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The Costs of Consistency: Precedent in Investment Treaty Arbitration

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The Costs of Consistency: Precedent in Investment Treaty Arbitration

IRENE M. TEN CATE*

This Article challenges the emerging consensus that arbitrators who adjudicate investor-state disputes should strive for greater consistency. It submits that consistent adjudication can only be realized by sacrificing accuracy, sincerity and transparency. For many national and supranational legal systems, this is a price worth paying to promote goals like equality, certainty, predictability and perceived legitimacy of dispute resolution. The case for privileging these goals, however, loses much of its force in the context of investment treaty arbitration. Substantive investment law, currently consisting of approximately three thousand instruments, is fragmented and dynamic. And due to its ad hoc character, arbitration is flawed as a vehicle for harmonizing law. For these reasons, arbitrators in investor-state arbitrations should resist any norm of precedent in the sense of deference to earlier awards. At the same time, arbitrators ought to be mindful that their awards contribute to the development of substantive law in an area of great public importance. The Article concludes that the key lessons from precedent lie in its forward-looking aspects, namely the decision-making and reason-giving responsibilities that flow from the notion that decisions will have effects beyond resolution of the immediate dispute.

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INTRODUCTION

Investment treaty scholars increasingly embrace Justice Brandeis’s observation that “in most matters it is more important that the applicable rule of law be settled than that it be settled right.”¹ In-

1. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J.,

consistent awards and annulment decisions, they submit, threaten the sustainability of the international investment regime.² While not everyone subscribes to the assessment that this regime is in the midst of a “legitimacy crisis,” there is an emerging consensus in the literature that greater consistency in investment treaty arbitration would be desirable. Consistent adjudication promotes equality among litigants, constrains idiosyncratic decision-making and increases the perception of legitimacy of dispute resolution. It also results in incremental development of substantive law, creating some degree of certainty as to the scope and contents of legal rules.³ The concern for consistency arises in investment treaty arbitration because of the public dimension of investor-state disputes, which always involve challenges to acts by government parties. Moreover, many awards and annulment decisions in investor-state cases get published, and arbitrators help shape the content of substantive investment law through the interpretation of open-ended norms in investment treaties.

Yet the pursuit of consistency comes at a price: giving weight to consistency in decision-making inevitably leads to a decrease in accuracy, sincerity and transparency. In this Article, I argue that international investment law is better served by abandoning efforts to implement a consistency norm in favor of a more immediate focus on the quality of decision-making and the merits of awards. Rather than demanding greater coherence, we should ask that investment tribunals reach what they believe is the correct decision in the case before them, in accordance with their independent assessment of what the law requires. Although earlier awards are often useful in making this determination, consistency *itself* should rarely,

dissenting).

2. See, e.g., William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283, 299 (2010) (arguing that inconsistent decisions by arbitral tribunals in cases involving similar facts are a threat to the legitimacy of investor-state arbitration); Christoph Schreuer & Matthew Weiniger, *Conversations Across Cases—Is There a Doctrine of Precedent in Investment Arbitration?*, 5 TRANSNAT'L DISP. MGMT., at 8–18 (2008) (characterizing conflicting awards as a “problem” and discussing several tools for addressing the issue); see also Benedict Kingsbury & Stephen Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, in 50 YEARS OF THE NEW YORK CONVENTION: ICAA INTERNATIONAL ARBITRATION CONFERENCE 5, 8 n.7 (Albert Jan van den Berg ed., 2009) (summarizing the literature about a “legitimacy crisis” in investment treaty arbitration).

3. See *infra* Parts III.A, III.B.4; cf. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (“*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions and contributes to the actual and perceived integrity of the judicial process.”).

if ever, sway a tribunal. In sum, in investor-state disputes it is critical that arbitrators try to identify the “right” rule, even if doing so leaves the law unsettled.⁴

It follows that investment arbitrators should not adopt precedent, in the sense of ascribing a constraining influence to earlier decisions.⁵ As formulated by Larry Alexander, the force of precedent manifests itself whenever “a subsequent court believes that, though a previous case was decided incorrectly, it must, nevertheless, through operation of the practice of precedent following, decide the case confronting it in a manner that it otherwise believes is incorrect.”⁶ At its strongest, precedent imposes a formal obligation to follow decisions from adjudicators that are higher up in a hierarchy. Proposals for precedent in investment treaty arbitration tend to envision softer forms—for instance, a (weak) presumption that earlier awards should be followed, or a norm that attaches precedential value only to consistent lines of cases.⁷ But the essence of precedent is that it imposes a *decisional* burden on an adjudicator.⁸

I am not the first to object to the adoption of precedent in investment arbitration. Although some tribunals in investor-state cases have suggested that arbitrators should aim to develop consistent norms, others have resisted this notion. Tribunals in the latter camp often note that there is no rule of precedent in international law, and emphatically disclaim reliance on earlier awards.⁹ In the academic literature, Alexander Orakhelashvili has argued that reliance on earlier awards for the purpose of interpreting treaty provisions is prob-

4. See *infra* Parts III.B, III.C.

5. See *infra* Part IV.A.

6. Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 4 (1989).

7. See *infra* Part II.B.

8. A practice of citing to or discussing earlier decisions does not constitute precedent when adjudicators are under no constraint to give these decisions any weight in the decision-making process. Frederick Schauer put it as follows: “When the choice whether to rely on a prior decisionmaker is entirely in the hands of the present decisionmaker, the prior decision does not *constrain* the present decision, and the present decisionmaker violates no norm by disregarding it.” Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 575 (1987) [hereinafter Schauer, *Precedent*]. The view that constraint is the essence of precedent stands in contrast to a broader approach, which would hold that “precedent” denotes any use of earlier awards by adjudicators: “I [do not] argue that awards necessarily constrain the discretion of future arbitrators As I use the term, arbitration generates precedent if awards have some observable relevance to the future conduct of system participants.” W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1900–01 (2010).

9. See *infra* Part II.C.

lematic in light of the absence of precedent from international law. He also submits that conceptually, lawmaking by investment arbitrators is at odds with the authority of sovereign treaty-makers to create the rules.¹⁰ Others have sounded skeptical notes about precedent, observing that a certain level of incoherence in investment law is unavoidable due to the characteristics of the dispute resolution process.¹¹ While my arguments build on these critiques, I go a step further by taking up the *normative* claim that giving weight to consistency is detrimental to the interests of parties to specific disputes and the investment community at large.

My position is motivated, in part, by the diminished force of the main goals promoted by consistent adjudication—equality, continuity, predictability and the perception of legitimacy—in the international investment context. This is in part because of the dynamic nature of the field: substantive investment law, which consists of approximately three thousand (mostly bilateral) treaties between sovereigns, is inherently fragmented. The constraints imposed by precedent are also in tension with key characteristics of arbitration, including the high level of party control over the appointment of the tribunal. Most importantly, a focus on consistency inevitably distracts from criteria that pertain directly to the quality of decision-making. After all, a consistency norm matters precisely when it would convince an arbitrator to reach an outcome or adopt a rule or rationale that differs from the one she would have arrived at independently. Faced with this dilemma, an arbitrator might decide to follow precedent that she believes does not reflect the best interpretation of the law. Alternatively, she could search for a way to reach the desired result while purporting to maintain uniformity. The first option sacrifices accuracy, the second sincerity. Either course of action,

10. Alexander Orakhelashvili, *Principles of Treaty Interpretation in the NAFTA Arbitral Award on Canadian Cattlemen*, 26 J. INT'L ARB. 159, 168–69 (2009).

11. See e.g., David D. Caron, *Investor State Arbitration: Strategic and Tactical Perspectives on Legitimacy*, 32 SUFFOLK TRANSNAT'L L. REV. 513, 516 (2009) (“Any discussion of coherency in the ICSID system must begin by noting that the root of the problem is embedded very deeply in the structure of arbitration itself. Arbitration . . . is not in fact a system, but rather is a framework within which discrete and possibly unknown private actions are taken.”); cf. Judith Gill, *Inconsistent Decisions: An Issue to Be Addressed or a Fact of Life?*, in 1 INVESTMENT TREATY LAW: CURRENT ISSUES 23, 27 (Federico Ortino, Audley Sheppard & Hugo Warner, eds., 2006) (arguing that inconsistency is a fact of life even in well-developed legal systems); Devashish Krishan, *Thinking About BITs and BIT Arbitration: The Legitimacy Crisis That Never Was*, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: IN MEMORIAM THOMAS WÄLDE 107, 132 (Todd Weiler & Freya Baetens, eds., 2011) (noting that the binary nature of investment arbitration makes it an unusual vehicle for lawmaking).

in turn, leads to a decrease in transparency by concealing the extent of disagreement among adjudicators or by masking the motivating reasons for decisions.

Importantly, I do not deny that the effects of awards in investment treaty cases extend to persons and entities beyond the parties to a dispute. Sovereigns respond to trends in awards when negotiating and drafting new investment treaties, and investors may take the strength of investor protection into account when deciding whether to pursue investment opportunities. Moreover, investment awards influence the shape and content of substantive norms, even if they have no precedential force.¹² Parties to later disputes will cite to pertinent awards, and future tribunals will study past decisions. As a result, it is not only unavoidable, but also desirable for investment arbitrators to be mindful of the broader and longer-term impact of their decisions. I submit, therefore, that the forward-looking aspects of precedent are instructive for understanding how the lawmaking function should affect the decision-making process in individual cases. Arbitrators in investor-state disputes should aim to contribute to the development of substantive law by explaining *why* their interpretation of the law is correct (regardless of whether it accords with the prevailing opinion in earlier awards) and by openly identifying points on which they disagree with other tribunals. Awareness of the larger impact of specific decisions may also operate as a disciplining force that, on balance, results in better decisions in individual cases.¹³

I develop my thesis in four Parts. Part I introduces some basic characteristics of investment treaty arbitration, and describes a recent instance of inconsistent adjudication by investment tribunals. Part II presents proposals for the introduction of precedent in investment treaty arbitration. Part III scrutinizes the consistency ideal on which the arguments for precedent are premised. It argues that in investment treaty arbitration, autonomous adjudication values should take priority over consistency. Part IV reconciles the rejection of precedent in the sense of a decisional constraint with the reality that investment awards and decisions play an important role in shaping the meaning of common terms in international investment law. It submits that the key lessons for investment treaty arbitration lie in the

12. See, e.g., Kingsbury & Schill, *supra* note 2, at 5 (describing effects of awards and decisions in investor-state arbitration beyond the resolution of the immediate dispute); Anthea Roberts, *Power and Persuasion in Investment Treaty Arbitration: The Dual Role of States*, 104 AM. J. INT'L L. 179, 179 (2010) (“[T]ribunal awards in particular cases informally contribute to the interpretation, and thus the creation, of the law.”).

13. See *infra* Part IV.B.

forward-looking aspects of precedent.

I. INCONSISTENCY IN INVESTMENT TREATY ARBITRATION

In this Part, I provide a basic sketch of the background against which the debate over consistency and precedent in investment treaty arbitration is set. I start with a basic description of pertinent characteristics of international investment law. I then summarize several awards and annulment decisions that were rendered in cases filed about ten years ago by American investors against Argentina. These awards and decisions present an ongoing, high-profile instance of inconsistent adjudication that has rendered the debate about precedent particularly acute.

A. The Investment Law Framework

Investment arbitrators occupy a unique position in the arbitration universe. Investment disputes, which always involve a state party, often concern matters of great public interest. The public dimension of investment treaty arbitration has resulted in a high level of transparency compared to other types of arbitration. The International Centre for Settlement of Investment Disputes (ICSID), the only institution entirely devoted to investment arbitration, has adopted a practice of transparency that is unusual for arbitration. ICSID lists pending and concluded cases on its website. Although not all investment awards are published, a significant number are easily accessible on the internet.¹⁴ The interests at stake have also moved some tribunals to allow submission of amicus briefs by non-parties or to open hearings to the public.¹⁵

Importantly, investment arbitrators are the primary interpreters of international investment treaties. In these treaties, sovereigns commit to protecting investments made by each other's nationals by granting certain substantive rights. Typically, the treaty parties agree to provide adequate compensation in case of expropriation, to accord "fair and equitable treatment" and provide "full protection and secu-

14. See INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, <http://icsid.worldbank.org> (last visited Feb. 7, 2013).

15. See, e.g., Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN ST. L. REV. 1269, 1286–94 [hereinafter Bjorklund, *Emerging Civilization*] (discussing developments toward increased transparency in investment arbitration); GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 160–64 (2007) (same).

arity” to investments, and to honor obligations made with regard to investments.¹⁶ By interpreting these open-ended standards, investment awards and annulment decisions contribute to the development of substantive investment law. Investment arbitrators also play a role in shaping customary international law, which is often invoked by the parties.

International investment law, however, is not a “system” in the sense in which most national legal regimes are.¹⁷ Substantively, there is no comprehensive multilateral investment treaty to which sovereigns can accede.¹⁸ Almost all investment treaties are negotiated between two sovereigns, and at present there are over three thousand bilateral investment treaties (BITs). Although many BIT provisions are identical, some variation exists.¹⁹

The decentralized nature of the dispute resolution of choice, arbitration, also contributes to the picture of fragmentation.²⁰ In-

16. CHRISTOPHER F. DUGAN ET AL., *INVESTOR-STATE ARBITRATION* 2 (2008); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521, 1532 (2005) [hereinafter Franck, *Legitimacy Crisis*].

17. Caron, *supra* note 11, at 516–17; *cf.* ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* 6 (2009) (“The analytical challenge presented by the investment treaty regime for the arbitration of investment disputes is that it cannot be adequately rationalized either as a form of public international or private transnational dispute resolution.”); Jan Paulsson, *Arbitration Without Privity*, 10 *ICSID REV.—FOREIGN INVESTMENT L.J.* 232, 256 (1995) (“[T]his is not a sub-genre of an existing discipline. It is dramatically different from anything previously known in the international sphere.”); *but see* Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 *HARV. INT’L L.J.* 427, 463–68 (2010) (arguing that an international regime for investment is emerging despite the bilateral nature of investment treaties, the decentralized nature of arbitration and the lack of a multilateral international organization).

18. Rainer Geiger, *The Multifaceted Nature of International Investment Law*, in *APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES* 17, 18 (Karl P. Sauvant & Michael Chiswick-Patterson eds., 2008) [hereinafter *APPEALS MECHANISM*] (describing failed attempts to arrive at a multilateral solution).

19. *See, e.g.*, Anna Joubin-Bret, *The Growing Diversity and Inconsistency in the IIA System*, in *APPEALS MECHANISM*, *supra* note 18, at 137, 137–38 (examining variation in approaches to the “fair and equitable treatment” standard in more than five hundred investment treaties); Patrick Juillard, *Variation in the Substantive Provisions and Interpretation of International Investment Agreements*, in *APPEALS MECHANISM*, *supra* note 18, at 81 (analyzing the relationship between variation in provisions in investment treaties and seemingly inconsistent results in awards); *cf.* Barton Legum, *Options to Establish an Appellate Mechanism for Investment Disputes*, in *APPEALS MECHANISM*, *supra* note 18, at 231, 234–35 (noting that even treaty provisions that are facially similar may need to be interpreted differently based on the apparent intent of the negotiating states).

20. Several authors have commented on the hybrid nature of investment arbitration, as

vestment treaties typically allow investors to bring claims in one of several forums, including ICSID.²¹ Tribunals usually consist of three arbitrators: two party-appointed arbitrators and a chair appointed in accordance with the parties' agreement.²² There is no appellate instance to promote uniformity. Instead, ICSID awards are subject to review under the ICSID annulment procedure.²³ Decisions on applications for annulment are made by *ad hoc* committees appointed by the Chairman of the Administrative Council of ICSID.²⁴ Annulment can only be rendered on limited grounds, which mostly concern procedural irregularities and do not include substantive incorrectness.²⁵ An annulment committee cannot substitute its opinion for that of the tribunal: its only options are to annul an award or let it stand.²⁶

well as the inherent tension between the public nature of the interests involved in investment law and the selection of a contractual and quintessentially private mechanism as the dispute resolution process. Stephan Schill has coined the term "public law challenge" to capture the dilemmas that arise from this tension. Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 57, 58–59, 67 (2011); see also Susan D. Franck, *The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future?*, 12 U.C. DAVIS J. INT'L L. & POL'Y 47, 69–79 (2005) [hereinafter Franck, *Investor Rights*].

21. Franck, *Legitimacy Crisis*, *supra* note 16, at 1541; see also Andrew P. Tuck, *Investor-State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules*, 13 LAW & BUS. REV. AM. 885, 886 (2007).

22. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 37(2)(b), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

23. The Convention precludes recourse outside of the ICSID framework, effectively shielding ICSID awards from enforcement challenges in the courts of the host state. See *id.* art. 53(1) (providing that ICSID awards "shall not be subject to any appeal or other remedy except those provided for in this Convention"); see also Dohyun Kim, Note, *The Annulment Committee's Role in Multiplying Inconsistency in ICSID Arbitration: The Need to Move Away from an Annulment-Based System*, 86 N.Y.U. L. REV. 242, 251–52 (2011). Non-ICSID investment awards could be set aside by a court at the seat of the arbitration, and are subject to the (limited) grounds for non-enforcement under the New York Convention. See Christian J. Tams, *An Appealing Option? The Debate About an ICSID Appellate Structure*, in 57 BEITRÄGE ZUM TRANSNATIONALEN WIRTSCHAFTSRECHT 5, 11 (2006).

24. ICSID Convention, *supra* note 22, art. 52(3).

25. The grounds for annulment are improper constitution of the tribunal, manifest excess of the tribunal's powers, corruption of a tribunal member, serious departure from a fundamental procedural rule or failure to state the reasons in the award. *Id.*, art. 52(1)(a)–(e).

26. One annulment committee has made the oft-quoted observation that "the role of an *ad hoc* committee is a limited one, restricted to assessing the legitimacy of the award and not

B. A Case Study of Inconsistent Adjudication

Arbitral tribunals in investor-state disputes are in agreement on many issues.²⁷ Scholars have long argued, however, that the characteristics of both the substantive law and the dispute resolution mechanism render investment treaty arbitration vulnerable to inconsistent adjudication.²⁸ And while the discussion may once have been mostly an academic one, one can no longer deny that tribunals *have* rendered inconsistent decisions about controversial issues.²⁹

The calls for increased consistency in investment treaty arbitration have intensified as a result of a high-profile instance of inconsistent decision-making in cases brought by investors against Argentina in connection with the measures taken by the government in 2001–02 to address the severe economic downturn. Five cases involved claims filed under the Argentina-United States BIT by American investors: CMS Gas Transmission Co., LG&E Energy Corp., Enron Creditors Recovery Corp., Sempra Energy International and

its correctness.” M.C.I. Power Group L.C. v. Republic of Ecuador, ICSID Case No. ARB/03/6, Annulment Decision, ¶ 24 (Oct. 19, 2009); see also David D. Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal*, 7 ICSID REV. 21, 24–25 (1992); CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 892 (2001).

27. See Gabrielle Kaufmann-Kohler, *Is Consistency a Myth?*, in PRECEDENT IN INTERNATIONAL ARBITRATION 137, 138–41 (Yas Banifatemi ed., 2007) [hereinafter Kaufmann-Kohler, *Consistency*] (noting consistency in arbitral decisions on (1) the distinctions between treaty and contract claims and (2) the fair and equitable treatment standard).

28. See, e.g., Franck, *Investor Rights*, *supra* note 20, at 69; Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity, or Excuse?*, 23 ARB. INT’L 357, 373–75 (2007) [hereinafter Kaufmann-Kohler, *Arbitral Precedent*]; Kaufmann-Kohler, *Consistency*, *supra* note 27, at 143–47; Valentina Vadi, *Towards Arbitral Path Coherence & Judicial Borrowing: Persuasive Precedent in Investment Arbitration*, 5 TRANSNAT’L DISP. MGMT., at 5–14 (2008).

29. See, e.g., Kaufmann-Kohler, *Consistency*, *supra* note 27, at 142–43 (noting inconsistency in arbitral decisions on (1) umbrella clauses, and (2) the state of necessity). On the well-known *Lauder* dispute, in which two UNCITRAL tribunals reached different outcomes in cases that involved the same facts but were brought under different treaties, compare Franck, *Investor Rights*, *supra* note 20, at 60–61 (discussing these awards as examples of inconsistency), with Jan Paulsson, *Avoiding Unintended Consequences*, in APPEALS MECHANISM, *supra* note 18, at 241, 249 [hereinafter Paulsson, *Unintended Consequences*] (arguing that the different outcomes can be attributed to the tribunals’ assessment of the facts, and that the awards are not inconsistent in a meaningful sense because “[t]heir understanding of the relevant legal standards . . . were perfectly congruent”).

Continental Casualty Co.³⁰ The claims of these investors are based on the same government acts. In evaluating those acts, the tribunals and annulment committees interpret the terms of a single BIT, as well as a defense under customary international law that was invoked in every case. As a result, these cases present a good starting point for an examination of the role consistency and precedent should play in investment treaty arbitration. The awards and decisions have been analyzed extensively in other publications,³¹ so my discussion here will be brief.

The operative facts in the five cases are substantially similar. The claimants invested in Argentine companies as part of Argentina's privatization program in the early 1990s. In these investment transactions, Argentina made commitments aimed at stabilizing the tariff structure in case of fluctuation of the peso.³² During the unprecedented economic meltdown approximately ten years later, the Argentine government effectively abrogated the stabilization measures.³³ The investors who filed claims with ICSID claimed that Argentina's actions violated several obligations under the BIT, including the obligations to accord fair and equitable treatment to investments and to honor commitments made to investors.³⁴ The disagreements among the adjudicators in these cases center on

30. CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005) [hereinafter CMS Award]; CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Annulment Decision (Sept. 25, 2007) [hereinafter CMS Annulment Decision]; Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Award (May 22, 2007) [hereinafter Enron Award]; Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Annulment Decision (July 30, 2010) [hereinafter Enron Annulment Decision]; LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006) [hereinafter LG&E Decision on Liability]; Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007) [hereinafter Sempra Award]; Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Annulment Decision (June 29, 2010) [hereinafter Sempra Annulment Decision]; Cont'l Cas. Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008) [hereinafter Continental Award], Annulment Decision (Sept. 16, 2011) [hereinafter Continental Annulment Decision].

31. See, e.g., José E. Alvarez & Tegan Brink, *Revisiting the Necessity Defense: Continental Casualty v. Argentina*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2010–2011, at 319 (Karl P. Sauvant ed., 2012); David Schneiderman, *Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes*, 30 NW. J. INT'L L. & BUS. 383 (2010).

32. See, e.g., CMS Award, *supra* note 30, ¶¶ 53–57 (describing CMS's understanding of such a commitment by Argentina).

33. E.g., *id.* ¶ 65.

34. E.g., *id.* ¶ 88.

Argentina's argument that it was not liable under the necessity defense under customary international law and the BIT's emergency clauses, chiefly Article XI.³⁵ In *CMS*, *Enron* and *Sempra*, the tribunals held that Argentina did not meet the standards for either defense.³⁶ The *LG&E* and *Continental* tribunals, on the other hand, held that Argentina had successfully established the emergency defense under the BIT.³⁷

The conflicting outcomes are at least in part the result of disagreement about the relationship between the defenses under, respectively, the treaty and customary international law.³⁸ In Article XI of the BIT, Argentina and the United States reserved the right to take "measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests."³⁹ This treaty text provides little guidance regarding the conditions under which the necessity defense applies. In contrast, Article 25 of the International Law Commission's Articles on State Responsibility, which codifies the emergency defense under customary international law, lists specific elements.

CMS Award: The inconsistencies already materialized in the first two awards, rendered in the *CMS* and *LG&E* cases in May 2005 and October 2006. The *CMS* tribunal concluded that Argentina had failed to establish either of the two defenses.⁴⁰ Among other reasons, the tribunal found that while Argentina's crisis was severe, it "did not result in total economic and social collapse." It held that, as a result, the crisis in and of itself could not preclude wrongfulness.⁴¹ Significantly, in making this determination the *CMS* tribunal first analyzed the customary international law defense. It then incorporated aspects of this analysis in its subsequent assessment of whether Ar-

35. See, e.g., *id.* ¶¶ 91–99.

36. *Id.* ¶ 331; *Enron Award*, *supra* note 30, ¶¶ 313, 321, 339; *Sempra Award*, *supra* note 30, ¶ 388.

37. *LG&E Decision on Liability*, *supra* note 30, ¶¶ 257–63; *Continental Award*, *supra* note 30, ¶¶ 219–22, 266.

38. My analysis of these disagreements draws on an illuminating presentation by Michael Nolan titled *The Dynamic Relationship Between the Customary International Law of Investment Protection and Bilateral Investment Treaties* (Columbia Law School International Investment Law and Policy Speaker Series, Mar. 19, 2012).

39. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. XI, Nov. 14, 1991, S. TREATY DOC. NO. 103–2.

40. *CMS Award*, *supra* note 30, ¶ 331.

41. *Id.* ¶¶ 320, 355.

gentina could successfully invoke the treaty defense.⁴²

LG&E Award: The *LG&E* tribunal, on the other hand, addressed the treaty defense first.⁴³ The tribunal noted that “[a]ll of the major economic indicators reached catastrophic proportions in December 2001.”⁴⁴ It summarized the resulting poverty, lack of trust in the banking system, deadly riots and political crisis,⁴⁵ and concluded that “[a]ll of these devastating conditions—economic, political, social—in the aggregate triggered the protections afforded under Article XI of the [BIT] to maintain order and control the civil unrest.”⁴⁶ The *LG&E* tribunal’s factual assessments as to the severity of the conditions in Argentina, in sum, differed from those of the *CMS* tribunal. The *LG&E* tribunal held that the conditions for necessity existed between December 1, 2001 and April 26, 2003, and that Argentina’s obligations revived after this period.⁴⁷ While noting that its ruling on the treaty defense was sufficient,⁴⁸ the tribunal proceeded to also analyze the customary international law defense. The *LG&E* tribunal concluded that Argentina met the conditions for this defense as well.⁴⁹ Remarkably, the *LG&E* tribunal referenced the *CMS* award several times for propositions with which it was in agreement.⁵⁰ Yet the *LG&E* Award does not acknowledge, and therefore fails to shed light on, the differences in reasoning and outcome in the two awards.

Enron Award: The *Enron* tribunal issued its award in May 2007. The tribunal followed the *CMS* approach: after analyzing Argentina’s defense under customary international law and concluding that Argentina fell short,⁵¹ the tribunal effectively noted that the Article XI defense was to be evaluated under the same standards.⁵² Un-

42. See, e.g., *id.* ¶ 374 (noting that the review under the treaty defense “is a substantive review that must examine whether the state of necessity or emergency meets the conditions laid down by customary international law and the treaty provisions and whether it thus is or is not able to preclude wrongfulness”).

43. *LG&E Decision on Liability*, *supra* note 30, ¶¶ 226–242.

44. *Id.* ¶ 232.

45. *Id.* ¶¶ 233–36.

46. *Id.* ¶ 237.

47. *Id.* ¶ 261.

48. *Id.* ¶ 245.

49. *Id.* ¶¶ 245–260.

50. See, e.g., *id.* ¶¶ 125 & nn.30–31, 127, 128 & nn.31 & 33, 236 n.35, 171 & nn.48–49.

51. *Enron Award*, *supra* note 30, ¶¶ 303–13.

52. *Id.* ¶¶ 333–34, 339.

like the *CMS* tribunal, the *Enron* tribunal offered an explicit justification for this approach. Specifically, the *Enron* tribunal addressed an expert opinion from Anne-Marie Slaughter and William Burke-White opining that a treaty, as *lex specialis*, is distinct from and takes priority over customary international law. The tribunal agreed that “a treaty regime specifically dealing with a given matter will prevail over more general rules of customary international law.” It stated, however, that this was not the situation presented by the U.S.-Argentina BIT: “[T]he problem is that the [BIT] itself did not deal with these elements. The [BIT] thus becomes inseparable from the customary law standard insofar as the conditions for the operation of state of necessity are concerned.”⁵³ The *Enron* tribunal cited the *LG&E* Decision on Liability in support of specific propositions on which the two tribunals agreed,⁵⁴ but did not account for the glaring inconsistencies between the two awards.

CMS Annulment Decision: In the meantime, the *CMS* case had proceeded to annulment, and the *CMS* annulment decision came out on September 25, 2007. The annulment committee harshly criticized the *CMS* award on the merits. Much of this criticism centered on the tribunal’s conflation of the necessity and emergency defenses. After pointing out textual and substantive differences between Article XI of the BIT and Article 25 of the Articles on State Responsibility, the annulment committee concluded that the tribunal’s failure to distinguish between the two standards constituted “a manifest error of law.”⁵⁵ The annulment committee also identified an error in the application of the two sources of law. It explained that Article XI goes to wrongfulness, meaning that necessity precludes a finding that a breach has occurred, while Article 25 could be interpreted as going to either wrongfulness or liability.⁵⁶ If both sources address wrongfulness, Article XI would be the *lex specialis* as to that issue and apply at the exclusion of customary law.⁵⁷ If, instead, Article 25 addresses liability, it would be a secondary rule that the tribunal should consider only after determining that Article XI did not preclude a breach.⁵⁸ Under either interpretation, in other words, the tribunal should have given priority status to Article XI. Noting the limited nature of the annulment remedy, the committee let the award stand, aside from a

53. *Id.* ¶ 334.

54. *Id.* ¶¶ 260, 261, 261 nn.59–60, 262 n.63, 263 nn.66–68, 264 n.74.

55. *CMS Annulment Decision*, *supra* note 30, ¶¶ 129–30.

56. *Id.* ¶¶ 129, 132.

57. *Id.* ¶ 133.

58. *Id.* ¶ 134.

partial annulment relating to a different issue that did not affect the validity of the award as a whole.⁵⁹

Sempra Award: The inconsistencies persisted through the last two awards, rendered in the *Sempra* and *Continental* cases. The *Sempra* tribunal issued an award on September 28, 2007, i.e., three days after the *CMS* annulment decision was rendered. The *Sempra* tribunal essentially followed the approach taken by the *CMS* and *Enron* tribunals, with the same result.⁶⁰ Among other things, like the *CMS* and *Enron* tribunals, the *Sempra* tribunal invoked customary international law in determining the standards for application of the treaty defense.⁶¹ One explanation for the similarities in approach taken by the *CMS*, *Enron* and *Sempra* tribunals lies in the overlap in arbitrators. Francisco Orrego-Vicuña chaired all three tribunals.⁶² In addition, Marc Lalonde sat on both the *CMS* and the *Sempra* tribunals, and in both cases had been selected by the plaintiffs.⁶³ Interestingly, the *Sempra* award expressly notes that members of the tribunal sat on other cases complaining of the same measures by the Argentine government. It also observes that some cases involved the same counsel on each side and that the party submissions contained similar or even identical language.⁶⁴ However, the tribunal hastened to add that although “[o]n occasion, the wording [in the *Sempra* award] resembles that of prior awards[,] [t]he Tribunal . . . has examined every single argument and petition on the basis of their merits in this proceeding.”⁶⁵ Unlike other tribunals, the *Sempra* tribunal acknowledged the inconsistency with the *LG&E* award (it did not address the *CMS* annulment decision, and the tribunal members may not have been aware of its existence given that it was hot off the press). The *Sempra* award, however, seems to gloss over fundamental differences in interpretation by the two tribunals. Instead, it plays up the different assessment of facts:

This tribunal must note, first, that in addition to differences in the legal interpretation of the Treaty in this

59. *Id.* ¶ 163.

60. *Sempra Award*, *supra* note 30, ¶ 388.

61. *Id.* ¶ 378.

62. *See CMS Award*, *supra* note 30, ¶ 11; *Enron Award*, *supra* note 30, ¶ 12; *Sempra Award*, *supra* note 30, ¶ 10.

63. *CMS Award*, *supra* note 30, ¶ 10; *Sempra Award*, *supra* note 30, ¶ 10.

64. *Sempra Award*, *supra* note 30, ¶ 76.

65. *Id.* ¶ 76. *See also id.* ¶ 346 (noting, as to Argentina’s emergency and necessity defenses, “while two arbitrators sitting in the present case were also members of the tribunal in the *CMS* case the matter has been examined anew”).

context, an important question that distinguishes the *LG&E* decision on liability from *CMS*, and for that matter also from the recent award in *Enron*, lies in the assessment of the facts. While the *CMS* and *Enron* tribunals have not been persuaded by the severity of the Argentine crisis as a factor capable of triggering the state of necessity, *LG&E* has considered the situation in a different light and justified the invocation of emergency and necessity, albeit for a limited period of time. This Tribunal, however, is not any more persuaded than the *CMS* and *Enron* tribunals about the crisis justifying the operation of emergency and necessity⁶⁶

Continental Award: The *Continental* tribunal, which rendered its award on September 5, 2008, honored Argentina's treaty defense. Like the *LG&E* tribunal and the *CMS* annulment committee, the *Continental* tribunal rejected the position, taken by the other three tribunals, that the treaty and customary law defenses are "inseparable."⁶⁷ Yet while the *LG&E* tribunal engaged purely in textual analysis to determine whether the evidence established the defense, the *Continental* tribunal turned to sources outside the investment treaty context for guidance. Noting that Article XI could eventually be traced back to a provision in the General Agreement on Tariffs and Trade (GATT) of 1947,⁶⁸ the *Continental* tribunal examined GATT and WTO case law on necessity.⁶⁹

The different interpretation methods in *Continental* and *LG&E* resulted in inconsistent rulings on damages. Specifically, the *LG&E* tribunal held that Argentina breached its BIT obligations, but was exempted from liability for any damages incurred during the

66. *Id.* ¶ 346.

67. *Continental Award*, *supra* note 30, ¶ 192.

68. *Id.*

69. *Id.* Although the *LG&E* and the *Continental* tribunals both honored Argentina's necessity defense under the BIT, the awards differ in their analysis of the operation of the treaty defense, resulting in inconsistent rulings on the extent of Argentina's liability. Among other things, the *LG&E* tribunal held that Article XI only shielded Argentina from liability during the state of necessity, and that its BIT obligations (and therefore its liability for violations) reemerged once the state of necessity had passed. *LG&E Award*, *supra* note 30, ¶ 261. The *Continental* tribunal, on the other hand, held that due to the protections accorded by Article XI, the measures taken by Argentina during the economic collapse were not in breach of the BIT obligations. *Continental Award*, *supra* note 30, ¶ 164. As a result, the claimants were entitled only to damages that resulted from measures taken after the crisis was over. *Id.* ¶¶ 220–22.

state of necessity. The *LG&E* tribunal concluded that Argentina's liability reemerged after the state of necessity was over.⁷⁰ The *Continental* tribunal, on the other hand, held that the measures taken by Argentina during the economic collapse were not in breach of the BIT obligations as a result of applicability of the necessity defense.⁷¹ The claimants' entitlement to damages was therefore limited to those that resulted from measures taken after the crisis was over.⁷² The *Continental* award cites the *CMS* annulment decision several times for support.⁷³ The *Continental* award also, at times, identifies discrepancies with earlier awards. For example, the award notes that the *Continental* tribunal disagreed with the *CMS* tribunal on the legal question of the level of severity that is necessary to trigger application of the treaty defense in case of an economic crisis.⁷⁴ The *Continental* tribunal also noted that its factual assessment of the gravity of the Argentine crisis differed from that of other tribunals.⁷⁵ The award, however, does not address the main areas of disagreement with the approach taken by the *LG&E* tribunal regarding liability.

Enron and Sempra Annulment Decisions: The *Enron* and *Sempra* annulment committees annulled the two awards under their review based on excess of powers due to the failure of the tribunal to apply the applicable law.⁷⁶ However, the two tribunals followed dif-

70. *LG&E Decision on Liability*, *supra* note 30, ¶¶ 257–63.

71. *Continental Award*, *supra* note 30, ¶¶ 219, 266.

72. *Id.* ¶¶ 220–22.

73. *See, e.g., id.* ¶¶ 164 & n.236, 165 & n.239, 167 & n.242, 168 & n.246; *cf. id.* ¶¶ 180 & n.261 (identifying agreement with the *LG&E* tribunal), 188 & n.282 (citing to the *CMS*, *LG&E* and *Enron* awards).

74. Specifically, after discussing its view that application of the treaty defense does not hinge on the existence of a “total collapse” or a “catastrophic situation,” the *Continental* tribunal notes: “In this respect this Tribunal takes a different view than that expressed in the *CMS* Award We note that Art. 25 of the ILC Articles, which is more restrictive than Art. XI, admits recourse to necessity at para. 1(a) to safeguard an essential interest against a *grave and imminent peril*.” *Id.* ¶ 180 & n.264 (citations omitted).

75. *Id.* ¶ 178 & n.259 (citing to the *CMS*, *LG&E* and *Enron* awards for support of the position that “there is nothing in the context of customary international law or the object and purpose of the treaty that could on its own exclude major economic crises from the scope of Art. XI” but noting that earlier tribunals “have taken a different evaluation *in concreto* as to the gravity of the Argentine economic crisis”).

76. *Sempra Annulment Decision*, *supra* note 30, ¶¶ 196–219; *Enron Annulment Decision*, *supra* note 30, ¶¶ 386–95. The *Continental* and *LG&E* cases also proceeded to annulment. The *Continental* annulment committee let the award stand. *Continental Annulment Decision*, *supra* note 30. In *LG&E*, the parties have suspended the proceedings. *See* case and docket information, available at <http://icsid.worldbank.org/ICSID/FrontServlet> (last visited Feb. 17, 2013) (requiring search input). In *Enron* and *Sempra*, new tribunals

ferent analyses. The *Sempra* committee ruled that the tribunal had failed to apply the pertinent BIT provisions because it had used customary international law as the primary source of law.⁷⁷ The *Enron* annulment committee, in contrast, based the annulment primarily on its conclusion that the tribunal had failed to apply customary international law.⁷⁸ The *Enron* annulment committee addressed the *CMS* annulment decision several times, including in at least one area of disagreement.⁷⁹

Not only do the annulment decisions represent different substantive approaches, but they also reveal divergent views regarding the proper application of the “manifest excess of powers” ground for annulment.⁸⁰ Despite pointing out several “manifest error[s]” in the award, the *CMS* annulment committee, as noted, let the award stand. In so deciding, the *CMS* committee noted that wrong application of the law does not constitute manifest excess of powers, and that it “cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal.”⁸¹ The *Enron* and *Sempra* annulment committees, on the other hand, engaged in a more aggressive application of the annulment ground. Neither the *Enron* nor the *Sempra* decision discusses the reasons for taking an approach that differs from the *CMS* annulment decision.⁸²

have been appointed. However, in *Enron* the parties have suspended the proceedings as well. *Id.*

77. *Sempra* Annulment Decision, *supra* note 30, ¶¶ 196–219.

78. *Enron* Annulment Decision, *supra* note 30, ¶¶ 386–95.

79. For example, the *Enron* annulment committee held that the tribunal had provided adequate reasons for its ruling that Argentina had violated the umbrella clause. The committee noted that the *CMS* committee had held differently, and proceeded to explain this difference based on differences in the awards the two committees were asked to annul. *Id.* ¶¶ 333–343.

80. This Article focuses on the case for consistency and precedent with regards to substantive international law. However, I should note that the argument for precedent may be stronger as to issues that go directly to the functioning of investment treaty arbitration process *itself*, such as the interpretation of the grounds for annulment under the ICSID Convention. In part, this is because the problem of fragmentation is not presented since the ICSID Convention is a multilateral treaty. Another reason is that arguably, considerations of perception of legitimacy should weigh heavier as to questions that pertain directly to the legitimacy of the process, especially because of the traditional emphasis on process in the review of arbitral awards.

81. *CMS* Annulment Decision, *supra* note 30, ¶ 136.

82. The *Enron* annulment decision, however, criticized the *CMS* annulment committee for opining on the relationship between the treaty and customary international law defenses, stating:

II. IMPLEMENTING PRECEDENT

In this Part, I discuss several proposals for precedent in investor-state arbitration. First, I provide a brief overview of the status of adjudicatory decisions in light of the ICSID Convention and the most relevant rules of international law. I then proceed with a general discussion of the different degrees of precedent, followed by summaries of the two main proposals for implementing precedent in investment treaty arbitration: the use of persuasive precedent to promote consistency, and the introduction of some doctrine of *jurisprudence constante*. I conclude this Part with some examples of positions endorsed by tribunals and annulment committees.

A. The Status of Adjudicatory Decisions

Although the case for precedent in investment treaty arbitration is based primarily on a desire for consistency, it raises important underlying questions about how arbitrators should determine what the law is and how it ought to be applied. A brief discussion of the international law framework is therefore in order.

The ICSID Convention instructs arbitrators to “decide a dispute in accordance with such rules of law as may be agreed by the parties.” If no such agreement exists, “the [t]ribunal shall apply the law of the Contracting State party to the dispute . . . and such rules of international law as may be applicable.”⁸³ The debate about precedent centers on the methods arbitrators should follow in identifying and applying “rules of international law.”

Article 38(1) of the Statute of the International Court of Justice, which is widely considered to be authoritative, provides some guidance.⁸⁴ It identifies three primary sources of international law: international treaties, customary international law and “general prin-

[T]he substantive operation and content of Article XI and the customary international law principles of necessity, and the interrelationship between the two, are issues that fall for decision by the tribunal. The role of an annulment committee is not to reach its own conclusions on these issues, but to determine whether the tribunal manifestly exceeded its powers in reaching the conclusion that it did, or whether the tribunal failed to state reasons for reaching the conclusions that it did.

Enron Annulment Decision, *supra* note 30, ¶ 405.

83. ICSID Convention, *supra* note 22, art. 42(1).

84. See, e.g., Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 FORDHAM INT'L L.J. 1014, 1026–27 (2007).

ciples of law recognized by civilized nations.”⁸⁵ The provision further identifies “judicial decisions and the teachings of the most highly qualified publicists of the various nations” as “subsidiary means for the determination of the rules of law.”⁸⁶ The authorization to use “subsidiary means” is made subject to Article 59 of the Statute, which provides that a decision from the International Court of Justice “has no binding force except between the parties and in respect of that particular case.”⁸⁷ In sum, under Article 38(1) judicial decisions do not possess the status of law. They may, however, be used for purposes of *determining* the law.

The law on interpreting treaties attaches even less authority to adjudicatory decisions. The rules for interpretation methods for treaties, including investment treaties, are codified in the 1969 Convention on the Law of Treaties (Vienna Convention).⁸⁸ Under Article 31 of the Vienna Convention, treaties are to be interpreted “in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context and *in the light of its object and purpose*.”⁸⁹ Although Article 32 permits the use of “supplementary means of interpretation,” this provision does not expressly identify adjudicatory decisions or awards.⁹⁰

85. Statute of the International Court of Justice, June 26, 1945, art. 38(1)(a)–(c), 59 Stat. 1031, 33 U.N.T.S. 993.

86. *Id.* art. 38(1)(d); *see also* Cheng, *supra* note 84, at 1026–30 (discussing the relevance of this provision for the status of investment awards).

87. *Id.* art. 59. Some investment treaties provide similar provisions. *See, e.g.*, North American Free Trade Agreement, U.S.-Can.-Mex., art. 1136, Dec. 17, 1992, 107 Stat. 2057 (1994), 32 I.L.M. 605 (1993) (specifying that “[a]n award made by a tribunal shall have no binding force except between the parties and in respect of the particular case”). Some have read the statement in Article 53(1) of the ICSID Convention that an award “shall be binding on the parties” as implying that arbitral awards cannot constitute binding precedent. ICSID Convention, *supra* note 22, art. 53(1); SCHREUER, *supra* note 26, at 1082.

88. Vienna Convention on the Law of Treaties, May 23, 1969, 1165 U.N.T.S. 331.

89. *Id.* art. 31 (emphases added).

90. Article 32 of the Vienna Convention provides two examples of “supplementary means of interpretation,” namely “the preparatory work of the treaty and the circumstances of its conclusion,” and specifies that recourse to these means is appropriate “in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.” *Id.* art. 32. Orakhelashvili observes that these two examples relate directly to the treaty-makers’ intent at the time of negotiation of the treaty. He argues that because the examples are qualitatively different from decisions rendered by adjudicators *after* a treaty has entered into force, the better inference is that adjudicatory decisions are *not* appropriate as supplementary means of interpretation of treaty texts. Orakhelashvili, *supra* note 10, at 168.

As for customary international law, some scholars have argued that arbitral awards could be indicative of the two elements of customary international law: state practice and *opinio juris*.⁹¹ The argument is that the existing treaties, combined with arbitral awards interpreting them, can come to represent customary international law (rather than *lex specialis*) and bind even those states that aren't signatories to investment treaties.⁹² This approach is, however, a controversial one that doesn't fit easily within traditional notions of treaty law and customary international law.⁹³

In addition to the absence of a formal basis for precedent in international law, the lack of a hierarchical structure poses challenges for implementing any form of precedent.⁹⁴ As we will see, proposals for the implementation of precedent into the investment treaty arbitration context are sensitive to these difficulties.

B. Adapting Precedent for the Investment Treaty Context

Proponents of precedent in investment arbitration stop short of arguing for binding precedent. Instead, some propose that arbitrators rely more heavily on persuasive authority. Others call for the adoption of a practice akin to the French doctrine of *jurisprudence constante*, which attaches precedential value to consistent lines of cases.

91. See, e.g., Kaufmann-Kohler, *Consistency*, *supra* note 27, at 147.

92. For the argument that BITs, and the way they are interpreted in arbitral awards, can rise to the level of customary international law (or, as argued by Lowenfeld, international law more generally), see, e.g., José E. Alvarez, *A BIT on Custom*, 42 N.Y.U. J. INT'L L. & POL. 17 (2009) [hereinafter Alvarez, *Custom*]; Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123 (2003); Stephen M. Schwebel, *The Influence of Bilateral Investment Treaties on Customary International Law*, 98 AM. SOC'Y INT'L L. 27 (2004).

93. See, e.g., Patrick Dumberry, *Are BITs Representing the "New" Customary International Law?*, 28 PENN ST. INT'L L. REV. 675 (2010) (rejecting the position that the BITs represent customary international law and arguing that BITs cannot establish state practice and *opinio juris*); see also Alvarez, *Custom*, *supra* note 92, at 19 (explaining the controversy regarding the idea that BITs have a role to play in determining customary international law).

94. I have discussed some of the difficulties that arise in trying to implement precedent in a horizontal context in Irene M. Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44 N.Y.U. J. INT'L L. & POL. 1109, 1190–95 (2012).

1. Degrees of Precedent

The essence of precedent, as it is traditionally understood, is that earlier decisions constrain the decision-making freedom of a present adjudicator.⁹⁵ The *degree* of constraint, however, may vary.⁹⁶ Within the formal structure of the federal courts system of the United States, for example, the amount of deference owed to earlier decisions depends primarily on jurisdiction and hierarchy. A brief explanation of this system will provide a useful framework for understanding the proposals regarding precedent in investor-state arbitration.

The 1987 Seventh Circuit opinion in *Colby v. J.C. Penney Co.*, authored by Judge Posner, identifies different levels of constraint that may exist within a precedent system.⁹⁷ The strongest form is binding precedent, which imposes an absolute obligation on lower court judges to follow the decisions from courts further up in the hierarchy.⁹⁸ Although the highest courts may overrule earlier decisions under such a model, the principle of *stare decisis* demands that they do so only in rare circumstances.⁹⁹

For purposes of understanding the form precedent could take in a horizontal context, the treatment of decisions that are not binding is most illuminating. The *Colby* case presents the issue nicely. In this case, appeal was taken from the dismissal of a sex discrimination case by a judge in the Northern District of Illinois. The district court appeared to have based its ruling on an earlier decision from a judge in the Eastern District of Michigan, which involved an identical claim brought against the same defendant by a different plaintiff.

95. See *supra* notes 6–8 and accompanying text.

96. As James Fry has pointed out, the “view of precedent as a binary, all-or-nothing phenomenon” is reductive. James D. Fry, *Regularity through Reason: A Foundation of Virtue for International Arbitration*, 4 CONTEMP. ASIA ARB. J. 57, 61 (2011).

97. 811 F.2d 1119 (7th Cir. 1987).

98. *Id.* at 1123.

99. *Id.* See also, e.g., *State Oil v. Khan*, 522 U.S. 3, 20 (1997) (“*Stare decisis* reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right It is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”) (citations and internal quotation marks omitted); *cf.* *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (“The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Courts and to the stability of the law. It is not, however, an inexorable command.”) (citation omitted); *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 864 (1992) (“[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.”) (citations omitted).

The Seventh Circuit observed that the district court was right in paying close attention to the earlier case, but held that the court failed to “discharge its judicial responsibilities” by merely citing the other court’s decision without providing independent analysis.¹⁰⁰ The Seventh Circuit stated that “district judges in this circuit must not treat decisions *by other district judges*, in this and *a fortiori* in other circuits, as controlling Such decisions will normally be entitled to no more weight than their intrinsic persuasiveness merits.”¹⁰¹ District court decisions, in other words, are to be given *no* deference.

The Seventh Circuit contrasted the status of district court decisions with that of decisions from sister appellate courts. The court held that the latter, while not binding, are entitled to *some* presumptive deference: “[W]e give most respectful consideration to the decisions of the other courts of appeals and follow them whenever we can. Our district court judges should, of course, do likewise with regards to such decisions”¹⁰² The reason, according to the court, lies in the appellate courts’ role in maintaining uniformity of law:

The reasons we gave for giving some though not controlling weight to decisions of other federal courts of appeals do not apply to decisions of other district courts, because the *responsibility for maintaining the law’s uniformity* is a responsibility of appellate rather than trial judges and because the Supreme Court does

100. 811 F.2d at 1123–24.

101. *Id.* at 1124; *see also* *Camreta v. Greene*, 131 S. Ct. 2020, 2033 & n.7 (2011) (“A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.”) (citing 18 J. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 134.02[1][d], at 124–26 (3d ed. 2011)); *Threadgill v. Armstrong World Industries, Inc.*, 928 F.2d 1366, 1371 (3d Cir. 1991) (noting that “there is no such thing as ‘the law of the district’” and that even if a case presents facts that are identical to those in a case decided by another judge in the same district, “the prior resolution of those claims does not bar reconsideration by this Court of similar contentions. The doctrine of *stare decisis* does not compel one district court judge to follow the decision of another.”) (citation omitted). The Seventh Circuit allowed, however, that district courts might give some deference to other district court opinions “[w]here different outcomes would place the defendant under inconsistent legal duties” 811 F.2d at 1124. Note that this is a more stringent criterion than inconsistency. The conflicting awards regarding Argentina’s necessity defense, for example, do not place Argentina in a situation in which it cannot comply with all awards as it could pay the damages it has been ordered to pay. *But see* *TMF Tool Co., Inc. v. Muller*, 913 F.2d 1185, 1191 (7th Cir. 1990) (“For a variety of quite valid reasons, including consistency of result, it is an entirely proper practice for district judges to give deference to persuasive opinions by their colleagues on the same court.”).

102. 811 F.2d at 1123.

not assume the burden of resolving conflicts between district judges whether in the same or different circuits.¹⁰³

The role of the appellate courts in harmonizing substantive law is, therefore, what justifies the deference (however minor) to be accorded to decisions from sister appellate courts. Conversely, since district courts aren't charged with the responsibility for uniformity, their decisions are entitled to no deference. The *Colby* opinion, in sum, directly links the justification for precedent to the role of the respective courts in establishing uniformity of law.¹⁰⁴

2. Persuasive Authority

Several authors have argued that treating prior decisions as persuasive authority could result in a more coherent body of investment law.¹⁰⁵ Indeed, some have observed that a practice of persuasive authority is already taking form in investor-state arbitration, a development that is often applauded.¹⁰⁶

That persuasive authority can contribute to consistent adjudication is not self-evident. As Frederic Schauer has pointed out, the very notion of persuasive authority is puzzling. After all, “the characteristic feature of authority is its *content-independence*. The force

103. *Id.* at 1124 (emphasis added).

104. The arguments that consistent adjudication serves continuity in law development, and that it promotes predictability, are addressed *infra* in Parts III.A.2 and III.A.3.

105. *See, e.g.,* Vadi, *supra* note 28, at 5–15.

106. *See, e.g.,* Bjorklund, *Emerging Civilization*, *supra* note 15, at 1273 (“Notwithstanding the general rule in public international law that case law has no precedential value, arbitral awards are increasingly used as persuasive authority both by advocates and by tribunals.”); Jeffrey P. Commission, *Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence*, 24 J. INT’L ARB. 129, 143–54 (analyzing citations to earlier awards and decisions in investment treaty arbitration); Schill, *supra* note 20, at 82–85 (analyzing arbitral precedent); Alec Stone Sweet, *Investor-State Arbitration: Proportionality’s New Frontier*, 4 L. & ETHICS HUM. RTS 47, 61 (2010) (“It is today indisputable that ‘a *de facto* doctrine of precedent’ governs investor-State arbitration: the parties intensively argue the substance and relevance of prior ICSID rulings, which Tribunals accept as persuasive authority, and then cite as supportive justification for their own rulings.”). James Fry provides a useful categorization of the different ways in which tribunals have dealt with pertinent past awards. *See* Fry, *supra* note 96, at 63–77; *see also* Andrés Rigo Sureda, *Precedent in Investment Treaty Arbitration*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 830, 833–39 (Christina Binder et al. eds., 2009) (describing different approaches to precedent taken by tribunals).

of an authoritative directive comes not from its content, but from its source.”¹⁰⁷ Yet the term “persuasive” indicates that an adjudicator needs to follow non-binding decisions only if she is convinced by the strength of their reasoning. In other words, persuasive authority has the *potential* to persuade. It is, however, optional in the sense that it does not constrain the decision-making freedom of adjudicators. This observation naturally leads to the question of whether persuasive authority is an oxymoron.¹⁰⁸

On closer examination, however, the existence of relevant decisions may plausibly influence decision-making even when an adjudicator is not operating under any formal constraints. As illustrated by the Seventh Circuit’s analysis of the deference due to decisions from sister appellate courts in *Colby*, one explanation for according deference to non-binding decisions lies in uniformity. In practice, a consistency norm leads to a presumption, however slight, in favor of following earlier decisions. Those who wish to introduce a more robust norm of horizontal precedent into investment arbitration may argue, with some force, that horizontal deference is needed precisely to compensate for the absence of a centralized appeals facility that could create and enforce harmonized interpretation of the law.¹⁰⁹

Another reason for giving weight to non-binding authority is expertise.¹¹⁰ In the United States, this phenomenon is demonstrated by the guiding role of the Delaware courts on the development of corporate law in virtually all other states. Needless to say, decisions from the Delaware Court of Chancery and the Delaware Supreme Court that interpret the Delaware General Corporation Law have no precedential value for cases involving the application of the corporate statute of, say, New York State. Yet in interpreting provisions in corporate statutes of other states, state and federal courts frequently cite decisions from the Delaware state courts. In so doing, they often explain that while those decisions are not binding, they are “instructive,” sometimes noting the expertise of the Delaware courts in corporate law.¹¹¹ An interesting aspect of this phenomenon is that it

107. Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1935 (2008) [hereinafter Schauer, *Authority*].

108. *Id.* at 1940–52.

109. *Cf.* Cheng, *supra* note 84, at 1044 (“Strong internal controls appear to compensate for the lack of external appellate controls on arbitral tribunals.”).

110. Schauer, *Authority*, *supra* note 107, at 1948–49.

111. *See, e.g.*, *Ficus Invs., Inc. v. Private Capital Mgmt.*, 872 N.Y.S.2d 93, 99 (Sup. Ct. 2009) (“Delaware courts have had ample opportunity to address these issues . . . and, although not binding as to either Florida or New York law, their holdings can be

blurs the distinction between the substantive persuasiveness of a decision and the authoritativeness of its source. The quality of the reasoning in opinions from a specialized judiciary has undoubtedly contributed to the *de facto* authority of the Delaware courts in the field of corporate law. Once that authority is established, however, the fact that a decision hails from a Delaware court gives it weight independent of its substantive merits.

Advocates for persuasive authority in investment arbitration could point to similarities between the Delaware example and the situation in investment arbitration. Like investment arbitrators, judges who refer to Delaware decisions when interpreting the laws of other states are often interpreting provisions that are not identical and that were enacted by different legislatures and at different times. Yet in investment arbitration, there is no systemic reason to believe that any one tribunal has greater expertise than others. Thus, although one might expect that arbitrators naturally view each other as experts, there is no principled reason for adopting a deferential attitude toward past decisions. At the same time, however, it is likely that certain awards will carry more weight in the minds of later arbitrators due to the experience, expertise or reputation of the individual tribunal members.

Lastly, informal pressures may lead adjudicators to accord some degree of deference to non-binding decisions. Among other things, relevant decisions that are on their face well-reasoned are appealing to adjudicators, especially when those earlier decisions have been met with approval. Following suit is easier and less risky than expressing disagreement. Collegiality may also play a role, especially in the still relatively close-knit community of investment arbitrators. And even though earlier awards are not authoritative, lawyers tend to derive comfort from the ability to cite sources, including non-binding ones, that are in apparent agreement with their own views. As a result of citation, those non-binding sources may effectively

instructive.”); *IBS Fin. Corp. v. Seidman & Assocs.*, 136 F.3d 940, 949–50 (3d Cir. 1998) (“When faced with novel issues of corporate law, New Jersey courts have often looked to Delaware’s rich abundance of corporate law for guidance.”); *Int’l Ins. Co. v. Johns*, 874 F.2d 1447, 1459 n.22 (11th Cir. 1989) (“We rely with confidence upon Delaware law to construe Florida corporate law. The Florida courts have relied upon Delaware corporate law to establish their own corporate doctrines.”). See also John C. Coffee, Jr. & Adolf A. Berle, *Derivative Litigation Under Part VII of the ALI Principles of Corporate Governance: A Review of the Positions and Premises*, C852 ALI-ABA 89, 114 (1993) (noting that “Delaware corporate law has long been followed—sometimes almost reflexively—by other American jurisdictions”).

gain authority.¹¹²

As a descriptive matter, therefore, the distinction between adjudicators who are under an obligation to accord some deference to earlier decisions and adjudicators who can treat them as they deem fit is a blurry one. Persuasive authority turns out to be a continuum, rather than a concept that lends itself to categorization and quantification.

3. Development of a *Jurisprudence Constante*

Another proposed approach to precedent in investor-state arbitrations is based on the doctrine of *jurisprudence constante* under French law. Gabrielle Kaufmann-Kohler explains that *jurisprudence constante* attaches a *stare decisis* effect to lines of cases, rather than to individual decisions. When a consistent line of cases exists, adjudicators should follow them, unless there are “compelling reasons” to justify departure.¹¹³ *Jurisprudence constante* is weaker than persuasive precedent in that any precedential force only takes effect when there is a *line* of consistent decisions. It is more rigid, however, in that once a line of cases is established, the doctrine imposes a strong presumption in favor of consistency. By demanding “compelling reasons” to justify departure from settled rules, *jurisprudence constante* places a significant decisional burden on adjudicators.

Andrea Bjorklund has pointed to several reasons why *jurisprudence constante* is a compelling model for investor-state arbitration. She explains that the doctrine gives primacy to the text of the code, but also recognizes that the meaning of code provisions is shaped through interpretation in concrete cases.¹¹⁴ *Jurisprudence*

112. See Schauer, *Authority*, *supra* note 107, at 1949–52.

113. Kaufmann-Kohler, *Consistency*, *supra* note 27, at 146–47; see also Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT’L L. 471, 474 (2009) (predicting that “the passage of time—bringing with it a continuous stream of investment jurisprudence, a refinement of state practice and treaty making, and growing doctrinal analysis—may help create a better understanding of the content and scope of the central principles of investment protection and result in the creation of a *jurisprudence constante*”); Thomas Wälde, *Confidential Awards as Precedent in Arbitration: Dynamics and Implication of Award Publication*, in PRECEDENT IN INTERNATIONAL ARBITRATION 113, 115 (Yas Banifatemi ed., 2008) (arguing that “cumulative arbitral jurisprudence in the field of investment arbitration could be said to crystallize into ‘settled jurisprudence’”).

114. Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, in INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 265, 272–73 (Colin B. Picker et al. eds., 2008).

constante leaves an opening for adjudicators to deviate from earlier awards if the text of the code does not appear to support the interpretation. Another appealing feature of the doctrine is that it does not place too much power in the hands of a single adjudicator or panel, since it attaches precedential value only to consistent lines of cases.¹¹⁵ Essentially, it provides at least a partial solution to the problem of arbitrariness that results from according deference to an earlier decision for no other reason than that it came first. This is an important consideration in investor-state arbitration, which is decentralized and does not have the safeguards associated with hierarchical adjudication.

C. Arbitrators on Precedent and Consistency

At times, language regarding a perceived need for coherence has entered arbitral awards. For example, the annulment committee in the *Enron* case posited that tribunals ought to strive for consistency, contrasting this responsibility with the more limited role of annulment committees:

[T]he role of an *ad hoc* committee is a limited one, restricted to assessing the legitimacy of the award and not its correctness The annulment mechanism is not designed to bring about consistency in the interpretation and application of international investment law. *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*.”¹¹⁶

Recently, the question of whether earlier decisions should constrain decision-making led to a split within a single tribunal in *Impregilo SpA v. Argentine Republic*.¹¹⁷ The disagreement centered on the tribunal’s jurisdiction to hear the dispute. The Argentina-Italy

115. *Id.*; see also Andrea K. Bjorklund, *The Promise and Peril of Arbitral Precedent: The Case of Amici Curiae*, in ASA Special Series No. 34, 165, 167 (Anne K. Hoffmann ed., 2010) [hereinafter Bjorklund, *Promise and Peril*] (“Assigning too great a role to any one decision could lead to the establishment of a norm that would soon be viewed as undesirable.”).

116. Enron Annulment Decision, *supra* note 30, ¶ 65 (emphasis added).

117. *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (June 21, 2011), ¶ 99.

BIT, which was invoked by the claimant, provides that arbitration is open to investors only after they have pursued a dispute in the Argentine courts for eighteen months.¹¹⁸ The BIT also includes a so-called “most favored nation” (MFN) clause, under which the treaty-makers commit to treat covered investments no less favorably than investments by investors from third states.¹¹⁹ Effectively, this means that investors can invoke stronger protections granted in other BITs. The question before the *Impregilo* tribunal was whether the MFN clause in the Argentina-Italy BIT extends to its dispute resolution clause. The majority of the tribunal held that it does, allowing the claimant investor to rely on the dispute resolution provision from the Argentina-United States BIT, under which investors could immediately resort to arbitration. In justifying its conclusion, the majority referenced its analysis of earlier awards on the issue:

It is true that . . . the jurisprudence regarding the application of MFN clauses to dispute settlement provisions is not fully consistent. Nevertheless, in cases where the MFN clause has referred to “all matters” or “any matter” regulated in the BIT, there has been near-unanimity in finding that the clause covered the dispute settlement rules. *On this basis*, the majority of the Tribunal reaches the conclusion that *Impregilo* is entitled to rely, in this respect, on the dispute settlement rules of the Argentina-[United States] BIT and that the case cannot be dismissed for non-observance of the requirements in Article 8(2) and (3) of the Argentina-Italy BIT.¹²⁰

In her dissenting opinion, tribunal member Brigitte Stern expressed strong disagreement with the ruling on jurisdiction, warning of the “great dangers” of allowing claimants to circumvent jurisdictional requirements by invoking MFN clauses.¹²¹ Stern also criticized the majority’s reliance on earlier awards. She pointed out that the appearance of broad consensus was deceptive because many arbitrators served on more than one tribunal.¹²² She then stated that “[i]n any case, it does not appear to me to be a legally convincing argu-

118. *Id.* ¶ 12 (discussing Article 8.3 of the BIT between Argentina and Italy).

119. *Id.* ¶ 101.

120. *Id.* ¶ 108 (emphasis added).

121. *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion, ¶ 99 (Stern, June 21, 2011).

122. *Id.* ¶ 5.

ment to rely on former cases as if they were binding precedents.”¹²³

Stern’s accusation that the majority treated other decisions as binding precedents may not be entirely fair, but it is clear that the majority attached at least some weight to earlier awards, and gave consideration to consistency. The majority position, as we have seen, has found strong support in the academic literature. In the next Part, I will argue that this literature overlooks the significant costs of consistency.¹²⁴

III. THE BENEFITS AND COSTS OF CONSISTENCY

The argument for precedent in investor-state arbitration is premised on a notion that greater consistency is something worth striving for.¹²⁵ In fact, the desirability of consistent adjudication is rarely questioned, even by those who do not come out in favor of precedent.¹²⁶

In this Part, I first scrutinize the goals served by consistent adjudication: equal treatment of litigants, continuity, predictability and legitimacy. The justifications for privileging these goals, as I will explain, are diminished in the context of investment arbitration. I next argue that a consistency criterion, by demanding that adjudicators deviate from their best professional judgment of what the law requires, interferes with other adjudication values. I conclude that investment arbitration is better served by abandoning consistency as a goal and focusing instead on accuracy, sincerity and transparency in decision-making.

123. *Id.*

124. I should note that it is unclear whether Stern would agree with my conclusion in Part III that arbitrators should give *no* deference to earlier awards. Her criticism that the majority treated earlier awards as binding precedents leaves open whether she would support weaker forms of precedent. Similarly, her observation that the basis for finding unity was weak leaves open whether she would attach some value to genuine consensus.

125. Kaufmann-Kohler, *Consistency*, *supra* note 27, at 147 (“Consistency is not a myth. Consistency is a reality and a necessary objective at the same time.”); Kim, *supra* note 23, at 257–58 (identifying coherence and consistency as key factors for enhancing legitimacy of investment arbitration).

126. *See, e.g.,* Fry, *supra* note 96, at 60 (“To be clear, this Article squarely fits within the international effort to bring unity to an otherwise fragmented investment treaty regime . . .”).

A. Goals Promoted by Consistency

Although some have argued that consistent adjudication is inherently valuable, the strongest explanations for *stare decisis* in court systems are consequentialist, i.e., based on *external* values that are served by consistency.¹²⁷

1. Equality

The notion that consistency in adjudication is desirable for its own sake is expressed most strongly in the maxim that like cases ought to be treated alike.¹²⁸ Although the argument from equality appeals to our sense of fairness, its practical application is far from straightforward. For one, whether two cases are identical can only be determined by reference to the rule that is being applied. Consider, for example, a rule stating that a government may not expropriate private property without adequate compensation. Equal treatment means that any claimant whose property is expropriated is entitled to adequate compensation. Yet we cannot determine whether two claimants are identically situated without resorting to the criteria for expropriation. Peter Westen has for these reasons argued that equality is tautological and an empty value, a position that has sparked extensive academic debate.¹²⁹

This issue could be overcome by reframing the appropriate inquiry as follows: once a decision-maker acknowledges that a case is identical to an earlier one in all relevant respects, should the two cases receive equal treatment?¹³⁰ Should there, perhaps, be a *pre-*

127. See, e.g., Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2037 (1996). But see Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1581 (2008) (arguing that in the U.S. court system, “eradicating nonuniformity has too often been given priority at the expense of other values”).

128. Franck, *Legitimacy Crisis*, *supra* note 16, at 1585; Franck, *Investor Rights*, *supra* note 20, at 65–66.

129. See PETER WESTEN, SPEAKING OF EQUALITY 185–225 (1990); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 542–48 (1982); see also Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983); Anthony D’Amato, *Is Equality a Totally Empty Idea?*, 81 MICH. L. REV. 600 (1983); Kent Greenawalt, *Prescriptive Equality: Two Steps Forward*, 110 HARV. L. REV. 1265, (1997).

130. Cf. Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 369 (1988) (“Virtually all would agree that two incidents adjudicated by the same court, occurring in the same place and at the same time, and arising out of facts which are identical except for the identity of the litigants, should be treated equally.”).

sumption of equality? An objection to a rule of equal treatment under this second formulation is that it may lead to the perpetuation of rules that have come to be viewed as harmful.¹³¹ As Larry Alexander has explained: “Neither two nor two million wrongs can make a right, however much they equalize situations. Nor is the two millionth wrong somehow less wrong than the first.”¹³² Alexander also points out that, if one takes equality seriously, the case for equal—but wrong—treatment is stronger in cases in which the error is more serious. The reason is that in those cases, the inequality between litigants whose cases were resolved before and after a “wrong” line of decisions was corrected would be more significant.¹³³ The logical corollary of these arguments, however, suggests that an equality criterion also has the desirable effect of protecting beneficial legal rules and principles from the whims of individual decision-makers.¹³⁴

In some circumstances, the case for equal treatment may be stronger, even in an arbitration context. Imagine that, instead of letting dozens of arbitrations run their course, Argentina and a significant number of investor claimants had agreed to set up a designated tribunal tasked with the resolution of BIT claims by foreign investors relating to specific government measures taken during a defined period of time.¹³⁵ In such a scenario, consistency would be critical. In part, this is because of the discrete character of the mandate. The tribunal would handle a limited docket of cases concerning state action that took place in a limited timeframe in the past. The task of such a tribunal is to achieve just and fair resolution of cases that are brought

131. Alexander, *supra* note 6, at 10 (“To take an extreme example, if most members of a particular group of people have been subjected to grossly unjust treatment—say, slavery or genocide—seeing that the rest of the members are subjected to the same treatment is no less wrong despite its furtherance of ‘equality.’”); *see also* Peters, *supra* note 127, at 2068 (“Equality is sequentially arbitrary: It makes the rightness or wrongness of a person’s treatment contingent on the sequence in which that person is treated with respect to other identically situated people.”).

132. Alexander, *supra* note 6, at 11.

133. *Id.*

134. *See* Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 8 (2012) (“Just as it has the power to entrench erroneous decisions against later correction, so *stare decisis* also has the power to entrench correct decisions against later temptations and deviations.”); *see also* Peters, *supra* note 127, at 2034.

135. The paradigmatic example of a mass claims settlement process is the Iran-United States Claims Tribunal, which was established in 1981. For a discussion of some of the characteristics of the Tribunal and its significance for the development of international dispute resolution, *see* David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT’L L. 104 (1990).

together in a single forum precisely because of their common features. In addition, the institutional nature of a standing tribunal creates justified expectations of continuity.

Those features are, of course, not present in the current investment arbitration framework. It is rare to encounter a cluster of cases, like the Argentina claims. Overall, the field is characterized by almost endless variety. At this time there are over three thousand BITs, each negotiated between different sovereigns and under varying circumstances. Nor are investment arbitrators dealing with a fixed docket. And although there have been calls for the creation of a permanent appeals facility, institutional continuity is lacking under the current framework, in which tribunals are appointed in accordance with the parties' agreement. In light of the characteristics of investment law and the defining features of arbitration, it is perhaps unsurprising that equal treatment of litigants has not featured prominently in the case for consistency in investment arbitration.

2. Continuity

The argument for consistency is closely associated with a stance on how adjudicators should handle the discretion that flows from the indeterminacy of legal norms. Adjudicative lawmaking involves the balancing of two values: the promotion of uniformity in the application of law, and the adaptation of an existing body of substantive law to meet new situations and changing circumstances.¹³⁶ These goals coexist in an uneasy tension. True uniformity requires strict adherence to earlier decisions, while the adaptation rationale mandates that, when the situation calls for it, earlier decisions be bent or even overruled.¹³⁷ The uniformity mandate is therefore never absolute. Rather than demanding a slavish following of earlier decisions, it calls for a certain amount of coherence. As a result, the law

136. David Frisch, *Contractual Choice of Law and the Prudential Foundations of Appellate Review*, 56 VAND. L. REV. 57, 74–76 (2003); cf. PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 2–3 (1976).

137. See Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 554 (1969) (“The lawmaking role requires a delicate balance between the importance of flexibility in the national law and the importance of stability of doctrine.”); Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 423 (1988) (“Th[e] possibility of improvement makes precedent unstable There is an equilibrium degree of disequilibrium.”); Schauer, *Precedent*, *supra* note 8, at 597 (“We attain predictability . . . only by diminishing our ability to adapt to a changing future.”).

still evolves, but the mode of change is an incremental one.¹³⁸

The perceived need for more controlled lawmaking takes center stage in the calls for consistency in investment arbitration.¹³⁹ Indeed, commentators tend to cite impediments to the development of coherent legal standards as the main reason for proposed reforms.¹⁴⁰ The implementation of an incremental change model into investment arbitration is challenging due to the absence of a central appeals facility that could impose its earlier interpretations through the threat of reversal. But the lack of a hierarchical structure does not have to be dispositive. If consistency is desirable, one could argue, the responsibility of investment tribunals in maintaining uniformity is *greater* than that of the lower courts in a hierarchical court system. The lack of formal enforcement might be offset to some extent through informal mechanisms, including reputational consequences.

A more fundamental question is whether incremental change is an appropriate model for lawmaking in a dynamic and relatively young field. Perhaps what is called for is a more flexible notion of law development, with a significant role for dialogue among tribunals as well as between tribunals and members of the legal academy. In some areas, consensus may naturally come about as a result of overwhelming agreement among arbitrators. In fact, this is already happening, although it is not clear whether any such consensus is due to widespread agreement, or because arbitrators feel constrained to follow earlier awards. Based on an examination of investment awards, Gabrielle Kaufmann-Kohler has concluded that case law addressing, respectively, the distinction between treaty and contract claims and the fair and equitable treatment standard is already remarkably consistent.¹⁴¹ Yet, although the emergence of common standards is one possible outcome of a dialectical process, the premise of such a process is that arbitrators do not strive for consistency. On more controversial questions, such as those involving the application of the necessity defense, tribunals will likely remain divided.¹⁴² Multiple

138. Cf. MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION 93 (2002) (noting that “the rules or practices of *stare decisis* [are] simply those of incrementalism stated in other terms”).

139. See, e.g., Franck, *Legitimacy Crisis*, *supra* note 16, at 1584–87; Christoph Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, 3 TRANSNAT’L DISP. MGMT., at 17–24 (2006).

140. See, e.g., Franck, *Legitimacy Crisis*, *supra* note 16, at 1584–87; Franck, *Investor Rights*, *supra* note 20, at 66–67; Fry, *supra* note 96, at 77–84.

141. Kaufmann-Kohler, *Consistency*, *supra* note 27, at 138–41.

142. Cf. *id.* at 142–43.

lines of authority may develop over time, without any perspective on a resolution. It is even possible that some disagreements will deepen.

Until now, I have taken for granted that investment arbitrators have a role to play in lawmaking. This notion, however, is open to debate. In national legal systems, the development of legal standards by judges who are not democratically elected poses issues of accountability and legitimacy.¹⁴³ Arguably, these concerns are exacerbated in the case of investment arbitration, which lacks an institutional judiciary or legislature.¹⁴⁴ A fuller exploration of the issue is outside the scope of this Article. I want to point out, however, that concerns about adjudicators usurping too much power do not necessarily counsel in favor of consistency, especially in a decentralized dispute resolution framework like investment arbitration.¹⁴⁵ Quite the contrary: such concerns provide arguments for faithfulness to the text of a treaty and the intent of the sovereigns as it appears from the circumstances under which the instrument was entered—in sum, interpretation methods that call for independent analysis and verification.

3. Predictability

Continuity is valued, in large part, because it renders the law more predictable. The argument is that members of a legal community plan their lives, conduct their affairs and assess risks in reliance on pronouncements about the law in published opinions.¹⁴⁶ Not only

143. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (1962).

144. Cf. José E. Alvarez, *The Emerging Foreign Direct Investment Regime*, 99 AM. SOC. INT'L L. & PROC. 94, 96 (2005) (“The emerging FDI regime draws some of the same ‘democratic’ critiques as more institutionalized international regimes: namely, that the law that it relies on is not accountable or respectful of traditional notions of separation of powers.”); Bjorklund, *Promise and Peril*, *supra* note 115, at 167 (“Arbitral innovation inevitably gives rise to questions about the democratic deficit in international judicial lawmaking. Because there is no established system of government, no legislative branch can reply to perceived excesses in judicial decision-making.”).

145. In the case of an institutionalized judiciary, the argument that consistency operates to restrain “activist” judging in violation of the limits imposed on the judiciary by the separation of powers doctrine is stronger. See, e.g., Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 286–87 (1990).

146. See, e.g., Evan Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 850–52 (1994); Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 6 & n.12 (citing F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 157 (1960)).

does stability of the law offer peace of mind, but it also enables actors to predict the consequences of contemplated courses of action with greater precision. This argument is formidable, especially when combined with the notion that in most cases, it is debatable whether any given interpretation of the law has a stronger claim to validity than competing interpretations. If—as eminent judges have acknowledged—in many cases there is no single right answer,¹⁴⁷ why shouldn't justified expectations tip the scale?

These considerations have significant force in the investment law context. Indeed, it could be said that the creation of a more stable climate for investors is the very objective of investment treaties.¹⁴⁸ Inconsistent decisions undermine this goal.¹⁴⁹ Sovereigns similarly have an interest in stability, as it helps assess the likelihood that contemplated courses of action will result in liability. Moreover, in their capacity of treaty-makers involved in the negotiation and drafting of new treaties, they take interpretations of common treaty terms by arbitrators into account.¹⁵⁰ It therefore makes sense that arbitral tribunals have invoked predictability as a reason for giving weight to earlier awards. Consider, for example, the following passage from a decision on jurisdiction by an ICSID tribunal in *Saipem*

147. See, e.g., Michael Boudin, *Judge Henry Friendly and the Craft of Judging*, 159 U. PA. L. REV. 1, 13 (2010) (“[M]any a complicated case is like a jigsaw puzzle with multiple solutions, often as to reasoning and sometimes as to outcome, none being inevitable.”); Jon O. Newman, *A Study of Appellate Reversals*, 58 BROOK. L. REV. 629, 630 (1992) (“Reasonable judges will inevitably come out differently on close questions of law. The hierarchical structure of a judicial system requires that even a well-reasoned view of a trial judge will be displaced by the well-reasoned view of a panel of appellate judges.”); see also Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 396 (1950).

148. Empirical studies, however, have cast doubt on the assumption that investment treaties result in larger flows of foreign investment. M. Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration*, in APPEALS MECHANISM, *supra* note 18, at 39, 39 & n.1.

149. Franck, *Legitimacy Crisis*, *supra* note 16, at 1584; see also Andreas Bucher, *Is There a Need to Establish a Permanent Reviewing Body?*, in THE REVIEW OF INTERNATIONAL ARBITRATION AWARDS 285, 285 (Emmanuel Gaillard ed., 2008) (noting that the lack of consistency in investment arbitration awards creates “uncertainty” and “has a negative impact on the authority that the ICSID system should command”); THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 52 (1990) (identifying “determinacy” and “coherence” as two of four indicators of rule legitimacy); Johanna Kalb, *Creating an ICSID Appellate Body*, UCLA J. INT’L L. & FOREIGN AFF. 179, 196–200 (2005) (arguing that inconsistent arbitration awards undermine international investment).

150. Cf. Cheng, *supra* note 84, at 1025 (“Awards may have a constitutive effect on international investment law if third-party observers adjust their strategies in anticipation that future similar disputes will lead to similar outcomes.”).

v. *Bangladesh*:

The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, *it has a duty to adopt solutions established in a series of consistent cases*. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, *it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law*.¹⁵¹

Yet given the characteristics of international investment law, any reliance on past awards rests on a fragile basis. Predictability is already limited in light of the fragmented nature of the sources of law, the indeterminacy of the terms used in investment treaties and the characteristics of dispute resolution by arbitrators who bring a diversity of legal backgrounds and expertise to the process.¹⁵² Moreover, to some extent the lack of systemic predictability is mitigated by the parties' influence on the constitution of the arbitral tribunal that is to decide their specific dispute. The default rule in ICSID arbitrations is that a tribunal consists of two party-appointed arbitrators and a chair who is "appointed by agreement of the parties."¹⁵³ Of course, the power this appointment method affords to each party is offset to a large extent by the circumstance that the other party enjoys the same amount of control. In addition, due to the uncertainties inherent in judging, even the most experienced counsel cannot predict the dynamics of a given tribunal with complete confidence. But the party control over the appointment removes some of the uncertainties that come with the random assignment of judges in court systems, and it reduces the risk of appointing an "outlier" tribunal.

151. *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures ¶ 67 (Mar. 21, 2007) (emphases added), available at <http://icsid.worldbank.org>; see also Kaufmann-Kohler, *Arbitral Precedent*, *supra* note 28, at 374 ("It may be debatable whether arbitrators have a *legal* obligation to follow precedents—probably not—but it seems well settled that they have a *moral* obligation to follow precedents so as to foster a normative environment that is predictable.").

152. Cf. NEIL DUXBURY, *THE NATURE AND AUTHORITY OF PRECEDENT* 164 (2008) ("Reliance does not justify precedent-following, but . . . emerges out of the fact that precedent-following is already the norm.").

153. ICSID Convention, *supra* note 22, art. 37(2)(b).

4. Legitimacy

Consistency is often said to promote the legitimacy of adjudication and increases the authority of the decision-makers.¹⁵⁴ Consistent adjudication, in this view, contributes to a perception that legal decision-makers decide in accordance with rules rather than arbitrary criteria.¹⁵⁵ This, in turn, renders judgments more acceptable to parties who do not prevail. Although the argument may seem to be concerned primarily with the *appearance* of justice, many adjudicators have internalized this notion of legitimacy.¹⁵⁶

In the United States, much of the debate about *stare decisis* has focused on the need to restrain the discretion of unelected judges to make determinations about the constitutionality of laws enacted by democratically elected legislatures. The legitimacy of courts, and especially the Supreme Court, is most clearly at stake in constitutional challenges to legislation concerning politically controversial issues. The plurality opinion in *Planned Parenthood v. Casey* expressly notes the connection between consistency and legitimacy:

[O]verruling Roe's central holding would . . . seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the

154. Charles H. Brower II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 51 (2003) (“[I]nternational regimes depend for their survival on perceptions of legitimacy To generate perceptions of legitimacy, legal regimes must operate predictably, conform to historical practice, and incorporate fundamental values shared by the governed community.”).

155. This observation holds true most strongly for the highest courts, especially in the area of constitutional law. See, e.g., Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 753 (1988) (“[T]he Court's institutional position would be weakened were it generally perceived that the Court itself views its own decisions as little more than ‘a restricted railroad ticket, good for this day and train only.’”) (citing *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting)). Although the argument appears to apply to adjudication in general, the federal court system of the United States tolerates a great deal of inconsistency among the district courts. See *infra* Part II.B.2.

156. See Maltz, *supra* note 130, at 371.

Court is obliged to make.¹⁵⁷

The notion that inconsistent adjudication undermines the legitimacy of the investment regime is at the heart of proposals intended to increase consistency in investor-state arbitrations. Indeed, such proposals have often been accompanied by the observation that investment arbitration is—or soon will be—in a “legitimacy crisis.”¹⁵⁸ But legitimacy takes a different form in arbitration than it does in legal systems with institutionalized adjudicatory bodies. Concepts of legitimacy from court systems cannot simply be transposed into a dispute resolution system that is grounded in consent.

In sum, the primary justifications for consistent adjudication are premised on the existence of relatively stable norms. It is not impossible to try to develop investment law into something that more closely resembles a “system,” but this approach is in tension with the dynamic and fragmented nature of the field. The selection of a dispute resolution method that has an *ad hoc* character also weakens the case for privileging consistency.

B. Consistency and Decision-Making

Having evaluated the goals served by consistency in adjudication, I will now address whether investment arbitrators should give some weight to consistency along with other considerations. In this Part, I identify an inherent conflict between consistency and accuracy, sincerity and transparency. While a consistency norm would reign in some idiosyncratic decision-making, on balance, international investment law is better served by not placing further limits on the autonomy of arbitrators.

157. 505 U.S. 833, 865 (1992).

158. Franck, *Legitimacy Crisis*, *supra* note 16, at 1586; Sornarajah, *supra* note 148, at 41–42 (arguing that a legitimacy crisis has arisen as a result of the exploding number of arbitrations, coupled with the absence of a control mechanism and the fact that most arbitrators come from commercial arbitration backgrounds and may not be as sensitive to the public nature of the interests involved). *See also* Brower II, *supra* note 154, at 93 (concluding that the investment chapter of NAFTA “finds itself in the midst of a legitimacy crisis,” in part as a result of incoherent decisions from *ad hoc* tribunals); *but see* Krishan, *supra* note 11, at 110–16 (arguing that the term “legitimacy crisis” is distorting and perverts the discussion as there is no legitimacy crisis in investment arbitration and none is looming); Paulsson, *Unintended Consequences*, *supra* note 29, at 241 (“What issues of coherence? . . . From a practitioner’s viewpoint, there is no crisis of unpredictability.”).

1. Accuracy

Consistency is value neutral, in the sense that it is concerned only with the equality of outcomes, not with their merits. One consequence of this characteristic is that consistency appears to provide an objective criterion for the resolution of questions as to which deep disagreement exists. Some of the considerations that support continuity in law development also favor using consistency as a proxy for measuring the “correctness” of individual opinions. Put simply: when reasonable jurists disagree about what the law requires, promoting stability and honoring expectations is a defensible policy choice.

The case for consistency is closely linked to an *institutional* conception of adjudication. In this conception—sometimes identified as a feature of the “rule of law”—judges decide not as individual adjudicators, but rather as members of an institution (the “judiciary”)¹⁵⁹ Even a weak form of precedent helps reinforce this institutional framework. The “correctness” of a decision, under this view, is determined by the extent to which it is connected to the cases that precede and follow it. The image that comes to mind is Ronald Dworkin’s analogy of judges to authors of a chain novel.¹⁶⁰ This notion is strongly associated with the common law system, in which judges have traditionally played a prominent part in the development of substantive law.¹⁶¹

What gets lost in this notion of “correctness,” however, is the adjudicator’s independent judgment about the “right” interpretation or application of the law. Practically speaking, any constraints im-

159. Waldron, *supra* note 134, at 17 (the rule of law requires that a judge “is to think of herself as deciding in the name of the whole society, not in her own name; not only that, but she is deciding *as a court*, as part of the judiciary”).

160. RONALD DWORKIN, *LAW’S EMPIRE*, 225–75 (1986); Ronald Dworkin, *How Law Is Like Literature*, in RONALD DWORKIN, *A MATTER OF PRINCIPLE* 146–66 (1985). As Jeremy Waldron has pointed out, however, Dworkin’s “law as integrity” is an account of interpretation, not of *stare decisis* or precedent (although some form of the latter may be implicit in his model). Waldron, *supra* note 134, at 17 & n.50.

161. In practice, lower court judges in civil law systems often follow the reasoning of higher courts to avoid reversal. See, e.g., Olav A. Haazen, *Precedent in the Netherlands*, in *PRECEDENT AND THE LAW* 227, 235–36 (Ewoud Hondius ed., 2007); Robert Alexy & Ralf Dreier, *Precedent in the Federal Republic of Germany*, in *INTERPRETING PRECEDENTS* 17, 36 (D. Neil MacCormick & Robert S. Summers, eds., 1997); see also Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 *AM. U. INT’L L. REV.* 845, 910–15 (1999) (citing sources for the proposition that, in practice, French courts overwhelmingly follow decisions from higher courts).

posed by a consistency criterion are not felt when earlier decisions overwhelmingly support the position an adjudicator would have reached independently. Precedent begins to matter, rather, when a decision-maker considers two or more outcomes that she believes are equally correct. At that juncture, following earlier decisions is perhaps no more troubling than flipping a coin. But the real test of the role of consistency and precedent comes when earlier cases are in conflict with the adjudicator's opinion regarding the "right" interpretation or application of the law. A decision to follow earlier case law in spite of this conflict, therefore, deprives the parties and the legal community of an adjudicator's view of what the law requires.¹⁶²

In investor-state arbitration, this sacrifice is problematic. As discussed earlier, international law does not confer the status of law on adjudicatory decisions.¹⁶³ Setting these formalistic arguments aside, there are compelling policy reasons to favor autonomy over consistency. As for the investment community as a whole, greater autonomy may over time result in better answers. Eventually, such answers may have a shot at attracting genuine consensus, as opposed to one that is the result of constraints imposed by precedent. This possibility is suggested by the Condorcet Jury Theorem, which explains that (i) if we assume that each voter has a more than even chance of being right, and (ii) decisions are made by majority vote, an increase of the number of voters will translate into a greater likelihood of arriving at the right answer.¹⁶⁴ Under this theory, arbitral tribunals consisting of three arbitrators have a good chance at getting to the right answer because it is unlikely that outlier positions would obtain a majority of the votes—an effect that compounds over time.¹⁶⁵ Paradoxically, the Condorcet Jury Theorem suggests that in-

162. Although such a view is, in a sense, necessarily subjective, this should not be equated with "arbitrary" or "free from constraints." Rather, I use the term here in the sense of the professional judgment of an adjudicator. Cf. Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 1013 (2008) (noting that "[judges'] perspectives are subjective in the sense that they may think their reasons provide sound justifications, even if that is, in fact, not the case").

163. See *supra* Part II.A.

164. Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 THEORETICAL INQ. L. 87, 88–89 (2002).

165. Note that this theory would also provide an argument for independent voting on tribunals, as opposed to joint deliberation. The reason is that in collegial adjudication, the decisionmaking process is affected—some would say distorted—by joint deliberation, compromises and incentives for strategic voting. See, e.g., Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 51, 56 (1993) (discussing reasons for strategic voting on multi-member courts); Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L.

dividual tribunals should be reluctant to reject interpretations that enjoy widespread acceptance. If sixty tribunals have considered an issue and all of them came out the same way, those tribunals are likely right. Yet the very assumptions that underlie the significance we attach to the apparent consensus among sixty tribunals also demands that we grant each tribunal complete freedom to arrive at the “right” decision. After all, these numbers are meaningful only if each tribunal reached its decision without feeling any pressure to close ranks.

A consistency norm is also problematic from the perspective of the parties to a particular dispute. Those who advocate the implementation of precedent into investment treaty arbitration effectively ask that arbitrators in investor-state disputes conceive of themselves as taking part in a joint endeavor similar to the way judges do. The typical features of arbitration, however, render it at odds with a notion of institutionalized adjudication. The consensual nature of arbitration extends to the appointment of the tribunal. Arbitrators are appointed in accordance with the parties’ agreement. In most cases parties have a strong say in the constitution of the tribunal: directly through the party-appointed arbitrators, and indirectly through the influence they have on the appointment of a chair.¹⁶⁶ For better or worse, parties expend significant resources in trying to identify arbitrators whom they believe will be sympathetic to their position.¹⁶⁷ Parties, in other words, entrust their dispute to a tribunal composed of specific individuals who were appointed in accordance with their agreement. Presumably, the parties to an arbitration wish to have their dispute decided by the arbitrators they selected, not—albeit indirectly—by tribunals that were appointed in the past by other parties. In this setting, there are compelling reasons to place a strong value on the independent judgment of the tribunal appointed pursuant to the parties’ agreement, as opposed to the collective wisdom of tribunals that have decided similar disputes in the past.

REV. 2297, 2312–33 (detailing opportunities and incentives for strategic conduct).

166. See *supra* note 22 and accompanying text.

167. Doak Bishop and Lucy Reed sum up the conventional wisdom in noting that most parties adhere to the view that “‘their’ arbitrators can be generally predisposed to them personally or to their positions, as long as they can ultimately decide the case—without partiality—in favour of the party with the better case.” R. Doak Bishop & Lucy F. Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-appointed Arbitrators in International Commercial Arbitration*, 14 *ARB. INT’L* 395, 396 (1998).

2. Sincerity

Sincerity is susceptible to different meanings, but at its core is a notion of truthfulness. Micah Schwartzman, for example, defines sincerity as “correspondence between what people say, what they intend to say, and what they believe.”¹⁶⁸ In the context of judging, sincerity is closely associated with the communication of reasons by adjudicators. Sincerity in adjudicatory reason-giving can take two forms. It may refer to correspondence between the reasons that motivated the decision-maker and the reasons communicated to justify the decision. But it may also refer to a requirement that the decision-maker provide reasons that she believes justify the outcome. A crucial difference between the two forms is that the second form does not require that the decision-maker is actually motivated by those reasons, only that she believes they are legally sufficient. Mathilde Cohen has termed these two forms, respectively, the “internalist” and “externalist” readings of sincerity.¹⁶⁹ A requirement that an adjudicator consider consistency as a factor in decision-making will often interfere with sincerity.

To understand the interplay between consistency and sincerity, it is useful to place ourselves in the position of a tribunal of three arbitrators who conclude that a line of earlier awards has been wrongly decided. Take, for example, the facts of the Argentina cases. However, let us imagine that instead of the chaos that ensued, five tribunals decided that Argentina faced full liability for the measures taken under the Emergency Law. All tribunals rejected Argentina’s necessity defense, holding that under the Argentina-United States BIT, Argentina’s crisis did not amount to a state of emergency. Let us also imagine that any annulment proceedings ended in rejections of the annulment applications, and that none of the annulment decisions cast doubt on the accuracy of the awards. The tribunal tasked with deciding the sixth case brought by a U.S. in-

168. Schwartzman, *supra* note 162, at 992.

169. Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?*, 59 DEPAUL L. REV. 1091, 1097–98 (2010). These concepts correspond largely with two principles of legitimacy of adjudication introduced by Schwartzman. Schwartzman’s principle of legal justification appears to be aimed at externalist sincerity: “Adjudication is legitimate only if (i) judge *J* has sufficient reason *R* to justify legal decision *D*, and (ii) makes *R* known to those governed by *D*.” And his principle of judicial sincerity seems to require internalist sincerity: “Adjudication is legitimate only if (i) *J* believes that *R* is sufficient to justify *D*, and (ii) makes *R* known to those governed by *D*.” Schwartzman, *supra* note 162, at 1014. Notably, Cohen extends the notion of sincerity from adjudication to a broader context that includes all state actors. Cohen, *supra*, at 1095–96.

vestor against Argentina concludes, however, that the right result is for Argentina to be exempted from liability to the investor under the necessity defense. Specifically, the members of this tribunal believe that the earlier decisions were based on a wrong interpretation of the relevant BIT provisions regarding the necessity defense and an incorrect assessment of the facts concerning the severity of the economic crisis.

If the arbitrators want to maintain consistency, one course of action would be to follow the earlier awards despite disagreeing with them. Yet if the award simply provides the reasoning and outcome from past awards, and fails to note that the decision was motivated by consistency, there is no compliance with the internalist reading of sincerity. Of course, communicating the motivating reason for the decision in this scenario would defeat the very purpose the tribunal is trying to achieve. To understand why, one need only imagine a decision explaining that although the tribunal believes the five earlier tribunals reached a wrong outcome based on an inaccurate interpretation of applicable law, it nonetheless follows these decisions for the sake of consistency.

This analysis is too simple, however, if adjudicators genuinely believe they are bound by earlier decisions. In that situation, an adjudicator's view that he needs to follow binding precedent will trump his or her convictions regarding the best interpretation of the law. So there would be no conflict with the internalist reading of sincerity if a panel of Second Circuit judges follows a Supreme Court decision the judges believe was wrongly decided, because they accept that under the governing rules, the law is whatever the Supreme Court says it is. Binding precedent, in other words, adds a meta-level of institutional obligation to the question of sincerity. A strong norm of horizontal precedent could play a similar role, if arbitrators were to view themselves as constrained to accord some deference to earlier awards. If, however, the decision to follow earlier awards is merely prudential, the practice of following earlier awards that arbitrators believe were wrongly decided poses a conflict with the internalist reading of sincerity.

Does the adoption of the reasoning from earlier awards without noting disagreement also conflict with an externalist reading of sincerity? This question is more difficult to answer, because "right" and "wrong" may not be absolute categories in the minds of adjudicators. If the adjudicators believe the adopted reasoning cannot justify the decision under any reasonable reading of the law, then there is a conflict with the externalist reading of sincerity. But if the adjudicators think the question is one of degree and discretion, and some

answers are better than others but neither is necessarily right or wrong, the issue is not as clear-cut. As a formal matter, they may believe that the reasons adequately support the decision, even though subjectively speaking they think a different reasoning and outcome would have been better. If one believes that adjudicators should strive to reach the decision that they believe is best supported by the law, however, there is a conflict even under the externalist reading.

Now, imagine that the same tribunal adopts a more strategic course of action. The arbitrators would like to achieve both goals: preserve consistency, but ensure that at least the outcome is correct in their view. So they look for a way to distinguish the case before it from the earlier ones. The arbitrators are aware that it is next to impossible to distinguish the case based on the facts or the law pertaining to the necessity defense, as those are essentially identical for all the cases. Instead, they shift their attention to the contracts between Argentina and the claimant in all six cases. There is some minor variation in the pertinent provisions, and the claimant in the sixth case negotiated the contract a few years later than the other five claimants. The arbitrators realize that if they can hold that Argentina did not breach the umbrella clause, they need not reach the necessity defense, which is premised on a breach of BIT obligations by the sovereign. So, even though their disagreement is (primarily) with the interpretation of the necessity defense, the arbitrators dispose of the claims by ruling that under the specific contract between Argentina and the claimant, Argentina's measures were not in breach of the umbrella clause.

Here, it is unclear whether there is a conflict with either reading of sincerity. For both readings, the analysis may turn on whether the arbitrators ultimately came to believe that the distinction they made regarding the umbrella clause was a valid one. To start with the internalist reading: although the arbitrators may initially have been motivated by their disagreement with the rulings of earlier tribunals on the necessity defense, their research may have genuinely convinced them of the correctness of the position that the umbrella clause was not breached. In that case, their award provided the reason that ultimately motivated the decision, and any mention of the necessity defense would have amounted to *dicta*. If, however, the arbitrators were not genuinely convinced by the distinction they provided but decided it was an elegant way to avoid overt disagreement, then the resulting award is insincere under the internalist reading.¹⁷⁰

170. A concept that is closely related to sincerity, but conceptually distinct, is candor. Scholars use different definitions for candor, and some definitions overlap with sincerity. The difference between sincerity and candor, as described by Schwartzman, is that

Similarly, under the externalist reading the award is sincere if the arbitrators believe that the reasons regarding the umbrella clause are sufficient to justify the distinction and the resulting difference in outcome. If, however, they believe that the distinction is immaterial, the award is insincere.

Exploring options that may avoid inconsistency with earlier decisions is not in and of itself problematic under either sincerity criterion. If the desire for consistency encourages arbitrators to engage in more thorough research of issues that are pertinent for resolution of the case, the quality of decision-making will likely improve. What does matter, however, is the mindset with which the arbitrators approach their task. They may decide to try to find a way to resolve the case without needlessly contradicting earlier awards, but still commit themselves to resolving the case in accordance with what they believe to be the best interpretation of the law. Or they may adopt a mindset that “the end justifies the means” and resolve to use whatever reasons they can marshal that will plausibly support the desired result, regardless of whether they themselves believe that those reasons are valid.

Consistency is thus potentially in conflict with both readings of sincerity. In centralized legal systems, the implementation of a meta-level of sincerity that imposes an obligation to accord deference to earlier decisions is justified by the need to promote certain system-wide goals, including coherent law development.¹⁷¹ In the context of investment arbitration, however, sacrificing sincerity is an unnecessarily high price. Although this may seem somewhat counter-

“sincerity merely requires intentional correspondence between belief and utterance,” and “candor demands a certain measure of affirmative disclosure on the part of the speaker.” Schwartzman, *supra* note 162, at 994–95. However, the scope of a candor requirement is imprecise. One reading of judicial candor is that it requires that judges disclose information that is sufficient so as to “not knowingly mislead others about a legal decision.” *Id.* at 996. This definition of candor overlaps with what Cohen has termed “externalist sincerity.” See *supra* note 169 and accompanying text. But candor can also refer to a thicker requirement to disclose “all information that [a judge] believes is relevant to a legal decision.” Schwartzman, *supra* at 996 (emphasis added). This interpretation of candor would impose, among other things, a requirement that judges not omit alternative reasons that they believe have contributed to the outcome. *Id.* at 995–97.

171. See, e.g., Grant Gilmore, *Law, Logic and Experience*, 3 *How. L.J.* 26, 37–38 (1957) (noting that judging involves “the maintenance of a continuity of tradition through the pretense that change is not change” and that judges engage in the creation of “legal fictions” to mask lawmaking); Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 *TEX. L. REV.* 1307, 1392–94 (1995) (discussing the tension between sincerity and “the demand for continuity”); cf. Schwartzman, *supra* note 162, at 988–89 (summarizing objections to a strong presumption in favor of judicial sincerity).

intuitive, if taken seriously sincerity could serve as an internal check on adjudicators, resulting in more deliberate decision-making. Specifically, an internalist sincerity requirement could lead arbitrators to question the rightness of their decision if they are uncomfortable about providing the “real” reasons for the outcome.¹⁷² Externalist sincerity forces arbitrators to think critically about the force of their legal arguments.

3. Transparency

The absence of a consistency constraint facilitates transparency in two respects. First, greater sincerity in opinion-writing leads to better insight into the grounds for decisions. Of course, any information about the motivations of a tribunal is of tremendous value to future parties in making appointment decisions. Greater openness also benefits the larger legal community, by enabling discussion about the merits of the real reasons for awards. Second, the removal of consistency reduces incentives to “massage” the facts of the case before the arbitrators so as to analogize or distinguish the case from earlier awards. Similarly, it diminishes the need to “reinterpret” the holdings of earlier decisions.¹⁷³ Instead, tribunals can engage in frank discussions about their disagreements with past awards. The decision on jurisdiction in *SGS v. Philippines* provides an example of such outspokenness. The tribunal in that case stated that it disagreed

172. The notion that adjudicators *should* question the reasons for their decisions is, of course, a normative proposition. Some Legal Realists have pointed out that rationalization can be a powerful tool for masking the influences of biases. See generally JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

173. See, e.g., Caminker, *supra* note 146, at 819 (“Lower court judges more often nullify the doctrine through less visible subterfuge [W]hen judges care deeply about a particular legal issue but disagree with existing precedent, they often attempt to subvert the doctrine and free themselves from its fetters by stretching to distinguish the holdings of the higher courts.”); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *COLUM. L. REV.* 809 (1935) (noting “the stretching or shrinking of precedents in every washing”); Comment, *The Attitude of Lower Courts to Changing Precedents*, 50 *YALE L.J.* 1448, 1449 (1941) (“[Many] precedents have been rejected through the stratagem of distinguishment; others have been the subject of conscious judicial oversight. As a consequence, judicial discretion among ‘inferior’ judges is not so confined and limited as legal theorists would have it.”); see also KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 62 (1960) (“[O]nly in times of stagnation or decay does [the judicial] system even faintly resemble . . . a picture of detailed dictation by the precedents”); cf. Timothy Schwarz, *Cases Time Forgot: Why Judges Can Sometimes Ignore Controlling Precedent*, 56 *EMORY L.J.* 1475, 1475 (2007) (explaining that precedent can be followed, distinguished, overruled, treated as mistaken or ignored).

on certain points with a decision rendered a few months earlier in a sister case, *SGS v. Pakistan*,¹⁷⁴ and explained why it was under no constraint to follow the earlier award:

As will become clear, the present Tribunal does not in all respects agree with the conclusions reached by the *SGS v. Pakistan* Tribunal on issues of the interpretation of arguably similar language in the Swiss-Philippines BIT. This raises a question whether, nonetheless, the present Tribunal should defer to the answers given by the *SGS v. Pakistan Tribunal* In the Tribunal's view, although different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law 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.¹⁷⁵

In court systems, in the words of Alec Stone Sweet, “[p]recedent camouflages lawmaking, while enabling it.”¹⁷⁶ In arbitration, there are no compelling reasons for engaging in such duplicity. By letting go of consistency as a goal and precedent as the method to achieve it, arbitrators do not need to face the choice between reaching a decision that they believe to be incorrect or concealing what they are doing. As *SGS v. Philippines* demonstrates, the open expression of disagreement with earlier awards could foster a continuing dialogue between tribunals. A secondary, but significant, benefit is that greater transparency stimulates scholarly debate on the merits of different decisions, allowing future tribunals to draw on richer scholarship.

174. *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (Aug. 6, 2003).

175. *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction ¶ 97 (Jan. 29, 2004) (footnotes omitted).

176. Alec Stone Sweet, *The European Court and Integration*, in ALEC STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE* 1, 10 (2004).

4. Constraining Discretion

Although consistency is achieved at the expense of accuracy, sincerity and transparency, its effects on the decision-making process are not all negative. Perhaps the strongest argument for asking that arbitrators give some consideration to consistency is that such a norm may reduce idiosyncratic decision-making.

First, by limiting subjectivity, consistency could function as a safeguard against arbitrariness. Even though investment arbitrators are not part of an institution in the way court judges are, their decisions should not be random, or worse, based on improper motivations. Sophisticated jurists can, and often will, disagree on whether specific decisions can be reconciled. Still, the argument would go, a consistency standard can be useful standard for preventing outlier decisions.¹⁷⁷

By its nature, however, arbitration may not lend itself well to evaluation of fairness over time. Perhaps what matters most in arbitration is not how a judgment stacks up against other awards in comparable cases, but whether the parties to a specific dispute have been given a fair shake. This understanding of fairness requires that arbitrators be receptive to arguments that may not have convinced other tribunals. Moreover, although the institution of the party-appointed arbitrator creates incentives for bias,¹⁷⁸ it also empowers the parties to prevent the appointment of a tribunal that, acting as a collective,

177. Cf. Kim, *supra* note 23, at 258 (noting that “[t]he norm of coherence acts as a check against arbitrators’ discretion”).

178. Several experienced arbitrators have recently called for abolition of party-appointment in international arbitration (including investor-state arbitration), arguing that this system creates incentives that are at odds with true impartiality. Jan Paulsson, *Moral Hazard in International Dispute Resolution: Inaugural Lecture*, University of Miami School of Law (Apr. 10, 2010), available at http://www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf; Hans Smit, *The Pernicious Institution of the Party-Appointed Arbitrator*, Columbia FDI Perspectives (Dec. 14, 2010), available at <http://www.vcc.columbia.edu/content/pernicious-institution-party-appointed-arbitrator>. Unsurprisingly, these proposals have been met with resistance. Herman Manuel Duarte, *Fixing the Way Multi-Arbitrator Tribunals Are Formed*, ABA Section of Litigation (Oct. 27, 2011), available at <http://apps.americanbar.org/litigation/committees/international/articles/fall2011-multi-arbitrator-tribunals-unilateral-appointments.html>; Alexis Moure, *Are Unilateral Appointments Defensible? On Jan Paulsson’s Moral Hazard in International Arbitration*, KLUWER ARBITRATION BLOG (Oct. 5, 2010), <http://kluwerarbitrationblog.com/blog/2010/10/05/are-unilateral-appointments-defensible-on-jan-paulsson%E2%80%99s-moral-hazard-in-international-arbitration>. See also Brower & Schill, *supra* note 113, at 491–92 (noting that in investment arbitration, “[w]hat is primarily important is the arbitrator’s reputation for impartial and independent judgment”).

would reach an idiosyncratic result.

A second, and perhaps stronger, argument is that a norm requiring some deference to earlier awards anchors the decision-making process. The process of analogizing and distinguishing earlier cases arguably is a methodology that ensures some intellectual rigor. In the face of consistency among a great amount of prior decisions, perhaps the most appropriate response is humility and respect for the collective judgment of all of the adjudicators who have considered the same legal issues.¹⁷⁹ Arbitrators, to invoke Dworkin's metaphor, should not break the chain lightly. The imposition of certain decisional burdens—for example, a requirement that arbitrators deviate from a consistent line of decisions only for compelling reasons—fosters diligence whenever a tribunal considers departing from the prevailing case law.¹⁸⁰

Of course, investment arbitrators should study earlier decisions and allow themselves to be convinced by their reasoning. The decisions of tribunals who have grappled with the same legal questions are a particularly useful source. Even if a tribunal ends up disagreeing with earlier awards, its decision will be more deliberate if it has been tested against the reasoning of other tribunals. The beneficial effects of serious consideration of earlier awards without losing sight of a tribunal's autonomy were insightfully described in the award rendered by an ICSID panel in 2005 in *AES Corp. v. Argentine Republic*:

Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem; but decisions on jurisdiction dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order to compare its own positions with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solution.¹⁸¹

The additional constraint imposed by a consistency norm,

179. I thank participants of the 2012 ITA Winter Forum, especially William Dodge, for this point.

180. Cf. Cheng, *supra* note 84, at 1020–21 (describing the relationship between precedent and control of adjudication process).

181. *AES Corp. v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, ¶ 30 (Apr. 26, 2005).

however, is unnecessary. The current framework does not grant investment arbitrators unfettered discretion to reach whichever decision they believe is “just” or “fair.” As we have seen, the ICSID Convention instructs arbitrators to identify the applicable rules of national or international law, and apply those.¹⁸² Where the law leaves room for discretion, there are no compelling reasons to demand that arbitrators defer to the way an earlier tribunal has exercised its discretion. After all, each tribunal is appointed in accordance with the parties’ agreement to adjudicate their specific dispute. A further check is provided by the explicit requirement that investment tribunals provide reasons for their decisions.¹⁸³ Non-compliance with this requirement renders an award vulnerable to annulment.¹⁸⁴ As a practical matter, meeting the reason-giving requirement is more burdensome for tribunals that deviate from prevailing case law. This course of action requires more work and poses reputational risks, at least when earlier awards have not been heavily criticized.¹⁸⁵ The natural inclination will therefore be to follow earlier awards, especially when they are convincingly reasoned.¹⁸⁶ It is unlikely that arbitrators will decide to part ways with a consistent line of awards without engaging in thorough research and serious deliberation.

Lastly, a significant check exists in the form of the court of public opinion. Unlike arbitrators in most other fields, and perhaps many trial court judges, investment arbitrators (at least in ICSID arbitrations) operate in the spotlights. Their awards are not only published, but they tend to be scrutinized, analyzed and criticized by annulment committees, other tribunals and the academic community.¹⁸⁷ The attention for individual awards may fade somewhat due to the exponential growth of investment arbitrations, but decisions that are perceived as outrageous will continue to attract attention.

In sum, the relatively public forum in which investment arbitration takes place, together with the legitimacy check performed by the annulment remedy and the natural pull that emanates from earlier

182. See *supra* note 83 and accompanying text.

183. Schwartzman, *supra* note 162, at 998–1001 (discussing how “principle of legal justification” helps reduce arbitrariness in judging).

184. For example, the *Enron* and *Sempra* awards were annulled for failure to state reasons. See *supra* notes 76–79 and accompanying text.

185. Cf. Cheng, *supra* note 84, at 1046 (noting that arbitrators further their reputational interests by applying a precedent method).

186. Cf. DUXBURY, *supra* note 152, at 154 (“Favouring the path of least resistance is certainly a reason for following precedent, but it will very often be the wrong reason.”).

187. Brower & Schill, *supra* note 113, at 492–93.

awards, already provide some safeguards against undue arbitrariness in decision-making. In practice, the existence of a consistent line of cases in practice results in stricter *explanatory* burdens for arbitrators who disagree with those decisions. The imposition of additional *decisional* burdens is unnecessary and detrimental to the quality of adjudication.

C. *The Value of Inconsistency*

There is no question that we will continue to perceive inconsistent awards as troubling. Yet the intuition that something is amiss when different tribunals reach outcomes or adopt rationales that seem to be at odds should be the beginning, not the end of the inquiry.

Let us revisit the Argentina cases discussed in Part I.B, and consider some explanations for the inconsistent outcomes and reasoning in the awards. First, the inconsistencies may be the result of the arbitrators' struggle to find the best answer in a hard case. Possibly, the *Continental* tribunal decided to use a different approach to the necessity defense because it concluded that earlier awards did not provide satisfactory answers. Perhaps the tribunal was influenced by the findings of the *CMS* annulment committee, which let the award stand but pointed out several legal errors, or by academic literature that was highly critical of the outcomes and the reasoning in earlier awards. Thus, one explanation for the inconsistent results could be that adjudicators reached the insight that earlier awards had been wrongly decided. Inconsistency may thus enable the detection of errors. If this is the case, our criticisms should not be directed at inconsistency, but at the wrongness of the earlier awards.¹⁸⁸ Relatedly, a systematic tolerance of inconsistency also provides the flexibility for tribunals to revisit what the "correct" answer is when adaptation is warranted due to changing circumstances.¹⁸⁹

Another possibility is that the different outcomes and reasoning reflect disagreement about what the law is, or how it must be applied to a particular set of facts. In theory, most of us readily accept that law is indeterminate, and that reasonable jurists may disagree on the proper application of legal standards. Similarly, we realize that

188. See John C. McCoid II, *Inconsistent Judgments*, 48 WASH. & LEE L. REV. 487, 488 (1991) ("Obviously, if two decisions are inconsistent, one of them must be wrong. Without more, however, the evil does not lie in the inconsistency; it lies in the erroneous decision. Inconsistency is merely a sign that error exists, a symptom of something bad, but not itself evil.").

189. Cf. John E. Coons, *Consistency*, 75 CAL. L. REV. 59, 105 (1987).

facts can be highly contested and that different fact-finders may reach inconsistent conclusions. Yet inconsistency that stares us in the face, as it does in the Argentina cases, reveals that we may not be quite so comfortable with the role of luck in adjudication.¹⁹⁰ And even though practitioners openly acknowledge that the selection of a tribunal is the most important factor in any arbitration, the reality that the identity of the arbitrators may have affected the outcome is a hard one to stomach for parties on the losing end. Of course, the flip side is that if each case is a new one, litigants should be less disadvantaged by unfavorable predispositions of tribunals who have decided similar disputes in the past.

Yet another reading of the Argentina cases could be that the applicability of the necessity defense presented a close case. If consistency is to have any weight in a tribunal's deliberations, "close call" situations would present the strongest case for following determinations of earlier tribunals. After all, if a tribunal is already on the fence, a small shift in opinion may not seem to be a big deal. This course of action, however, would sacrifice accuracy *and* fairness on the altar of a consistency ideal. It would expose Argentina to almost unlimited liability in dozens of cases based on a call made by the tribunal that happened to write the first award. Moreover, policy considerations could end up being more dominant: the awareness of the significance of the first award could easily make a tribunal hesitant to rule against a sovereign, especially if the case is a close one. Again, in legal systems there may be strong justifications for insisting on coherence in drawing these lines. However, in the context of investment treaty arbitration, the reasons for striking the balance differently are more compelling.

Lastly, advocacy may well have played a role. Perhaps Argentina put up a stronger case in some arbitrations, and its opponents may not have been equally skillful at making their case. It makes sense that Argentina, as a repeat player, built a more convincing factual record and sharpened its legal arguments over time.

All that being said, inconsistency could signal improper decision-making. We would be right, for example, to question the impartiality of a repeat arbitrator whose awards are inconsistent from one

190. For these reasons, judges have incentives to downplay the extent to which they engage in lawmaking. Martin Shapiro has explained that the message judges send to losing parties is: "You did not lose because we the judges chose that you should lose. You lost because the law required that you should lose." He notes that "[t]his paradox means that although every court makes law in a few of its cases, judges almost always deny that they make law." Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL'Y 155, 156 (1994).

case to the next but unfailingly come out in favor of the side that appointed him or her.¹⁹¹ Here again, it is not the inconsistency itself that is the problem, but rather the suspected bias. If anything, overt inconsistency would help reveal these underlying problems.¹⁹² As a general matter, however, inconsistency is too blunt a tool to be used as a proxy for other adjudication values. Ultimately, each arbitral decision should be judged on its own merits.

Inconsistency, in sum, is valuable because it keeps the investment arbitration community vigilant. It makes us question the reasons for differences between awards, and look for explanations in the reasoning in the awards and in external factors. The inquiries and debates triggered by inconsistent adjudication further contribute to the development and refinement of substantive and procedural standards.

IV. PRECEDENT REVISITED

Most arguments for introducing precedent into investment arbitration are premised on the view that greater consistency in arbitral decision-making is desirable. My rejection of this view logically encompasses a rejection of precedent, in the sense of a constraint, however slight, on decision-making by investment arbitrators.

In this last Part, I first explain how investment arbitrators should treat past awards and decisions. I conclude with some observations about the significance of the forward-looking aspects of precedent for investor-state arbitration.

A. Backward-Looking Constraints

Earlier in this Article, I described the distinction Judge Posner made in *Colby v. J.C. Penney Co.* between decisions from sister appellate courts, which are entitled to minor deference, and those from district courts, which should be given no deference.¹⁹³ Those who wish to promote consistency in investor-state arbitration through persuasive precedent essentially support adoption of the standard Judge

191. See, e.g., Schneiderman, *supra* note 31 (identifying a potential role of arbitrator bias in the conflicting Argentina awards).

192. Of course, a smart arbitrator who is biased will instead try to achieve results that are favorable for the party who appointed him or her, but give off the appearance of consistency. Arbitrator bias is therefore often not easy to detect and even harder to prove.

193. See *supra* Part II.B.1.

Posner applies to non-binding appellate decisions. In contrast, my rejection of a consistency norm means that arbitrators ought to approach earlier awards with the attitude district court judges should take vis-à-vis decisions from their peers. Arbitrators in investor-state disputes, in other words, should not be subject to the backward-looking constraints that we tend to view as the essence of precedent.¹⁹⁴

It is important, however, to clarify how arbitrators should treat earlier awards. By submitting that arbitrators should not be constrained by earlier awards, I don't argue that arbitrators should decide in a vacuum, nor do I argue that they should not familiarize themselves with relevant awards and decisions. In fact, it is critical that arbitrators review decisions from other tribunals and annulment committees. First, while earlier awards are not law, they are often useful in helping arbitrators identify what the law requires.¹⁹⁵ The role played by arbitral decisions is in this sense similar to that of scholarly works. Of course, there are significant differences between the nature of adjudication and scholarship, which are reflected in the products that result from the practices. On the one hand, decisions from other adjudicators may be more useful as a resource. After all, arbitrators in other cases are similarly situated in that they resolve real-world disputes.¹⁹⁶ On the other hand, scholarly works can be useful precisely because academics have more freedom. Academic writing tends not to be colored by the particularities of a specific case, including the arguments and materials submitted by the parties. Each type of source comes with its strengths and weaknesses, and there is no reason (at least in the context of investment treaty arbitration) to systematically favor one over another.¹⁹⁷

In addition to pointing tribunals to the rules of law, the reasoning in earlier awards may be so compelling that a tribunal becomes convinced that it represents an accurate interpretation and application of the law. This is the core of persuasive authority. Tribunals in investor-state disputes should therefore consider the rea-

194. Schauer, *Precedent*, *supra* note 8, at 572.

195. Orakhelashvili, *supra* note 10, at 169 (“Arbitral awards can be an elucidation of international law, not a precedent, and possess no *a priori* value.”).

196. *Cf.* Chad Flanders, *Toward a Theory of Persuasive Authority*, 62 OKLA. L. REV. 55, 71 (2009).

197. Whatever the merits of Chad Flanders' argument that in court systems court decisions are “super persuasive” compared to other persuasive authorities (such as law review articles), *see* Flanders, *supra* note 196, at 74–76, there appear to be strong arguments against identifying a similar hierarchy in investment treaty arbitration.

soning of earlier awards, and carefully weigh competing answers to the questions their cases present. And it is unproblematic for tribunals to adopt solutions from earlier awards and decisions on the basis that they are convinced by the strength of the reasoning. Yet arbitrators should be careful not to cross the line into “following” earlier awards for the sake of promoting consistency.

I want to conclude this section with a warning. In light of the natural inclination to give some weight to earlier decisions that have no claim to authority, one may wonder whether the distinction Judge Posner has drawn between non-binding appellate court decisions and district court decisions has any practical significance. The difference, after all, is subtle, as district and circuit court judges do not face significant constraints in deciding whether to follow awards from sister appellate courts. Translated to the arbitration context, the question could be: what is the harm of converting an informal practice into a norm? In response, I submit that the attitude with which adjudicators are asked to approach their task is of some importance. In part, this is because of the likely consequences that flow from the mindset of an adjudicator. Arbitrators are not machines, and they cannot simply turn off informal considerations that motivate them at a subconscious level. It is inevitable that they are influenced by factors beyond the intrinsic persuasiveness of earlier awards. The pull of consistency is always there, and may be strengthened by several factors including the tribunal members’ personal assessments of the arbitrators who rendered an earlier award, or the praise or criticism awards have encountered. Rather than imposing a consistency norm, we should therefore encourage arbitrators to be wary of the natural inclination to follow earlier awards. Ultimately, the emphasis should be on the responsibility of each tribunal to make an independent determination of how a dispute should be resolved under applicable law.¹⁹⁸

In addition, a consistency norm—even a weak one—would affect the expectations of the parties to disputes and of the international investment community at large. If earlier awards are entitled to even a small amount of deference, arbitrators who choose not to follow them may be subject to disapproval. If, on the other hand, the arbitration community expects a tribunal to reach an independent decision on the case before it, aided by an honest assessment of the

198. *Cf.* Roberts, *supra* note 12, at 179 (comparing investment treaty awards to “a house of cards built largely by reference to other tribunal awards and academic opinions, with little consideration of the views and practices of states in general or the treaty parties in particular”).

merits of earlier awards, arbitrators in turn will feel empowered to deviate from earlier awards that they believe were wrong. Even though tribunals will often end up adopting the reasoning in earlier cases, they should do so from a position of freedom.¹⁹⁹

B. Forward-Looking Constraints

The rejection of any obligation to accord deference to past awards does not necessarily imply a denunciation of the lawmaking role of arbitrators. As a matter of principle, there is nothing about an autonomous decision-making model that renders it incompatible with lawmaking conduct.²⁰⁰ In fact, the role played by arbitral awards in the development of substantive law has consequences for decision-making as well as reason-giving.

The forward-looking aspects of investment arbitration present a dilemma for arbitrators. Should they focus only on the dispute they are resolving? Or should they be mindful of the fact that their awards will be read by a broader audience, including future tribunals? There are strong arguments for requiring a narrow focus on the resolution of the dispute at hand. After all, arbitrators are appointed and paid by parties to resolve a particular dispute between the parties that appointed them, not to set the stage for other cases. Moreover, the forward-looking aspects of adjudication may detract from the sincerity that enables arbitrators to reach the best decision in a particular case. Interestingly, Maxwell Stearns has suggested that the Condorcet Jury Theorem is of reduced utility as a tool for understanding appellate adjudication. The reason is that the awareness that decisions are precedent-setting interferes with some of the assumptions that underlie the autonomous decision-making ideal.²⁰¹

In practice, however, investment arbitrators are keenly aware

199. Arbitral awards that state arbitrators should follow consistent lines of cases often use the word “duty” in this context. See *supra* note 151 and accompanying text. It appears, therefore, that at least some arbitrators sense a degree of constraint in dealing with earlier awards. The awards do not, however, explain where this duty comes from.

200. Cf. Caminker, *supra* note 146, at 826 (noting that one could imagine a regime in which courts “behave as autonomous law-declaring actors. Under such a system, each individual court would decide every case according to its own best judgment, unrestricted by the precedents of higher courts In such a non-precedent-based hierarchy, inferior courts would function more as autonomous interpretive agents than as messengers for an oracular Supreme Court”); Alexander, *supra* note 6, at 28 (“[C]ourts could decide cases ‘as if’ particular rules existed in order to further the ‘rule of law’ values.”).

201. Maxwell L. Stearns, *The Condorcet Jury Theorem and Judicial Decision-making: A Reply to Saul Levmore*, 3 THEORETICAL INQ. L. 125, 125–26 (2002).

that their decisions will influence the behavior of constituents in investment law, and inform the decision-making of adjudicators in future disputes.²⁰² Of course, the effects of the forward-looking aspects of adjudication are stronger in a system in which adjudicators know that their decisions will formally bind other adjudicators (and constrain their own freedom). In precedent-based systems, in other words, the forward-looking aspects of decision-making are derivative of the backward-looking ones. Investment arbitration, however, provides an example of how the awareness of adjudicators that they contribute to the development of law affects decision-making even in the absence of backward-looking constraints. Specifically, the very notion of law implies a certain level of generality.²⁰³ Arguably, the ICSID Convention's mandate to resolve disputes in accordance with applicable "law" already imposes an implicit obligation on investment arbitrators to apply universalizable norms.²⁰⁴ The notion that investment arbitrators not only *apply* law, but also shape it, strengthens this requirement. The effect of the lawmaking aspects on arbitral decision-making is especially pronounced when comparing investment arbitrators to arbitrators in, for example, international commercial disputes. Commercial arbitrators and investment arbitrators are, in a sense, each other's mirror images. Commercial arbitrators follow precedent from the jurisdictions whose laws they apply but do not participate in the development of law, while investment arbitrators create law without being under an obligation to treat earlier decisions as authoritative.

Awareness of the larger impact of awards may thus detract, to some extent, from achieving the best result in the case at hand. On the other hand, it also forces investment arbitrators to think about the dispute before them as one that falls in a category of cases. This exercise requires thinking through the applications of the law outside the confines of the specific disputes before them. The forward-looking aspects of investment arbitration, by broadening the scope of the inquiry, may ultimately result in better adjudication in individual cases.

The fact that arbitral awards help shape the meaning of terms in investment treaties also gives rise to an obligation to be transparent about the reasons for decisions. Presumably, arbitrators whose awards are confidential direct their reasoning primarily at the parties,

202. Cf. Schauer, *Precedent*, *supra* note 8, at 572–75.

203. Waldron, *supra* note 134, at 18–20; see also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989).

204. See *supra* note 182 and accompanying text.

although they may also take care to satisfy courts in enforcement challenges. The audience of investment arbitrators, on the other hand, also includes their peers. Investment arbitrators should aim to provide reasons that will persuade future adjudicators that the decisions that were made are the right ones. Among other things, this means that tribunals should identify where they disagree with earlier tribunals, and provide reasons for siding with one camp when there is already divergence, or for deviating from lines of consistent cases. Interestingly, these obligations do not arise out of formal, backward-looking constraints. Rather, the reasons for these obligations lie in the forward-looking aspects of precedent.²⁰⁵ An award gains in persuasive force if it explains how it is situated in the context of relevant case law and what the reasons are for adopting or rejecting earlier interpretations or applications. Thus, the existence of earlier awards on point—especially if there is a consistent line of awards—imposes additional explanatory burdens. This should not, however, be equated with a decisional constraint.²⁰⁶

The *Glamis Gold* award rendered in 2009 by an ICSID tribunal describes the disciplining effect that may emanate from an awareness of a decision's broader implications:

[T]his Tribunal, in undertaking its primary mandate of resolving this particular dispute, does so with an awareness of the context within which it operates. The Tribunal emphasizes that it in no way views its awareness of the context in which it operates as justifying (or indeed requiring) a departure from its duty to focus on the specific case before it. Rather it views its awareness of operating in this context as a discipline upon its reasoning that does not alter the Tribunal's decision, but rather guides and aides the Tribunal in

205. The consent-based nature of arbitration provides another basis for requiring that arbitrators address awards and decisions that are discussed in the parties' submissions. Possibly, the requirements that ICSID awards "deal with every question submitted to the Tribunal" and that they state the reasons for the award provide a basis for inferring such an obligation. ICSID Convention, *supra* note 22, art. 48(3). I thank Andrea Bjorklund and Andrew Newcombe for this point.

206. Stephan Schill has noted that "[t]he more established precedent becomes, and the more investment treaty tribunals align themselves with a certain line of jurisprudence, the more difficult it becomes to meet that burden and to convince tribunals to adopt solutions that deviate from prior practice." Stephan W. Schill, *System-Building in Investment Treaty Arbitration and Lawmaking*, 12 GERMAN L.J. 1083, 1101–02 (2011). While this may be true as a descriptive matter, I disagree with any suggestion that arbitrators *should* consider themselves constrained by "established" jurisprudence.

simultaneously supporting the system of which it is only a temporary part.²⁰⁷

My rejection of backward-looking constraints imposed by precedent is based on the position that precedent should not be used as a means to achieve consistency in arbitration. Disentangled from this instrumental role, however, precedent provides a useful lens through which to study the influence of past awards and future disputes on the decision-making process in investment arbitration. It helps make sense of the unique task arbitrators in investor-state disputes face in reconciling their obligations to the parties who appointed them with the awareness that the effects of their decisions may extend far beyond the dispute they are resolving.

CONCLUSION

This Article warns of the costs that come with consistency in adjudication, and counsels against the implementation of precedent in investor-state arbitration. The justifications that support a consistency norm in court systems take on diminished importance in the arbitration context. Moreover, attempts to promote consistency interfere with adjudication values that are more important for investment law and arbitration. These include autonomous decision-making, a commitment to identifying the best legal answer (even if reasonable jurists may disagree about what that is in any given context), and transparency about the reasons for a disposition and the extent of any disagreement with earlier awards.

Although consistency should not factor into arbitral decision-making, it is inevitable that earlier decisions will, and do, influence arbitrators. Furthermore, the existence of a consensus among tribunals who have decided specific questions will naturally raise the stakes for tribunals who disagree. Yet cementing this practice into a doctrine of precedent will do little good and has the potential to be harmful. Instead, arbitrators should be conscious of the natural inclination to follow earlier decisions, and ensure that they reach independent decisions about the legal and factual issues presented in the cases before them.

Lastly, investment arbitrators' role in developing substantive international law comes with responsibilities that are unique in the arbitration universe. In deciding specific disputes, investment arbi-

207. *Glamis Gold Ltd. v. United States of America*, UNCITRAL Award ¶ 3 (June 8, 2009), available at http://italaw.com/documents/Glamis_Award_001.pdf.

trators ought to be mindful of the broader and longer-term implications of their decisions. Although the primary goal of awards remains to explain the disposition to the parties, tribunals must provide reasons with an eye toward the larger investment community, including future tribunals. Intriguingly, investment arbitrators should conceive of themselves as norm creators, even if neither they, nor future tribunals, are under any constraint to be norm followers.