I. Introduction

For more than a decade, international lawyers and international relations scholars have been fascinated by an ever-increasing number of international courts and tribunals. These are producing more international case-law, thereby replacing the traditional scarcity of international law precedents embodied in a few celebrated ICJ and PCIJ cases. Today, there is a host of frequently highly specialized international dispute settlement mechanisms like the WTO Dispute Settlement Body, the International Tribunal for the Law of The Sea, the International Criminal Court, various investment tribunals acting under The International Centre for Settlement of Investment Disputes (ICSID) Convention or other arbitration rules. All apply, interpret and probably 'make' international law. One question frequently raised in this context is whether these institutions contribute to the development of a single uniform body of international law or whether they make 'their own' ever more fragmented law. To the extent that they must apply specifically agreed upon rules, such as the WTO agreements, various bilateral investment protection treaties or the Law of the Sea Convention, etc., this is of course largely a false problem. In so far as they rely on common rules of international law, coherence vs. fragmentation does indeed arise and is a serious issue.

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Scholars of international law have intensely debated these problems mostly under the heading ‘fragmentation’ of international law or ‘proliferation’ of international courts and tribunals. Gerhard Hafner has significantly contributed to this scholarly


debate in a number of articles,3 and most importantly in a report prepared for the International Law Commission (ILC), which triggered the Commission’s work on fragmentation and was further pursued by Gerhard Hafner’s successor on the ILC, Martti Koskenniemi.5

It thus appears appropriate to dedicate a few modest thoughts about these issues to a great international lawyer with whom I have had the privilege to work at the Department of International Law and International Relations at the University of Vienna during the last twenty years. Gerhard Hafner will understand that due to the space allotted in this *liber amicorum*, I must limit the scope of my remarks on fragmentation and proliferation to a specific sub-field of international law. He will also appreciate that the chosen field is investment law and arbitration, which, in many respects, may be viewed as a test laboratorium of international law where many of the pertinent problems mentioned above have appeared in particularly visible form.

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II. Investment Arbitration Boom

Since the mid-1990s a constantly growing jurisprudence of ICSID and other investment arbitration has begun to interpret the rather general and sometimes vague standards usually contained in international investment agreements. Most of the roughly 2500 bilateral investment treaties (BITs), NAFTA’s Chapter 11 as well as other investment chapters of Free Trade Agreements and treaties, such as the Energy Charter Treaty, contain similarly worded guarantees to foreign investors. They usually prohibit uncompensated expropriation, require fair and equitable treatment, as well as full protection and security, demand non-discriminatory treatment, such as most-favored nation and national treatment and provide for transfer of capital and gains as well as other guarantees.

The 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States established The International Centre for Settlement of Investment Disputes (ICSID). The Centre offers arbitration services and provides arbitration rules in investment disputes between private parties and states where both the host state and the home state of the investor are parties to the Convention. As of January 2008, ICSID lists 138 concluded and 121 pending cases. Where only one is a treaty party, arbitration may be conducted pursuant to the ICSID Additional Facility. ICSID Additional Facility arbitration is frequently used in the context of the investment rules of NAFTA Chapter 11 since only the United States is a party to the ICSID Convention. In addition, investment arbitration, i.e. mixed arbitration between states and private parties, is taking place according to the arbitration rules of the ICC,
the Stockholm Chamber of Commerce,\textsuperscript{14} the LCIA,\textsuperscript{15} or the UNCITRAL Rules,\textsuperscript{16} which are often administered by the Permanent Court of Arbitration.

Investment arbitration is an important practical alternative to settling disputes between investors and host states pursuant to traditional methods under domestic or international law, i.e. before national courts or administrative agencies of the host state or through inter-state arbitration or litigation or by other means of diplomatic protection. In investment arbitration, private investors have a direct right to institute arbitral proceedings against host states. Thus, starting such proceedings is not influenced by any political considerations of their home states, whether or not they should espouse the claims of their nationals. This ‘emancipation’ of the individual investor\textsuperscript{17} has been a crucial element in producing the current boom of investment arbitration under NAFTA as well as ICSID and other arbitral regimes. The second decisive factor as to why investment arbitration has become so ‘popular’ is its rather high enforcement probability.

III. The Enforceability of Investment Arbitration Awards

The lack of enforcement options in international law is often deplored. Some commentators still question the ‘legal’ quality of international law because of its perceived absence of enforcement mechanisms.\textsuperscript{18} Indeed, the judgments and decisions of international courts and arbitration tribunals are usually complied with as a matter of political considerations, reciprocity, etc., or they are simply disregarded. Actual enforcement is rare. With regard to the binding judgments of the ICJ,\textsuperscript{19} Article 94(2) of the UN Charter has remained a theoretical threat of enforcement, though it unequivocally gives the UN Security Council broad enforcement powers.\textsuperscript{20} In practice, the only attempt to rely

\textsuperscript{18} See, e.g., L. F. Damrosch, 'Enforcing International Law Through Non-forcible Measures', 269 Recueil des Cours 9, at 19 (1997).
\textsuperscript{19} 1945 Statute of the International Court of Justice, art. 59 provides: 'The decision of the Court has no binding force except between the parties and in respect of that particular case.'
\textsuperscript{20} 1945 Charter of the United Nations, art. 94(2) provides: 'If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give to the judgment.'
upon this provision was defeated by a veto in the Security Council. Also regarding other inter-state dispute settlement mechanisms such as regional courts or tribunals or _ad hoc_ arbitration, enforcement is usually not provided. Instead, states are expected to comply with judicial or arbitral outcomes.

The scarcity of enforcement measures against states in international dispute settlement is mirrored by the protection afforded through state immunity on the domestic level. National courts are still very reluctant to permit enforcement measures against foreign states, even where they have denied jurisdictional immunity.

It is against this background that investment arbitration provides a stark contrast. Investment and, in particular, ICSID awards enjoy a very high level of enforceability. The awards rendered pursuant to most _ad hoc_ investment arbitrations as well as those administered by arbitration institutions, such as ICC, LCIA, SCC or the like, are usually treated as foreign arbitral awards pursuant to the 1958 New York Convention and are thus enforceable in domestic courts according to the Convention’s provisions.

Pursuant to Article V of the New York Convention, ‘a court may refuse to recognize and enforce an award on its own initiative if: (a) the subject matter is not capable of settlement by arbitration under the local law; or (b) recognition or enforcement would be contrary to the local public policy’. In general, however, arbitral awards governed by the New York Convention must be recognized and enforced in its Contracting States. ICSID awards enjoy an even higher effectiveness. The enforcement of ICSID awards is directly regulated by the ICSID Convention, which provides that awards shall be enforced in all Contracting States, like judgments of their own domestic courts. This excludes public policy exceptions that would be available under the New York Convention. The only remaining obstacles to a quasi-automatic enforcement of ICSID awards are the rules on state immunity from execution, which are expressly reserved in Article 55 of the ICSID Convention.

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23 Ibid., art. III provides: ‘Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.’
24 1965 ICSID Convention, art. 54 provides: ‘(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.’
25 1965 ICSID Convention, art. 55 provides: ‘Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.’
These specific rules of state immunity are determined by national procedural law and should conform to customary international law and, where applicable, to treaty law. There is a clearly discernible trend to permit enforcement measures against property serving commercial purposes, while property serving official or governmental functions is generally regarded to be immune from execution. The dividing line between these two types of property is difficult to draw and also in the context of enforcing ICSID awards, national courts encountered a few problems. Diplomatic and consular property, including embassy bank accounts, as well as military property and state ships are usually immune from execution. Most national courts will recognize a waiver of enforcement immunity. In practice, however, enforcement immunity questions regarding ICSID awards rarely arise because awards are regularly complied with. Whether this is a result of the increased likelihood of successful enforcement remains speculative though appears very probable.

In addition to the relatively strict provisions of the ICSID Convention concerning recognition and enforcement before national courts, the Convention also imposes an international law obligation upon host states to comply with awards rendered against them. If this treaty-based obligation were disregarded, the right of diplomatic protection of the investor’s home state would revive and may lead to additional political pressure to comply with an award.

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30 1965 ICSID Convention, art. 53 provides: ‘(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.’
Ultimately, it seems that concerns over a host state’s investment climate, or rather its perception by investors, play a crucial part in the decision of states to ‘voluntarily’ comply with investment awards whether rendered pursuant to the ICSID Convention or under other arbitration rules.

IV. The ‘Dangers’ of the Proliferation of Investment Arbitration

The attractiveness and thus increased use of investment arbitration owes much to the high likelihood of compliance with its outcomes. At the same time, the proliferation of investment dispute settlement mechanisms bears its own risks. The concurrent availability of different investment dispute settlement systems may lead to parallel proceedings or to the re-litigation of already decided cases. This phenomenon is, of course, not limited to investment arbitration but a general problem arising in situations of an increased availability of dispute settlement mechanisms.

The proliferation of international courts and tribunals can lead to forum shopping and to a duplication or multiplication of proceedings before different fora, involving a waste of judicial resources as well as the threat of divergent or even conflicting outcomes. This may ultimately contribute to the fragmentation of international law and weaken both coherence and credibility of international law.31

Because of the rapid increase in investment arbitration, some of these dangers have actually materialized. Four groups of cases illustrate the potential threats: The SGS cases, where two ICSID tribunals came to divergent assessments of the meaning of umbrella clauses, the Maffezini tribunal and others that are split on the interpretation of MFN clauses, the CME/Lauder v. Czech Republic arbitrations, where the same dispute was arbitrated under two different bilateral investment agreements, and finally the CMS v. Argentina and LG&E v. Argentina cases which, together with subsequent cases, answered the question of whether a state of necessity prevailed differently in Argentina. These cases demonstrate the inherent danger of a multiplication of procedures if answers found by different tribunals are contradictory.

A. The SGS Cases

In two ICSID proceedings initiated by the Swiss company SGS against Pakistan32 and the Philippines,33 the arbitral tribunals came to opposing results regarding the meaning of so-called umbrella clauses, according to which host States stipulate that they will

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33 SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on Jurisdiction of 29 January 2004, 8 ICSID Reports 515.
observe obligations assumed with regard to specific investments in their territories by investors of the other contracting parties.\textsuperscript{34}

The \textit{SGS v. Pakistan} tribunal rejected the view that ‘breaches of a contract [...] concluded with a State (widely considered to be a matter of municipal rather than international law) are automatically “elevated” to the level of breaches of international law’.\textsuperscript{35} The \textit{SGS v. Philippines} tribunal, however, adhered to the traditional view that an umbrella clause ‘makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments. But it does not convert the issue of the extent or content of such obligations into an issue of international law’.\textsuperscript{36}

This divergence was not the result of oversight but embodies a deliberate disagreement. The \textit{SGS v. Philippines} tribunal justified its dissent by expressly renouncing any system of binding precedent under the ICSID Convention or international law in general. It held:

‘no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision. [...] It must be [...] in the longer term for the development of a common legal opinion or jurisprudence constante, to resolve the difficult legal questions discussed by the \textit{SGS v. Pakistan} Tribunal and also in the present decision.’\textsuperscript{37}

The ‘development of a common legal opinion’ has still not materialized with investment tribunals partly adhering to the \textit{SGS v. Pakistan}\textsuperscript{38} and partly to the \textit{SGS v. Philippines} approach.\textsuperscript{39}

\textbf{B. Maffezini and Its Progeny}

A similarly controversial assessment of BIT provisions arose in the aftermath of the decision on jurisdiction in the ICSID case, \textit{Maffezini v. Spain}.\textsuperscript{40} In this case, brought by an Argentine investor against a member state of the EU, the arbitral tribunal permitted

\textsuperscript{34} 1995 Switzerland/Pakistan BIT, art. 11 reads: ‘Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.’ 1997 Switzerland/Philippines BIT, art. X(2) reads: ‘Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party.’

\textsuperscript{35} SGS \textit{v. Pakistan}, \textit{supra} note 32, para. 167.

\textsuperscript{36} SGS \textit{v. Philippines}, \textit{supra} note 33, para. 128.

\textsuperscript{37} SGS \textit{v. Philippines}, \textit{supra} note 33, para. 97.


\textsuperscript{39} Eureko B.V. \textit{v.} Republic of Poland, Partial Award of 19 August 2005, para. 257.

\textsuperscript{40} Emilio Agustín Maffezini \textit{v.} Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction of 25 January 2000, \textit{5 ICSID Reports} 396 (2002).
the claimant to rely on more favourable dispute settlement provisions than those contained in the Argentina/Spain BIT as a result of the MFN clause contained in the latter treaty. Whether MFN clauses are limited to the substantive treatment standards of BITs, like fair and equitable treatment, full protection and security or guarantees against uncompensated expropriation, or include dispute settlement provisions is an issue that keeps investment tribunals divided. While in a number of cases tribunals have adopted the *Maffezini* approach, other tribunals have sharply rejected it.

Although tribunals tend to emphasize the different wording of the applicable MFN clauses as a rationale for their diverging assessments, it is obvious that there remains a deeper underlying disagreement about the scope of MFN treatment that is still unresolved.

C. **CME/Lauder v. Czech Republic**

The ultimate fiasco in investment arbitration occurred in the *Lauder/CME* arbitrations against the Czech Republic. The *Lauder* tribunal unanimously held that although the Czech Republic had committed breaches of its obligations under the US-Czech Republic BIT in relation to some of the alleged events, these infringements did not give rise to liability. Shortly after the initiation of the *Lauder* proceedings, CME, a company incorporated in the Netherlands and controlled by Mr Lauder, also initiated arbitration against the Czech Republic and relied on the BIT between The Netherlands and the Czech Republic. CME claimed and pleaded the same violations and facts as Mr Lauder had done in the other proceedings. Within days after the award had been rendered in *Lauder v. Czech Republic*, a partial award was adopted by the tribunal in *CME v. Czech Republic* which came to conclusions diametrically opposing the first award. Attempts by the Czech Republic to set aside the second award through legal

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41 1991 Argentina/Spain BIT, art. IV(2) provides: ‘In all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country.’


proceedings before Swedish courts remained unsuccessful. Both the CME v. Czech Republic tribunal and the Swedish courts stressed the formal non-identity of the two claimants, Mr Lauder and CME, which militated against the application of the general principles of res judicata and/or lis pendens in order to prevent the re-litigation of one investment dispute before two different investment tribunals.

D. CMS v. Argentina and LG&E v. Argentina and Others

The latest examples of investment tribunals assessing identical facts in a contradictory fashion is provided by the difference of opinion regarding the question whether the situation during the Argentine economic crisis at the beginning of the 21st century constituted a state of necessity. In the Argentine cases the tribunals did not have to interpret and apply BIT provisions but rather the same customary international law defence of ‘state of necessity’ as ‘codified’ in the ILC Articles on State Responsibility. The ‘applicable’ international law was Article 25 of the ILC Articles on State Responsibility which provides:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

   (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

   (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

   (a) The international obligation in question excludes the possibility of invoking necessity; or

   (b) The State has contributed to the situation of necessity.’

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In the view of the CMS v. Argentina tribunal, such a state of necessity did not prevail during the period in question because the situation, though ‘severe’, was not severe enough to amount to necessity. The tribunal reasoned:

‘The Tribunal is convinced that the crisis was indeed severe and the argument that nothing important happened is not tenable. However, neither could it be held that wrongfulness should be precluded as a matter of course under the circumstances. As is many times the case in international affairs and international law, situations of this kind are not given in black and white but in many shades of grey. It follows that the relative effect that can be reasonably attributed to the crisis does not allow for a finding on preclusion of wrongfulness.’

Less than a year later, another ICSID tribunal found that the same situation did reach the level of a state of necessity. According to the LG&E v. Argentina tribunal:

‘[the] essential interests of the Argentine State were threatened in December 2001. It faced an extremely serious threat to its existence, its political and economic survival, to the possibility of maintaining its essential services in operation, and to the preservation of its internal peace.’

In fact, the two tribunals disagreed less about the interpretation of the law of state responsibility than on the qualification of the actual facts. While it may be understandable that reasonable persons disagree about such fundamental issues like whether an economic crisis amounted to a state of necessity in international law, it is hardly understandable that a tribunal deciding such an important issue disregarded the findings of a previous tribunal. It should be added that as of the end of 2007, the view of the CMS v. Argentina tribunal that there had not been a state of necessity in Argentina prevailed among investment tribunals as can been seen on the Enron52 and the Sempra53 award. This by now dominant view was not even corrected by the ad hoc Committee in the annulment decision concerning CMS v. Argentina, which found fault with many aspects of the tribunal’s 2005 award but refrained from annulling it on grounds related to the state of necessity defence.54

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V. Options to Avoid These Risks

The phenomenon of inconsistent and sometimes even contradictory outcomes of dispute settlement results from the overall increase of investment arbitration. There is no doubt that a further rise of such inconsistencies may erode the predictability and reliability of the system and may in the long run seriously undermine the confidence of the system’s users, i.e. of investors and states. It is thus natural that those concerned about the viability of international investment arbitration have begun to consider ways of improving it by eliminating or at least reducing the risks that have become apparent.

On a domestic level, the traditional judicial approach to secure uniformity in the interpretation and application of the law lies in the establishment of appellate review exercised by higher courts coupled with a formal or informal obligation to follow appellate decisions on the part of lower courts, and possibly even by courts on the same level.

Up until recently appellate review was practically unknown in international law. In 1994, however, the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes introduced an Appellate Body with the task of hearing appeals from panel cases. It was a central aim of this innovative feature in international economic law to contribute to one of the main goals of the WTO dispute settlement system, i.e. ‘providing security and predictability to the multilateral trading system’. Meanwhile, other international courts and tribunals provide for appellate review: the ad hoc criminal tribunals established by the UN Security Council as well as the International Criminal Court have appeals chambers competent to review judgments of the trial chambers. One must acknowledge, however, that in the context of criminal tribunals the main rationale for appellate review is found in the fundamental right of individuals to have their convictions reviewed by a higher tribunal, as guaranteed by human rights instruments such as the International Covenant on Civil and Political Rights.

A. An Appellate Mechanism for Investment Arbitration

The notion of an appellate mechanism for investment arbitration apparently had some appeal and was intensely discussed in the investment arbitration community in the aftermath of the Lauder/CME arbitrations against the Czech Republic. A discussion

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56 Ibid., art. 17(1).
57 Ibid., art. 3(2).
58 See 1966 International Covenant on Civil and Political Rights, art. 14(5), 999 UNTS 171, which provides: ‘Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.’
paper of the ICSID Secretariat was circulated and widely debated. It outlined the possibility of the establishment of an appellate institution within the ICSID system that was clearly influenced by the system of WTO appellate review.

The contemplated introduction of an appellate mechanism clearly departed from the ‘correction’ tool presently contained in the ICSID Convention in the form of the annulment of awards by special ad hoc committees. The grounds of annulment provided in Article 52 are, however, limited to extreme procedural defects of the arbitration proceedings and do not give rise to wide powers of substantive review.

The proposal for an appellate mechanism to be included in ICSID arbitration faced serious difficulties. Since Article 53 of the ICSID Convention expressly provides that ICSID awards ‘shall be binding on the parties and shall not be subject to any appeal [...]’ it would be hard to introduce an appellate system without treaty amendment. As a matter of practice, changing the ICSID Convention would be hardly feasible. Thus, the plan was not further pursued.

However, some relicts can still be found in a number of US BITs. Based on a provision in the 2004 US Model BIT, they provide for future discussions on the establishment of an ‘appellate body or similar mechanism’ for investment arbitration. So far, no action has been taken.

B. A Preliminary Reference System

The practical difficulties with establishing an appellate system for investment arbitration meant that alternative ideas pursuing similar purposes were called for. It was thus not surprising that one of the major ‘harmonization’ vehicles, successfully employed in the EU, the ‘preliminary reference’ system was invoked as possible template for investment arbitration. According to the EC Treaty, national courts may ask the European Court

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60 1965 ICSID Convention, art. 52(1) provides: ‘Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
(a) that the Tribunal was not properly constituted;
(b) that the Tribunal has manifestly exceeded its powers;
(c) that there was corruption on the part of a member of the Tribunal;
(d) that there has been a serious departure from a fundamental rule of procedure; or
(e) that the award has failed to state the reasons on which it is based.’

61 See supra note 30.

62 See 2004 US Model BIT, Ann. D, which provides: ‘Within three years after the date of entry into force of this Treaty, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 34 in arbitrations commenced after they establish the appellate body or similar mechanism.’
of Justice for a preliminary ruling on matters of Community law which is then binding for them in their final decision of the dispute.63

The potential usefulness of such a system for securing the coherence and uniformity of international law has been recognized by a number of international law scholars and practitioners, including presidents of the ICJ, who have proposed that specialized international courts and tribunals should have similar opportunities to make such ‘references’ to the ICJ with regard to questions of general public international law.64

It was suggested that the establishment of a permanent body authorized to give preliminary rulings on investment law issues would be less ambitious than the creation of an appellate court or tribunal, that it would avoid the ‘constitutional’ difficulty of Article 53 ICSID Convention and equally serve the purpose of ensuring consistency in investment decisions.65 Despite the ‘lighter’ design of such a system it would still require a number of legal steps. Whether they will be taken depends on the political will of the states involved.

C. Consolidation of Proceedings or Similar Pragmatic Moves

Another, even more pragmatic, measure to avoid the risk of diverging dispute settlement outcomes in investment arbitration, which does not require any treaty action by states, is the consolidation of arbitration proceedings that are related to each other. In fact, such consolidation has already happened in a number of NAFTA Chapter 11 cases.66

The high number of investment claims brought against Argentina in the aftermath of the latter’s currency crisis has prompted another practical move to secure the consistency of results by trying to obtain an identical or at least a similar composition of

63 Treaty establishing the European Community, art. 234(1) provides: ‘The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community [...]’


ICSID tribunals, as it happened in \textit{Camuzzi v. Argentina}^{67} and \textit{Sempra v. Argentina}.^{68} The two awards on jurisdiction, based on two different BITs because of the different nationality of the two investors, were rendered on the same date and did not only reach the same conclusion, but also relied on largely identical reasons in upholding their jurisdiction over the claims. This demonstrates that very simple mechanisms may often lead to the wanted result.

As a practical matter it must be mentioned, however, that such consolidation always depends upon the willingness of the parties to accept it. Where parties reject it, often as a result of strategic considerations,^69 the best intentions will fail. Also, the 2004 US Model requires the consent of the parties.^70

D. Strengthening the Power of Precedent

The least spectacular but probably most effective adjudicatory technique to avoid inconsistent decisions is relying on and ‘remaining faithful to’ prior decisions: \textit{stare decisis}.^71 But international adjudication exhibits an awkward relationship to the doctrine of precedent or \textit{stare decisis}. Since the renunciation of \textit{stare decisis} by the drafters of the Statute of the Permanent Court of International Justice in the 1920s, carried over to the present ICJ Statute,^72 most international dispute settlement rules, including those applying in investment arbitration, expressly or implicitly disavow any binding force of precedent.^73

\begin{footnotes}


69 For instance, in the CME case, supra note 45, the Czech Republic resisted consolidation with the Lauder arbitration, supra note 44.

70 2004 US Model BIT, art. 33(1) provides: ‘Where two or more claims have been submitted separately to arbitration under Article 24(1) and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties […]’.

71 According to B. A. Garner, Black's Law Dictionary 1406 (1990), the Common Law doctrine of \textit{stare decisis} (et non quieta movere) means a ‘[p]olicy of courts to stand by precedent and not to disturb settled point.’

72 1920 Statute of the Permanent Court of International Justice, art. 59, \textit{PCIJ} (Ser. D) No. 1, 7, 25, provided – in the same words as today’s Statute of the ICJ – that ‘[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.’

73 \textit{See}, e.g., 1982 Statute of the International Tribunal for the Law of the Sea, Annex VI to the United Nations Convention on the Law of the Sea (UNCLOS), art. 33(2); 1992 NAFTA, supra note 6, art. 1136(1), expressly states: ‘An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.’ Though 1965 ICSID Convention, art. 53(1) merely provides that an ‘award shall be binding on the parties’, this provision is generally interpreted as excluding the applicability of the principle of binding precedent in ICSID arbitration. \textit{Cf.} Ch. Schreuer, \textit{The ICSID Convention: A Commentary} 1082 (2001).
\end{footnotes}
As a practical matter, however, most international dispute settlement systems have developed a de facto case law whereby they rather faithfully tend to follow their earlier decisions. The ICJ is notorious for closely following its earlier judgments, almost exclusively citing its own precedent and rarely overruling itself.\textsuperscript{74} WTO Panels and the WTO Appellate Body have equally developed a consistent body of international trade law by a de facto stare decisis.\textsuperscript{75}

In an almost schizophrenic fashion, international courts and tribunals regularly first reject any stare decisis and then follow their own and others’ precedents. This phenomenon can also be witnessed in investment arbitration. In the early annulment decision of the Amco case, the ad hoc Committee found that ‘[n]either the decisions of the International Court of Justice in the case of the Award of the King of Spain nor the Decision of the Klöckner ad hoc Committee are binding on this ad hoc Committee’.\textsuperscript{76} It added, however, that ‘the absence […] of a rule of stare decisis in the ICSID arbitration system does not prevent this ad hoc Committee from sharing the interpretation given to Article 52(1)(e) by the Klöckner ad hoc Committee’.\textsuperscript{77} In a similar way, the ICSID tribunal in LETCO v. Liberia found that though it was ‘not bound by the precedents established by other ICSID Tribunals, it is nonetheless instructive to consider their interpretations’.\textsuperscript{78}

With the increasing number of investment awards, the potential sources serving as precedents are also growing. It is thus no wonder that ICSID and other investment tribunals must carefully navigate between the Scylla of overly zealous adherence to false precedents in the form of arbitral pronouncements on differently worded BIT provisions, inapplicable in the specific case, and the Charybdis of disregarding relevant interpretations of general international law, putting the unity of the law at risk. The danger of falsely relying on arbitral interpretations of investment treaty provisions that are not applicable and do not even resemble the applicable interpretations in a specific dispute is usually met by the tribunals’ careful emphasis that they must exercise their adjudicatory powers only on the basis of the specific applicable law. In the words of the SGS v. Philippines tribunal, ‘in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State’.\textsuperscript{79} The threat of creating inconsistencies and deviating from accepted interpretations of international law may be met by the alertness


\textsuperscript{76} Amco \textit{v.} Indonesia, Decision on Annulment of 16 May 1986, para. 44, \textit{1 ICSID Reports} 509, 521.

\textsuperscript{77} \textit{Ibid}.

\textsuperscript{78} LETCO \textit{v.} Liberia, Award of 31 March 1986, \textit{2 ICSID Reports} 346, 352.

\textsuperscript{79} SGS \textit{v.} Philippines, \textit{supra} note 33, para. 97.
of tribunals and their willingness to adopt persuasive interpretations of similar or comparable issues. In the words of the ICSID tribunal in *AES v. Argentina*,

‘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 position 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.’

The navigating skills employed by arbitrators in such rough waters have been aptly summarized and characterized by two recent ICSID tribunals. In *ADC v Hungary*,

"The Parties to the present case have also debated the relevance of international case law relating to expropriation. It is true that arbitral awards do not constitute binding precedent. It is also true that a number of cases are fact-driven and that the findings in those cases cannot be transposed in and of themselves to other cases. It is further true that a number of cases are based on treaties that differ from the present BIT in certain respects. However, cautious reliance on certain principles developed in a number of those cases, as persuasive authority, may advance the body of law, which in turn may serve predictability in the interest of both investors and host States."

Similarly, the ICSID tribunal in *Saipem v. Bangladesh*

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

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80 *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction of 26 April 2005.
81 AES v. Argentina, *supra* note 80, paras. 30.
82 ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary, ICSID Case No. ARB/03/16, Award of 2 October 2006.
83 ADC v. Hungary, *supra* note 82, para. 293.
VI. A More Effective International System?

The current boom of investment arbitration demonstrates that the enforcement of treaty and customary law obligations has become a matter of routine in this particular field of international economic law. The increased probability of the actual enforcement of international standards of investment protection is generally welcomed in a system, such as the international legal order, which normally suffers from rather weak compliance mechanisms.

At present, investment tribunals provide a constant ‘supply’ of the actual application of international law, not only of specific treaty standards contained in bilateral and multilateral agreements, but also of customary international law concerning foreign investment. Beyond that, investment arbitration significantly contributes to the development of general international law by rendering decisions on questions such as attribution of conduct to states, preclusion of wrongfulness, treaty interpretation and others. Today, as a result of carefully argued awards, we know much better what fair and equitable treatment, expropriation, or full protection and security mean than we did ten of fifteen years ago.

That the increase of investment decisions also leads to a certain number of inconsistencies is probably normal in any developed legal system. Thus, the risk of fragmentation should not be exaggerated. The overall tendency of investment tribunals to adhere to previous decisions and attempt to contribute to the formation of a 'jurisprudence constante' is likely to safeguard the coherence and predictability required of any mature legal system.

VII. Conclusion

Investment arbitration has turned into a ‘hothouse’ for all problems associated with the proliferation of courts and tribunals in international law. It has all the drama of arbitral decision-makers uttering conflicting and diverging opinions about central legal issues which may cast doubt on the reliability and predictability of the entire system. At the same time, it re-cycles old hopes and generates innovative ideas about remediating these problems while most arbitral tribunals simply become more cautious in their pronouncements, trying to avoid open conflict by largely adhering to what has become a body of de facto precedent.