with the award but is not part of it.¹⁴⁹ These dissenting or separate opinions do not constitute in themselves legal decisions comparable to awards. Yet, they are also cited by the parties and, to a lesser extent, by arbitral tribunals, as precedents. This occurs with opinions of arbitrators of a certain reputation and prestige.

It is interesting to analyze the case of one of the most famous dissenting opinions in investment arbitration, the opinion of Prosper Weil in *Tokios Tokeles*. In this case, *Tokios Tokeles*, a company incorporated in Lithuania initiated arbitration based on a BIT between Lithuania and Ukraine for the violation of the BIT obligations. Ukraine claimed that *Tokeles Tokios* was not protected because it was controlled by Ukrainian capital, and therefore clearly fell outside the jurisdiction of ICSID under Article 25 of the Convention. The tribunal rejected the argument of Ukraine and stated that the origin of capital is irrelevant for the purposes of the definition of investment. The presiding judge, Prosper Weil said in a dissenting opinion of irrefutable logic, that it can not be consistent with the object and purpose of the ICSID Convention to give investment protection to investments that have no international status. What impact did this decision have in subsequent similar cases? While the award and the dissenting opinion are regularly cited by the parties (investors citing the award and States the dissenting opinion), most tribunals have followed the criterion of the award instead of that of the dissenting arbitrator.¹⁵⁰ This however, is done in a very unclear way. In fact, in several cases in which the parties cited *Tokios Tokeles* and Weil's dissent, arbitral tribunals avoided referring explicitly to the case, and cited other awards that contain the same criterion as the one of *Tokios Tokeles*.¹⁵¹ In the recent *Yukos* case, while the defendant referred to *Tokios Tokeles* and *Palma*, the tribunal only cited *Palma* in its decision.¹⁵²

¹⁴⁹ Rivera, *Arbitraje Comercial. Internacional y Domestico* (2007), at 588; Werner, 'Dissenting Opinions: Beyond Fears', 9 (4) *Journal of International Arbitration* (1992) 23, at 28. Redfern, 'The 2003 Freshfields - Lecture Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly'.

¹⁵⁰ According to an UNCTAD Report of 2008, from 16 awards which dealt with this issue, only 4 followed the position of Prosper Weil. These are: *TSA Spectrum v. Argentina*, *Wintershall v. Argentina*, *African Holding Company of America v. Democratic Republic of the Congo y Canadian Cattlemen for Fair Trade v. United States*. UNCTAD, 'Latest Developments in Investor-State Dispute Settlement. IIA MONITOR No. 1 (2009), International Investment Agreements, UNITED NATIONS, New York and Geneva, 2009, UNCTAD/WEB/DIAE/IA/2009/6/Rev1.,' 5. Some of the cases where arbitral tribunals followed the criterion of the award *Tokios Tokeles* are: *Wena Hotels Award*, at § 38 y s., *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16 (Turkey-Kazakhstan BIT), Award, 29 July 2008. *Rompetrol v. Romania*, at § 82; *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, *Decision on Jurisdiction and Admissibility*, 24 September 2008., at § 100; *Saluka v. Czech Republic*, at § 240; *Yukos v. Russia*, at § 416-417; *Plama v. Bulgaria*, at § 128.

¹⁵¹ *Wena Hotels Award*, at § 38 ff.; *Rompetrol Group NV v. Romania*, ICSID Case No ARB/06/3; *Decision on Preliminary Objections*, signed 18 April 2008, IIC 322 (2008) 2008; *Saluka v. Czech Republic*, at § 240; *Yukos v. Russia*, at § 416-417; *Plama v. Bulgaria*, at § 128.

¹⁵² *Yukos Universal Ltd v. Russian Federation*, PCA Case No AA 227, *Interim Award on Jurisdiction and Admissibility*, signed 30 November 2009, IIC 416 2009, at § 416-417

IV. SOME NORMS OF ARBITRAL ORIGIN IN INVESTMENT ARBITRATION

Arbitral jurisprudence is constituted by general solutions drawn from a series of repeated and consistent decisions. These solutions are general since they arise from a plurality of cases. These allow giving the arbitral norm the universality the law claims, and thus completing the latter. But they should not be confused with the law itself as they operate differently. They are contextual (since they operate in the application of law in a social and extra legal context), professional (since as opposed to law they do not derive from one or various political acts but from the legal profession) and flexible (since they do not enjoy the stability and certainty law enjoys). If we compare a BIT's clause with the content arbitral tribunals gave to them, one can see how important jurisprudence is in investment arbitration. BITs are very abstract and contain in many cases general standards, which, as opposed to rules, principles or legal categories, give more freedom and creativity to judicial discretion.¹⁵³ These solutions are key to our understanding of investment law and constitute the language in which legal arguments are made in the arbitral process.

Those solutions that are not consistent or repeated are not arbitral norms. However, there are grey areas. Since time is a key element of jurisprudence, there are situations of developing and emerging norms. Further, while divergences represent the absence of any sort of jurisprudence, given that conflicting solutions are mutually excluding, general solutions might emerge. The dialogue between tribunals and the practice of imitation may with time evolve and bring consensus. Therefore, from a dynamic perspective (jurisprudence as a process), I classify those norms in constant, developing and potential.

A. CONSTANT

In investment arbitration two examples of these norms are:

a) Arbitration based on the arbitration provision in a BIT

The first example is the admission of the BIT arbitration clause as a basis of jurisdiction of arbitral tribunals. Neither the ICSID Convention nor its preparatory work had predicted the possibility of consent to arbitration through a treaty¹⁵⁴. The report of the Executive Directors of the World Bank mentioned as possible examples only contract or national laws¹⁵⁵. Since the first treaty-based arbitration, *AAPL c. Sri-*

¹⁵³ Puig Brutau *et al.*, *La jurisprudencia como fuente de derecho. Interpretación creadora y arbitrio judicial*, at 234-235.

¹⁵⁴ Art. 25 of the ICSID Convention only refers to consent.

¹⁵⁵ Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, § 24 ('Consent of the parties must exist when the Centre is seized (Articles 28(3) and 36(3)) but the Convention does not otherwise specify the time at which consent should be given. Consent may be given, for

Lanka, tribunals have systematically accepted the treaty as a basis of jurisdiction, despite the doctrinal debate on what J. Paulsson called 'arbitration without privity'.¹⁵⁶

b) Shareholders' right to claim for indirect damages

The second example of a constant arbitral norm is the admissibility of shareholders' claims for damages suffered by the violation of contracts and concessions passed by the host State with the local company. The right of shareholders to claim for the damages of the company had been discussed by the ICJ in the *Barcelona Traction Case*. In that case the ICJ stated that in general international law the State of the shareholders has no standing to claim diplomatic protection for the damages occurred by the company.¹⁵⁷ In the vast majority of treaty based arbitration cases brought by shareholders of local companies, mostly against Argentina, the host State objected that under international law there is no right of shareholder to claim for the rights of the local company. Arbitral tribunals have consistently rejected this argument because shareholders were claiming for their own treaty rights and not for those of the local company. Decisions in this regard are not only unanimous, but represent more than 50 awards.¹⁵⁸

B. DEVELOPING

There are partial solutions that represent consensus on specific issues of a broader question. These solutions are less coherent and partially consistent, but are part of a developing jurisprudence that gradually gives content to certain provisions, such as Article 25 of the ICSID Convention and the fair and equal treatment standard contained in some BITs.

a) The definition of investment for the purposes of Art. 25 of the ICSID Convention

Article 25 of the ICSID Convention mentions that arbitral tribunals have jurisdiction over legal disputes directly related to the investment, but it does not define what is meant by investment. The preparatory work shows that there was no consensus on a definition of investment and several delegates expressed their

example, in a clause included in an investment agreement, providing for the submission to the Centre of future disputes arising out of that agreement, or in a *compromis* regarding a dispute which has already arisen. Nor does the Convention require that the consent of both parties be expressed in a single instrument. Thus, a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.')

¹⁵⁶ Paulsson, 'Arbitration without privity', 10 (2) *ICSID Review* (1995).

¹⁵⁷ *Case concerning the Barcelona Traction, Light and Power Company (Belgium v Spain)* [1970] ICJ Rep 44 at § 96.

¹⁵⁸ Bentolila, 'Shareholders' action to claim for indirect damages'.

dissatisfaction with certain elements such as the duration of the investment¹⁵⁹, the term contribution¹⁶⁰, the magnitude of the investment¹⁶¹, the inclusion of shares¹⁶² and of construction contracts¹⁶³ among others. Whereas in the 1990's it was not possible to give a clear definition of investment, today there are certain elements that investment should have for jurisdictional purposes: (a) contribution¹⁶⁴, (b) duration¹⁶⁵, (c) risk¹⁶⁶, (d) good faith¹⁶⁷ and it should be done (e) in accordance with the laws of the host State¹⁶⁸; whereas the requirement that the investment contributes to development of the host State remains controversial¹⁶⁹.

b) Fair and Equitable Treatment

The second example is the definition of fair and equitable treatment (FET). The definition of fair and equitable treatment is one of the most imprecise of international investment law.¹⁷⁰ In general terms, there are two approaches: (a) the treatment is equivalent to the international minimum standard of treatment or (b) it goes beyond the minimum standard and ensures greater protection.¹⁷¹ As mentioned by Christoph Schreuer¹⁷² the concept of FET has evolved from the Neer case in 1926 and today there is consensus, for example, on the absence of a requirement of bad faith to find a violation of FET.¹⁷³

¹⁵⁹ *History of the ICSID Convention. Documents concerning the origin and the formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of other States*, vol. II (1968), at 625,668, 700, 703, 707.

¹⁶⁰ *Ibid.*, at 702, 703, 708-710.

¹⁶¹ *Ibid.*, at 34.

¹⁶² *Ibid.*, at 661.

¹⁶³ *Ibid.*, at 500.

¹⁶⁴ *Salini Costruttori S.p.A. y Italstrade S.p.A. v. Reino de Marruecos (Caso CIADI No. ARB/00/4) Decisión sobre jurisdicción del 23 de julio de 2001*, 129 JDI 196 2002, at § 53. § 53

¹⁶⁵ *Ibid.*, at 54.

¹⁶⁶ Rubins, 'The Notion of 'Investment' in International Investment Arbitration', in Horn (ed), *Arbitrating Foreign Investment Disputes Procedural and Substantive Legal Aspects* (2004) 283 - 324, at 66.

¹⁶⁷ *Phoenix Action Ltd. v. República Checa, Caso CIADI No. ARB/06/5) Laudo del 15 de abril de 2009*, 2009, at § 114-142.

¹⁶⁸ *Ibid.*, at 114.

¹⁶⁹ Whereas this element was considered a decisive requirement in *Patrick Mitchell v. Democratic Republic of the Congo (ICSID Case No. ARB/99/7) Decision on the Stay of Enforcement of the Award of November 30, 2004*, 20 ICSID Rev—FILJ 2005, 587; *Malaysian Historical Salvors, SDN, and BHD v. Malaysia (ICSID Case No ARB/05/10) Award, May 17, 2007*, 2007, at § 123., it has not been considered decisive in *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria (ICSID Case No. ARB/05/3) Decision on Jurisdiction, July 12, 2006* 2006.

¹⁷⁰ Schreuer, 'Fair and equitable treatment in arbitral practice', 6 (3) *The Journal of World Investment & Trade* (2005) 359, at 364.

¹⁷¹ *Ibid*; Cheng, 'Precedent and Control in Investment Treaty Arbitration', at 1034.

¹⁷² Schreuer, 'Fair and equitable treatment in arbitral practice'; Cheng, 'Precedent and Control in Investment Treaty Arbitration', at 1034.

¹⁷³ *Técnicas Medioambientales Tecmed SA v. Mexico (ARB(AF)/00/2), Award, May 29, 2003*, 10 ICSID Rep 130 2003, at § 153-144.; *Waste Management Inc v. Mexico, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004, IIC 270 2004*, at § 137; *Loewen Group Inc and Loewen v. United States, ICSID Case No ARB(AF)/98/3, Award signed 25 June 2003, IIC 254 2003*, at § 132.

C. POTENTIAL

As I explained divergences mean the absence of jurisprudence since the legal criteria are contradictory. On the other hand, it represents a lack of consensus (and therefore total freedom of the arbitrator). As previously mentioned, the differences correspond to social or extra-legal divisions, sometimes irreconcilable. However, the dialogue that occurs between arbitral tribunals largely driven by the parties and their argumentative strategies can lead to a jurisprudential norm. The very practice of distinguishing and criticizing decision making, will incorporate new elements to the process and decisions can lead to developments on conflicting criteria. Therefore, these differences are potential norms which participate of jurisprudence as a process, as a dialogue.

a) If MFN clauses apply to procedural rights

The question whether the MFN clause is applicable to procedural rights, such as the conditions in which consent to arbitrate was given, there are two sets of conflicting interpretations. On one side *Maffezini*, where the tribunal interpreted the clause as including procedural rights, and the other, *Renta 4*, and more cited *Palma*, in which tribunals had interpreted the clause narrowly.¹⁷⁴

b) Umbrella Clauses

As stated by the recent ad hoc committee in *Bureau Veritas*, umbrella clauses are the clear example of divergent arbitral decisions. As to whether the umbrella clause should be interpreted as transforming all contractual rights in international obligations, investment arbitral tribunals have issued conflicting decisions. Whereas a group of awards (*SGS v. Pakistan*, *Salini*, *Joy Mining v. Egypt*, *El Paso*, *Pan American*, *Bureau Veritas*) excluded contractual rights of the umbrella clause, another group (*Eureko v. Poland*, *Noble Venture v. Romania* and *Siemens*) considered that the nature of the clause is to transform domestic rights into international obligations.¹⁷⁵ While these courts have justified the divergence in the specificity of the treaty provisions, no justification is sufficient for all the differences.¹⁷⁶

V. CONCLUSION

Precedent, although not binding has an important normative value. It is used by the parties to establish their legal claims in the arbitral process, and absorb much of the discussion and motivation of the award. 'Discovering, marshalling, enumerating,

¹⁷⁴ Ver Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' at 370.

¹⁷⁵ *Ibid.*, at 369.

¹⁷⁶ *Ibid.*

and explaining precedents are not costless undertakings, and would not be undertaken if precedents did not enter systematically into the decision of the case.¹⁷⁷ While the mission of the arbitrator is to resolve a specific dispute concerning the interpretation or implementation of a specific treaty obligation, such application is not a mechanical activity. The arbitrator has the power to interpret; clarifying, filling gaps and adapting the rule to modern times. It is precisely this power that allows the development of consensual solutions.

What is the legal status of these solutions? The three approaches on the value of arbitral jurisprudence previously presented, although antagonist have something in common: they assimilate arbitral jurisprudence to a binding one. Since the arbitral tribunal does not have that power to make the law because of the specific nature of the basis of its competence, the use of precedent is either irrelevant (faculty), illegitimate (prohibition), or a legally unjustifiable phenomenon (moral duty).

The legal nature of treaty-based arbitral jurisprudence is typically analyzed under Article 38 of the Statute of the International Court of Justice (ICJ).¹⁷⁸ The relevance of this article in investment arbitration results from the Report of the Executive Directors of the World Bank which in its comment to Article 42 of the ICSID Convention mentions that international law referred to therein, refers to international law in accordance with Article 38 of the Statute ICJ. According to this Article, subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, are subsidiary means for the determination of rules of law. Therefore, judicial decisions would be excluded from formal sources of international law having a mere value of proof of the rules of law; an evidence of what the Court considers being international law. Although arbitration awards are not listed in this article, they are generally assimilated to judicial decisions.¹⁷⁹ This arises from the practice of the ICJ who cited arbitral awards several times, such as the Alabama case.¹⁸⁰ Previous arbitral decisions to prove the existence of an international rule¹⁸¹ could be very useful, in particular for certain

¹⁷⁷ Landes and Posner, 'Legal Precedent', at 252.

¹⁷⁸ Report of The Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. § 40. ('Under the Convention an Arbitral Tribunal is required to apply the law agreed by the parties. Failing such agreement, the Tribunal must apply the law of the State party to the dispute (unless that law calls for the application of some other law), as well as such rules of international law as may be applicable. The term 'international law' as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes')

¹⁷⁹ Guillaume, 'Can Arbitral Awards Constitute a Source of International Law under Article 38 of the Statute of the International Court of Justice?' Guillaume, 'Le Précédent dans La Justice et L'Arbitrage International', 137, (3) *JDI* (2010), at 695.

¹⁸⁰ Guillaume, 'Can Arbitral Awards Constitute a Source of International Law under Article 38 of the Statute of the International Court of Justice?' at 109.

¹⁸¹ Though the distinction between source and evidence is blurry. Lauterpacht, *The Development of International Law by the International Court* (1958 (Reprinted in 1982)), at 21.

sources of difficult determination, such as custom and general principles. In investment law, however, jurisprudence is composed mostly (though not exclusively) of interpretative criteria of BIT clauses. Is this a demonstration of international law? It is difficult to give an affirmative answer given that the treaty, since it is contained in a formal instrument, is proved by itself. Thus, arbitral decisions are used as persuasive examples of treaty interpretation. This is different from an auxiliary function, then, what is?

If we analyze the question under the looking glass of the binary code (binding- not binding), as the three positions previously presented, we will not be able to understand the true nature of arbitral jurisprudence.¹⁸² Either it is considered a *de facto* or illegitimate manifestation of international law, or an irrelevant phenomenon. In all cases, arbitral jurisprudence is assimilated to binding jurisprudence. The looking glass prevents to see jurisprudence as it really is, an informal phenomenon with a normative value that plays an important role. Even if both jurisprudence and law are in a close relationship, their roles are different. Arbitral jurisprudence possesses its own specificity; it has a different normative value and results from the legal profession of settling arbitral disputes. At the same time it generates consensus on the content of the law on certain issues. For these reasons, it is a grey concept that does not fall into the category of binding or not binding. Only if we admit intermediate or grey areas we will be able to understand arbitral jurisprudence as a distinct phenomenon, normative but not binding. A sort of *infra legem* normativity operating between formal sources and their application to specific facts and circumstances. It is general, but informal, and represents a consensual manner of exercising a professional freedom derived from the mandate to apply the law.

Arbitral jurisprudence, on the other hand, is more modest than law and is not intended to replace it or compete with it. Instead, it provides the rigid and predictable law, some flexibility and actuality. It has no legal sanction and it does not seek to provide legal certainty and equality. Arbitral jurisprudence is a flexible phenomenon, resulting from its convenience and economy, which helps to preserve a past judicial experience. It is the result of dialogue: a consensus. It has its origin and acquires its acceptance by other arbitrators through the process of imitation and confrontation. These solutions are not binding and thus, do not have the rigidity of law or binding precedent, but are part of the language of the arbitral settlement of disputes and shape investment law in its realization.

¹⁸² Against this dogma, see: Bianchi, 'Looking ahead: international law's main challenges', at 398-399.