DIVERSITY AND HARMONIZATION OF TREATY INTERPRETATION IN INVESTMENT ARBITRATION*

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Investment arbitration typically involves a variety of treaties. Most frequently it is based on bilateral investment treaties (BITs). Alternatively, multilateral regional treaties such as the North American Free Trade Agreement (NAFTA) or the Energy Charter Treaty (ECT) are the basis of consent to arbitration. In addition, multilateral treaties such as the Convention on the Settlement of Investment Disputes between States and the Nationals of Other States (ICSID Convention) are frequently interpreted and applied.

Investment arbitration takes place before *ad hoc* tribunals. Their composition varies from case to case. This makes it considerably more difficult to develop a consistent case law than in a permanent judicial institution such as the International Court of Justice (ICJ), The European Court of Human Rights (ECtHR) or The Court of Justice of the European Communities.

This article looks at the methodology of tribunals in interpreting treaties, at their willingness to follow previous decisions on like questions and at possible methods to achieve consistency and harmonization.[1]

I. The Methods of Treaty Interpretation Adopted by Tribunals

A. *Interpretation in Accordance with the Vienna Convention on the Law of Treaties*

Tribunals almost invariably start by invoking Article 31 of the Vienna Convention on the Law of Treaties (VCLT) when interpreting treaties. There

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[1] Most of the decisions cited in this article may be found at one of the following websites: <ita.law.uvic.ca/> or www.investmentclaims.com/ (accessed on 1 May 2009).

are numerous decisions to this effect.[2] For instance the Tribunal in *Siemens* v. *Argentina*[3] said:

> 80. Both parties have based their arguments on the interpretation of the Treaty in accordance with Article 31(1) of the Vienna Convention. This Article provides that a treaty 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." The Tribunal will adhere to these rules of interpretation in considering the disputed provisions of the Treaty. ...[4]

In referring to the rules of interpretation contained in the VCLT, tribunals sometimes point out that these rules reflect customary international law.[5] Thus the Tribunal in *Tokios Tokeles* v. *Ukraine*[6] said:

> 27. As have other tribunals, we interpret the ICSID Convention and the Treaty between the Contracting Parties according to the rules set forth in the Vienna Convention on the Law of Treaties, much of which reflects customary international law. Article 31 of the Vienna Convention provides that "[a] treaty shall 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 light of its object and purpose.[7]

At times, tribunals will also refer to the supplementary means of interpretation contained in Article 32 of the VCLT. In the words of the Tribunal in *Noble Ventures* v. *Romania:*[8]

> 50. ... reference has to be made to Arts. 31 et seq. of the Vienna Convention on the Law of Treaties which reflect the customary international law concerning treaty interpretation. Accordingly, treaties have 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 the object and purpose of the Treaty, while

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[2] *See also AAPL v. Sri Lanka*, Award, 27 June 1990, paras. 38–42; *MTD v. Chile*, Award, 25 May 2004, para. 112; *Enron v. Argentina*, Decision on Jurisdiction (Ancillary Claim), 2 August 2004, para. 32; *Salini v. Jordan*, Decision on Jurisdiction, 29 November 2004, para. 75; *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, paras. 117, 147–165; *Sempra Energy Intl. v. Argentina*, Decision on Jurisdiction, 11 May 2005, para. 141; *Camuzzi v. Argentina*, Decision on Jurisdiction, 11 May 2005, para. 133; *Methanex v. United States*, Award, 3 August 2005, Part II, Chapter B, paras. 15–23, Part IV, Chapter B, para. 29; *Eureko v. Poland*, Partial Award, 19 August 2005, para. 247; *Aguas del Tunari, S.A. v. Bolivia*, Decision on Jurisdiction, 21 October 2005, paras. 88–93, 226, 230, 239; *National Grid v. Argentine Republic*, Decision on Jurisdiction, 20 June 2006, paras. 51, 80; *Canfor v. United States, Tembec v. United States, Terminal Forest Products v. United States*, Order of the Consolidation Tribunal, 7 September 2005, paras. 59, 86, 95, 113; *Bogdanov v. Moldova*, Award, 22 September 2005, section 4.2.4; *Saluka v. Czech Republic*, Partial Award, 17 March 2006, para. 296 *et seq.; Suez* v. *Argentina*, Decision on Jurisdiction, 16 May 2006, ICSID Case No. ARB/03/17, para. 54; *Azurix v. Argentina*, Award, 14 July 2006, paras. 307, 360, 391.

[3] *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004.

[4] para. 80.

[5] *National Grid v. Argentine Republic*, Decision on Jurisdiction, 20 June 2006, para. 51; *Canfor v. United States, Tembec v. United States, Terminal Forest Products v. United States*, Order of the Consolidation Tribunal, 7 September 2005, para. 59.

[6] *Tokios Tokeles v. Ukraine*, Decision on Jurisdiction, 29 April 2004.

[7] Para. 27, footnotes omitted. *See also* paras. 46, 75 and 85.

[8] *Noble Ventures v. Romania*, Award, 12 October 2005.

> recourse may be had to supplementary means of interpretation, including the preparatory work and the circumstances of its conclusion, only in order to confirm the meaning resulting from the application of the aforementioned methods of interpretation. Reference should also be made to the principle of effectiveness (effet utile), which, too plays an important role in interpreting treaties.[9]

B. *Interpretation in Accordance with the Treaty's Object and Purpose*

Among the principles contained in Article 31 VCLT an interpretation that looks at the treaty's object and purpose is particularly popular.[10] In the context of BITs this often leads to an interpretation that is favourable to investors. For instance, the Tribunal in *Noble Ventures* v. *Romania*[11] said:

> 52. The object and purpose rule also supports such an interpretation. While it is not permissible, as is too often done regarding BITs, to interpret clauses exclusively in favour of investors, here such an interpretation is justified. Considering, as pointed out above, that any other interpretation would deprive Art. II (2)(c) [an umbrella clause] of practical content, reference has necessarily to be made to the principle of effectiveness, also applied by other Tribunals in interpreting BIT provisions (see SGS v. Philippines, para. 116 and Salini v. Jordan, para. 95). ...[12]

On the other hand the Tribunal in *Amco* v. *Indonesia*[13] in interpreting the ICSID Convention pointed out that investment protection was also in the longer term interest of host States: "...to protect investments is to protect the general interest of development and of developing countries".[14] The most frequent way to find a treaty's object and purpose was to look at the preamble.[15] The Tribunal in *Siemens* v. *Argentina*[16] said in this respect:

> 81. The Tribunal considers that the Treaty has to be interpreted neither liberally nor restrictively, as neither of these adverbs is part of Article 31(1) of the Vienna Convention. The Tribunal shall be guided by the purpose of the Treaty as expressed in its title and preamble. It is a treaty "to protect" and "to promote" investments. The preamble provides that the parties have agreed to the provisions

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[9] para. 50.

[10] *See also Lauder v. Czech Republic*, Award, 3 September 2001, para. 292; *MTD v. Chile*, Award, 25 May 2004, paras. 104, 105; *CMS v. Argentina*, Award, 12 May 2005, para. 274; *Aguas del Tunari, S.A. v. Bolivia*, Decision on Jurisdiction, 21 October 2005, paras. 153, 240–1, 247; *Continental Casualty Co. v. Argentina*, Decision on Jurisdiction, 22 February 2006, para. 80; *Azurix v. Argentina*, Award, 14 July 2006, para. 360.

[11] *Noble Ventures v. Romania*, Award, 12 October 2005.

[12] para. 52.

[13] *Amco v. Indonesia*, Decision on Jurisdiction, 25 September 1983, *ICSID Reports* 1: 389.

[14] At para. 23. *See also* Award, 20 November 1984, *ICSID Reports* 1: 413, at para. 249.

[15] *SGS v. Philippines*, Decision on Jurisdiction, 29 January 2004, para. 116; *Occidental Exploration and Production Co. v. Ecuador*, Award, 1 July 2004, para. 183; *CMS v. Argentina*, Award, 12 May 2005, para. 274; *Bogdanov v. Moldova*, Award, 22 September 2005, section 4.2.4; *Aguas del Tunari v. Bolivia*, Decision on Jurisdiction, 21 October 2005, para. 241; *Saluka v. Czech Republic*, Partial Award, 17 March 2006, para. 299; *Azurix v. Argentina*, Award, 14 July 2006, para. 360.

[16] *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004.

> of the Treaty for the purpose of creating favorable conditions for the investments of nationals or companies of one of the two States in the territory of the other State. Both parties recognize that the promotion and protection of these investments by a treaty may stimulate private economic initiative and increase the well-being of the peoples of both countries. The intention of the parties is clear. It is to create favorable conditions for investments and to stimulate private initiative.[17]

One tribunal warned against over-extending the method of looking at object and purpose. The Tribunal in *Plama* v. *Bulgaria*[18] said:

> 193. ... the Tribunal is mindful of Sir Ian Sinclair's warning of the "risk that the placing of undue emphasis on the 'object and purpose' of a treaty will encourage teleological methods of interpretation [which], in some of its more extreme forms, will even deny the relevance of the intentions of the parties.[19]

C. *Restrictive or Effective Interpretation*

The discussion about the propriety of a restrictive or effective interpretation is by no means new. The idea that treaty provisions that constitute derogations from sovereignty call for a restrictive interpretation is usually rejected nowadays.[20] Object and purpose oriented methods of interpretation typically lead to results that favour effectiveness. Investment tribunals have grappled with these conflicting theories in a number of cases. The correct interpretation of "umbrella clauses" is particularly prominent in these cases.[21]

The Tribunal in *SGS* v. *Pakistan*[22] clearly favoured a restrictive approach. It said:

> 171. ... The appropriate interpretive approach [to the umbrella clause] is the prudential one summed up in the literature as *in dubio pars mitior est sequenda*, or more tersely, *in dubio mitius*[23]

The Tribunal in *Noble Ventures* v. *Romania*[24] seemed to proceed from a similar presumption:

> 55. Thus, an umbrella clause, when included in a bilateral investment treaty, introduces an exception to the general separation of States obligations under

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[17] para. 81. Footnote omitted.

[18] *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, para. 193.

[19] para. 193. Footnote omitted.

[20] *See* Christoph Schreuer, 'The Interpretation of Treaties by Domestic Courts', *BYIL* 45 (1971): 255, at 283–301.

[21] Umbrella clauses put undertakings by the host State, especially in investment contracts, under the treaties' protective umbrella. These clauses while common in BITs may also be contained in other treaties for the protection of investments. The Energy Charter Treaty in Article 10(1), last sentence also contains an umbrella clause: "Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party". *Generally see*: Anthony C. Sinclair, 'The Origin of the Umbrella Clause in the International Law of Investment Protection', *Arbitration International* 20 (2004): 411.

[22] *SGS v. Pakistan*, Decision on Jurisdiction, 6 August 2003.

[23] para. 171.

[24] *Noble Ventures v. Romania*, Award, 12 October 2005.

> municipal and under international law. In consequence, as with any other exception to established general rules of law, the identification of a provision as an "umbrella clause" can as a consequence proceed only from a strict, if not indeed restrictive, interpretation of its terms and, more generally, in accordance with the well known customary rules codified under Article 31 of the Vienna Convention of the Law of Treaties (1969).[25]

This quote is curious in more than one respect. The Tribunal seemed to link its preference for a restrictive interpretation to the VCLT which, however, is silent on the point. Even more surprisingly, the Tribunal then proceeded to an application of the umbrella clause that gives it full effect.[26]

Other tribunals clearly rejected a restrictive interpretation.[27] For instance, the Tribunal in *Aguas del Tunari, S.A.* v. *Bolivia*[28] said:

> 91. ... the Vienna Convention represents a move away from the canons of interpretation previously common in treaty interpretation and which erroneously persist in various international law decisions today. For example, the Vienna Convention does not mention the canon that treaties are to be construed narrowly, a canon that presumes States can not have intended to restrict their range of action.[29]

Some tribunals clearly embraced a method of interpretation that gives full effect to the provision in question. The Tribunal in *SGS* v. *Philippines*[30] said:

> 116. The object and purpose of the BIT supports an effective interpretation of Article X(2) [umbrella clause]. The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended "to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other". It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.[31]

The Tribunal in *Eureko* v. *Poland*[32] also subscribed to an effective interpretation:

> 248. ... The context of Article 3.5 [the umbrella clause] is a Treaty whose object and purpose is "the encouragement and reciprocal protection of investment", a treaty which contains specific provisions designed to accomplish that end, of which Article 3.5 is one. It is a cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful

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[25] para. 55.

[26] Paras. 46–62. *See* at para 61: "... the Parties had as their aim to equate contractual obligations governed by municipal law to international treaty obligations as established in the BIT".

[27] *Loewen v. United States*, Decision on Jurisdiction, 9 January 2001, para. 51; *Methanex v. United States*, Decision on Jurisdiction, 7 August 2002, paras. 103–5; *Suez v. Argentina*, Decision on Jurisdiction, 16 May 2006, para. 59, 64; *Suez v. Argentina, AWG Group v. Argentina*, Decision on Jurisdiction, 3 August 2006, paras. 60, 61, 66.

[28] *Aguas del Tunari, S.A. v. Bolivia*, Decision on Jurisdiction, 21 October 2005.

[29] para. 91. Footnote omitted.

[30] *SGS v. Philippines*, Decision on Jurisdiction, 29 January 2004.

[31] para. 116.

[32] *Eureko v. Poland*, Partial Award, 19 August 2005.

> rather than meaningless. It is equally well established in the jurisprudence of international law, particularly that of the Permanent Court of International Justice and the International Court of Justice, that treaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective.[33]

Some tribunals, probably wisely, distance themselves from rules purporting to prescribe a restrictive or an extensive interpretation.[34] The Tribunal in *Mondev* v. *United States*[35] said:

> 43. In the Tribunal's view, there is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties. These are set out in Articles 31–33 of the Vienna Convention on the Law of Treaties, which for this purpose can be taken to reflect the position under customary international law.[36]

D. *Special Rules of Interpretation*

1. Expressio Unius est Exclusio Alterius

The proposition that the expression of one thing is the exclusion of another is not really a rule of law but a purported rule of logic. The limited value of this kind of logic is demonstrated by the conflicting ways in which this "rule" has been received by tribunals. The Tribunal in *Waste Management* v. *Mexico*[37] seemed to embrace it when it said:

> 85. Where a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law in the field of diplomatic protection or otherwise.[38]

Similarly, the Tribunal in *National Grid* v. *Argentina*[39] found that the non-inclusion of dispute settlement in a list of exceptions to the application of an MFN clause was an indication that it should be seen as included. The Tribunal said:

> 82. The Tribunal observes that the MFN clause does not expressly refer to dispute resolution or for that matter to any other standard of treatment provided for specifically in the Treaty. On the other hand, dispute resolution is not included among the exceptions to the application of the clause. As a matter of

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[33] para. 248.

[34] *El Paso v. Argentina*, Decision on Jurisdiction, 27 April 2006, paras. 68–70; *Pan American Energy v. Argentina*, Decision on Preliminary Objections, 27 July 2006, paras. 97–99; *Azurix v. Argentina*, Award, 14 July 2006, para. 307.

[35] *Mondev v. United States of America*, Award, 11 October 2002.

[36] para. 43. Footnote omitted.

[37] *Waste Management v. United Mexican States*, Award, 30 April 2004.

[38] para. 85.

[39] *National Grid v. Argentine Republic*, Decision on Jurisdiction, 20 June 2006.

> interpretation, specific mention of an item excludes others: *expressio unius est exclusio alterius.*[40]

By contrast, other tribunals seemed to reject this principle. The Tribunal in *Enron* v. *Argentina*[41] said:

> 46. The fact that a treaty may have provided expressly for certain rights of shareholders does not mean that a treaty not so providing has meant to exclude such rights if this can be reasonably inferred from the provisions of such treaty. Each instrument must be interpreted autonomously in the light of its own context and in the light of its interconnections with international law.[42]

The *expressio unius* principle also did not find favour with the Tribunal in *Siemens* v. *Argentina.*[43] The Tribunal said:

> 140. ... If the Treaty should be interpreted as alleged by Argentina – by excluding from its application every specific situation that has not been included –, we would be bound to reach the conclusion that, in cases of discrimination, arbitrary measures, or treatment short of the just and equitable standard, there would not be a right to compensation under the Treaty – an unlikely intended result by the Contracting Parties given the Treaty's purpose. If a matter is dealt with in a provision of the Treaty and not specifically mentioned under other provisions, it does not necessarily follow that the other provisions should be considered to exclude the matter especially covered.[44]

The problem with the *expressio unius* principle is not so much a lack of consistency of the tribunals but its limited usefulness. Whether the mention of one item or a list of items in a provision really excludes the relevance of other items depends very much on the particular circumstances and cannot be answered in a generalized way. Similarly, the question whether a provision in one treaty may be taken as proof that another treaty that lacks such a provision was meant to exclude the effects of the provision is difficult to answer in a generalized way with the tools of abstract logic.

2. *Interpretation in the Light of Other Treaties*

The large number of BITs, often containing similar or identical provisions, lends itself to a comparative approach. Especially the BITs of the host State but also of the investor's home State with third countries often lead to extensive comparisons and inferences.[45] The similarities and differences in the treaties offer infinite possibilities to try and draw conclusions.

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[40] para. 82. Footnote omitted.
[41] *Enron v. Argentina*, Decision on Jurisdiction, 14 January 2004.
[42] para. 46.
[43] *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004.
[44] para. 140.
[45] For an extensive comparative analysis of this kind *see Aguas del Tunari, S.A. v. Bolivia*, Decision on Jurisdiction, 21 October 2005, paras. 289–314.

At the simplest level, it seems plausible that identical or very similar wording in different treaties has the same meaning unless a different meaning can be gathered from the circumstances. The Tribunal in *Enron* v. Argentina[46] said to this effect:

> 47. ... Indeed, the interpretation of a bilateral treaty between two parties in connection with the text of another treaty between different parties will normally be the same, unless the parties express a different intention in accordance with international law. A similar logic is found in Article 31 of the Vienna Convention in so far as subsequent agreement or practice between the parties to the same treaty is taken into account regarding the interpretation of the treaty. There is no evidence in this case that the intention of the parties to the Argentina-United States Bilateral Treaty might be different from that expressed in other investment treaties invoked.[47]

But even this seemingly simple principle has narrow limits. Taken out of its specific context a seemingly similar provision can assume an entirely different meaning. This is illustrated by the interpretation of national treatment clauses such as Article 1102 of the NAFTA or similar provisions in BITs. Tribunals have refused to simply adopt the practice of GATT/WTO for the interpretation of national treatment clauses in investment treaties.[48] The Tribunal in *Methanex* v. *United States*[49] said in this context:

> As to the third general principle, the term is not to be examined in isolation or in abstracto, but in the context of the treaty and in the light of its object and purpose. One result of this third general principle, being relevant to Methanex's first argument on GATT jurisprudence and Article 1102 NAFTA, is that, as noted by the International Tribunal for the Law of the Sea in The MOX Plant case (as also applied in The OSPAR case): "the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard, to, inter alia, differences in the respective contexts, objects and purposes, subsequent practice of parties and travaux preparatoires."[50]

3. *The Significance of Model Treaties for Interpretation*

BITs are typically based on model treaties. Many States have model BITs which serve as a starting point for negotiations with a prospective treaty partner. To what extent the final product will resemble a country's model will depend on the relative weight of the negotiating partners, on whether the other country

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[46] *Enron v. Argentina*, Decision on Jurisdiction, 14 January 2004.

[47] para. 47. In the same sense: *Sempra Energy Intl. v. Argentina*, Decision on Jurisdiction, 11 May 2005, at para. 144.

[48] *See Occidental Exploration and Production Co. v. Ecuador*, Award, 1 July 2004, at paras. 174–6. But *see* for a contrary approach: *Pope and Talbot v. Canada*, Award on the Merits, 10 April 2001, at paras. 45–63, 68–9, *ICSID Reports* 7: 102.

[49] *Methanex Corp. v. United States*, Award, 3 August 2005.

[50] Part II, Chapter B, para. 16. *See also* paras. 25–37.

also has a model BIT that it wants to promote and on the general circumstances of the negotiations.

In *Siemens* v. *Argentina*,[51] Argentina had argued that the fact that a particular treaty provision departed from Germany's model BIT and was hence specifically negotiated should be given special weight in its interpretation. The Tribunal rejected this contention. It said:

> 106. The Respondent has stressed the fact that the dispute settlement clause departs from the standard bilateral investment treaty of Germany in order to support its argument that this was a clause specially negotiated and hence which should be differentiated from the rest. The acceptance of a clause from a model text does not invest this clause with either more or less legal force than other clauses which may had [sic] been more difficult to negotiate. The end result of the negotiations is an agreed text and the legal significance of each clause is not affected by how arduous was the negotiating path to arrive there. The Tribunal feels bound, in its interpretation of the Treaty, by the expressed intention of the parties to promote investments and create conditions favorable to them. The Tribunal finds that when the intention of the parties has been clearly expressed, it is not in its power to second-guess their intentions by attributing special meaning to phrases based on whether they were or were not part of a model draft.[52]

In *National Grid* v. *Argentina*[53] the United Kingdom had included a clarifying phrase concerning the reach of the MFN clause in its model treaty. But that model BIT was subsequent to the BIT that was applicable in the particular case which did not contain the clarifying phrase. The Tribunal found that the opening phrase "[f]or the avoidance of doubt" indicated that the clarifying phrase reflected the intention of the United Kingdom even with respect to earlier BITs. The Tribunal said:

> The implication in the wording of this additional paragraph is that, all along, this was the UK's understanding of the meaning of the MFN clause in previously concluded investment treaties.[54]

E. *The Use of* Travaux Preparatoires

According to Article 32 of the VCLT, the materials reflecting the preparatory work to a treaty only figure as supplementary means of interpretation. They are to be used only to confirm a meaning resulting from the primary means of interpretation contained in Article 31 or to determine the meaning if the primary means leave the meaning ambiguous or obscure or lead to a result that is manifestly absurd or unreasonable.

In practice, resort to *travaux preparatoires* seems to be determined less by their position among the canons of interpretation than by their availability.

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[51] *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004.
[52] para. 106.
[53] *National Grid v. Argentine Republic*, Decision on Jurisdiction, 20 June 2006.
[54] para. 85. Footnote omitted.

The drafting history of the ICSID Convention is documented in detail, readily available and easily accessible through an analytical index.[55] As a consequence ICSID tribunals frequently resort to it.

By contrast, the negotiating history of BITs is typically not documented. Therefore tribunals do not have the possibility to rely on *travaux preparatoires* even if they are minded to do so.

In *Aguas del Tunari, S.A.* v. *Bolivia*[56] the Tribunal requested the parties to submit any available evidence concerning the BITs interpretation and practice.[57] It summarized the unsatisfactory outcome of this attempt in the following terms:

> 274. This sparse negotiating history thus offers little additional insight into the meaning of the aspects of the BIT at issue, neither particularly confirming nor contradicting the Tribunal's interpretation.[58]

The position with NAFTA occupies a middle ground. For a number of years the documents illustrating the negotiating history were unavailable to the public. This had led to complaints about an inequality of arms between a respondent State which had access to these materials and a claimant investor who did not. In July 2004 the NAFTA Free Trade Commission announced the release of the negotiating history of Chapter Eleven of NAFTA dealing with investment.[59] Tribunals have referred to aspects of NAFTA's negotiating history.[60]

The Tribunal in *Methanex* v. *United States*[61] not only denied a request for documentary disclosure of the *travaux* to a number of NAFTA Articles.[62] It also stressed the limited relevance of the negotiating history under Article 32 of the VCLT. The Tribunal said:

> 22. *Article 32:* With respect to Article 32 of the Vienna Convention, Methanex has sought disclosure from the USA of the negotiating history of Articles 1101, 1102, 1105 and 2101 NAFTA in order to resolve the issues of their interpretation, as considered further below in Chapter II H of this Award. For present purposes, it is sufficient to note that, pursuant to Article 32, recourse may be had to supplementary means of interpretation only in the limited circumstances there specified. Other than that, the approach of the Vienna Convention is that the text of the treaty is deemed to be the authentic expression of the intentions of the

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[55] ICSID, *History of the ICSID Convention. Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Washington, DC: ICSID, 1968, reprinted in 2001).

[56] *Aguas del Tunari, S.A. v. Bolivia*, Decision on Jurisdiction, 21 October 2005.

[57] para. 268.

[58] para. 274.

[59] The documents are published at <www.naftaclaims.com/commission.htm> (accessed on 1 May 2009) It is unclear whether the available documentation covers all existing documents.

[60] *See e.g., Grand River Enterprises Six Nations Ltd. v. United States*, Decision on Jurisdiction, 20 July 2006, para. 35.

[61] *Methanex Corp. v. United States*, Award, 3 August 2005.

[62] Part II, Chapter H, paras. 1–26.

> parties; and its elucidation, rather than wide-ranging searches for the supposed intentions of the parties, is the proper object of interpretation.[63]

II. The Authority of Previous Decisions

A. *The Treatment of 'Precedents'*

Reliance on past decisions is a fundamental feature of any orderly decision process. Drawing on the experience of past decisions plays an important role in securing the necessary uniformity and stability of the law. The need for a coherent case law is evident. It strengthens the predictability of decisions and enhances their authority.

In actual fact, tribunals in investment disputes, including ICSID tribunals, rely on previous decisions of other tribunals whenever they can. At the same time, it is also well-established that the doctrine of precedent, in the sense known in the common law, does not apply in international adjudication.[64] In other words, tribunals in investment arbitrations are not bound by previous decisions of other tribunals. Each tribunal is constituted *ad hoc* for the particular case. Therefore, ICSID cannot be expected to act like an international court such as the ICJ or ECtHR.

The first part of Article 53(1) of the ICSID Convention states: "The award shall be binding on the parties...". This may be read as excluding the applicability of the principle of binding precedent to successive ICSID cases.[65] Nothing in the Convention's *travaux preparatories* suggests that the doctrine of *stare decisis* should be applied to ICSID arbitration.

Tribunals have pointed out repeatedly that they are not bound by previous ICSID cases. In the annulment proceedings in *Amco* v. *Indonesia*[66] the *ad hoc* Committee stated:

> 44. Neither the decisions of the International Court of Justice in the case of the Award of the King of Spain nor the Decision of the *Klockner ad hoc* Committee are binding on this *ad hoc* Committee. The absence, however, 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 *Klockner ad hoc* Committee. This interpretation is well founded in the context of the Convention and in harmony with applicable international jurisprudence. Therefore this *ad hoc* Committee does not feel compelled to distinguish strictly between the *ratio decidendi* and *obiter dicta* in the *Klockner ad hoc* Committee decision.[67]

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[63] Part II, Chapter B, para. 22. Footnote omitted.

[64] *See* Mohamed Shahabuddeen, *Precedent in the World Court* (Cambridge: CUP, 1996).

[65] Art. 59 of the Statute of the International Court of Justice is more specific on this point by saying: "The decision of the Court has no binding force except between the parties and in respect of that particular case".

[66] *Amco v. Indonesia*, Decision on Annulment, 16 May 1986, *ICSID Reports* 1: 521.

[67] para. 44; *see also Amco v. Indonesia*, Decision on Jurisdiction, 25 September 1983, *ICSID Reports* 1: 395.

Similarly, in *LETCO* v. *Liberia*,[68] the Tribunal, before quoting authority from other ICSID tribunals, said: "Though the Tribunal is not bound by the precedents established by other ICSID Tribunals, it is nonetheless instructive to consider their interpretations".[69]

Tribunals operating under the NAFTA in the framework of the ICSID Additional Facility have reached the same result. For instance, the Tribunal in *Feldman* v. *Mexico*[70] said:

> ... this Tribunal has also sought guidance in the decisions of several earlier NAFTA Chapter 11 Tribunals that have interpreted Article 1110. The Tribunal realizes that under NAFTA Article 1136(1), "An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case", and that each determination under Article 1110 is necessarily fact-specific. However, in view of the fact that both of the parties in this proceeding have extensively cited and relied upon some of the earlier decisions, the Tribunal believes it appropriate to discuss briefly relevant aspects of earlier decisions ...[71]

Other tribunals have followed the same line in finding that they are not bound by previous decisions but will take due account of them.[72]

The question of the authority of previous decisions became the subject-matter of heated debate in some of the cases against Argentina. Despite numerous decisions to the contrary, Argentina tenaciously kept raising the same jurisdictional objections over and over again. In the Decision on Jurisdiction in the resubmitted *Vivendi* case,[73] one of Argentina's objections concerned the question of whether the participation of foreign shareholders in a domestically incorporated company constituted an 'investment'. The Tribunal not only rejected the Argentinean objection but added an appendix to its decision in which it listed previous decisions that had rejected that same argument. The Tribunal said:[74]

> 94. Finally, numerous arbitral tribunals have rejected this very same jurisdictional objection as shown by the 18 cases referred to in Appendix 1 to this Decision. In each of those eighteen cases the tribunals upheld the right of shareholders to pursue such claims. In 11 cases, the Argentine Republic was respondent

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[68] *LETCO v. Liberia*, Award, 31 March 1986, *ICSID Reports* 2: 346.

[69] At p. 352.

[70] *Feldman v. Mexico*, Award, 16 December 2002, *ICSID Reports* 7: 341.

[71] para. 107.

[72] *EnCana v. Ecuador*, Award, 3 February 2006, para. 189; *El Paso v. Argentina*, Decision on Jurisdiction, 27 April 2006, para. 39; *Suez v. Argentina*, Decision on Jurisdiction, 16 May 2006, paras. 26, 31, 60–65; *Jan de Nul & Dredging International v. Egypt*, Decision on Jurisdiction, 16 June 2006, paras. 63, 64; *Azurix v. Argentina*, Award, 14 July 2006, para. 391; *Pan American Energy v. Argentina*, Decision on Preliminary Objections, 27 July 2006, para. 42; *Grand River Enterprises Six Nations Ltd. v. United States*, Decision on Jurisdiction, 20 July 2006, para. 36.

[73] *Compania de Aguas del Aconquija, S. A. & Vivendi Universal (formerly Compagnie Generale des Eaux) v. Argentine Republic*, Decision on Jurisdiction, 14 November 2005.

[74] para. 94.

> and asserted, and lost, this same objection. In the last one of these cases, the Tribunal observed that the very objection which Argentina raises in this case *has been made numerous times, never, so far as the Tribunal has been aware, with success.*[75]

Despite the tedium of repeated identical objections, tribunals have treated Argentina's right to reintroduce arguments that had failed in other cases and its insistence on the irrelevance of previous decisions with respect and caution. In *Enron* v. *Argentina*[76] the Tribunal said:

> 40. The Tribunal is of course mindful that decisions of ICSID or other arbitral tribunals are not a primary source of rules. The citations of and references to those decisions respond to the fact that the Tribunal in examining the claim and arguments of this case under international law, believes that in essence the conclusions and reasons of those decisions are correct.[77]

In a subsequent decision in the same case the Tribunal was even more specific. It said:

> The Tribunal agrees with the view expressed by the Argentine Republic in the hearing on jurisdiction held in respect of this dispute, to the effect that the decisions of ICSID tribunals are not binding precedents and that every case must be examined in the light of its own circumstances.[78]

By far the most extensive discussion of the value of previous decisions as 'precedents' can be found in *AES Corp.* v. *Argentina*.[79] In that case the Claimant had pointed out that all of Argentina's objections to jurisdiction had been raised repeatedly in similar terms in other cases and that these same objections had been rejected consistently by other tribunals.[80] In response, Argentina insisted on the specificity of each treaty involved and said:

> Repeating decisions taken in other cases, without making the factual and legal distinctions, may constitute an excess of power and may affect the integrity of the international system for the protection of investments.[81]

The Tribunal agreed with Argentina and stated that the provisions of Article 25 of the ICSID Convention, together with fundamental principles of public international law, dictate that:

> ... each decision or award delivered by an ICSID Tribunal is only binding on the parties to the dispute settled by this decision or award.[82] There is so far no

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[75] *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Question on Jurisdiction, 17 June 2005. [footnote original].

[76] *Enron v. Argentina*, Decision on Jurisdiction, 14 January 2004.

[77] para. 40.

[78] *Enron v. Argentina*, Decision on Jurisdiction (Ancillary Claim), 2 August 2004, para. 25.

[79] *AES Corp. v. Argentina*, Decision on Jurisdiction, 26 April 2005, paras. 17–33.

[80] paras. 17, 18.

[81] Quoted at para. 22.

[82] Article 53 of the ICSID Convention. [footnote original].

> rule of precedent in general international law; nor is there any within the specific ICSID system for the settlement of disputes between one State party to the Convention and the National of another State Party. This was in particular illustrated by diverging positions respectively taken by two ICSID tribunals on issues dealing with the interpretation of arguably similar language in two different BITs.[83]

The *AES* Tribunal pointed out that each BIT has its own identity and that striking similarities in the wording of many BITs often dissimulate real differences.[84] The Tribunal drew the following conclusion:

> From the above derive at least two consequences: *the first* is that the findings of law made by one ICSID tribunal in one case in consideration, among others, of the terms of a determined BIT, are not necessarily relevant for other ICSID tribunals, which were constituted for other cases; the *second* is that, although Argentina had already submitted similar objections to the jurisdiction of other tribunals prior to those raised in the present case before this Tribunal, Argentina has a valid and legitimate right to raise the objections it has chosen for opposing the jurisdiction of this Tribunal.[85]

At the same time the Tribunal rejected the "excessive assertion" that "absolutely no consideration might be given to other decisions on jurisdiction or awards delivered by other tribunals in similar cases".[86] In case of a high level of similarity or identity of underlying legal questions the Tribunal did not feel barred as a matter of principle from considering the position taken by other tribunals.[87]

This led the Tribunal to the following compromise solution:

> An identity of the basis of jurisdiction of these tribunals, even when it meets with very similar if not even identical facts at the origin of the disputes, does not suffice to apply systematically to the present case positions or solutions already adopted in these cases. 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 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.[88]

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[83] SGS *Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case N° ARB/01/13 and *SGS Societe Generate de Surveillance S.A v. Republic of the Philippines*, ICSID Case N° ARB/02/6. [footnote original].

[84] paras. 24–5.

[85] para. 26.

[86] para. 27.

[87] para. 28.

[88] para. 30.

Having made these broad statements on the limited value of "precedents", the Tribunal actually proceeded to examine and rely on previous decisions by other tribunals.[89]

The decision in *Gas Natural* v. *Argentina*[90] demonstrates the Tribunal's cautious attitude towards 'precedents' not only in its wording but also in the decision's structure. The Tribunal first gave its Decision on Jurisdiction without reference to previous cases.[91] After having reached a result it stated:

> 36. The Tribunal wishes to emphasize that it has rendered its decision independently, without considering itself bound by any other judgments or arbitral awards. Having reached its conclusions, however, the Tribunal thought it useful to compare its conclusion with the conclusions reached in other recent arbitrations conducted pursuant to the ICSID Arbitration Rules and arising out of claims under contemporary bilateral investment treaties. We summarize a few of these decisions here, and confirm that we have not found or been referred to any decisions or awards reaching a contrary conclusion.[92]

Only after having made that statement does the Tribunal examine a number of previous decisions which it finds to be in line with its own conclusions.[93] Its conclusion is as follows:

> 52. In sum, the Tribunal is satisfied that its analyses and decisions, independently arrived at, are consistent with the conclusions of other arbitral tribunals faced with similar issues. It does not follow that the ultimate decisions of this Tribunal on the merits will be wholly consistent with those of other arbitral tribunals, because different claims have been based on different treaties and different factual situations.[94]

Whether a decision that relies preponderantly or exclusively on previous decisions might be subject to annulment for that reason may be subject to doubt. No decision on annulment in ICSID proceedings has ever annulled an award because it rested its reasoning on precedents. But an application for annulment that alleges an excess of powers or a failure to state reasons because the tribunal has simply relied on earlier decisions without making an independent decision or developing its own reasons is entirely possible. From the perspective of tribunals it seems wiser not to expose themselves to this charge.

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[89] paras. 51–9, 70, 73, 86, 89, 95–7. *See also Bayindir v. Pakistan*, Decision on Jurisdiction, 14 November 2005, para. 76: "The Tribunal agrees that it is not bound by earlier decisions, but will certainly carefully consider such decisions whenever appropriate". [referring to *AES Corp. v. Argentina*].

[90] *Gas Natural SDG, S.A. v. Argentina*, Decision on Jurisdiction, 17 June 2005.

[91] paras. 20–35.

[92] para 36.

[93] paras. 37–51.

[94] para. 52.

B. *Inconsistent Decisions*

In some cases tribunals did not follow earlier decisions but adopt different solutions. At times they simply adopted a different solution without distancing themselves from the earlier decision. At other times they referred to the earlier decision and pointed out that they were unconvinced by what another tribunal had said and that, therefore, their decision departed from the one adopted earlier.

A clear example of a rejection of an earlier decision occurred in *SGS* v. *Philippines*.[95] The Tribunal discussed the earlier decision in *SGS* v. *Pakistan*[96] and voiced its disagreement with some of the answers given there. The *SGS v. Philippines* Tribunal said:

> 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. The ICSID Convention provides only that awards rendered under it are "binding on the parties" (Article 53(1)), a provision which might be regarded as directed to the *res judicata* effect of awards rather than their impact as precedents in later cases. In the Tribunal's view, although different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State. Moreover there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision. There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals. It must be initially for the control mechanisms provided for under the BIT and the ICSID Convention, and in the longer term for the development of a common legal opinion or *jurisprudence constante*, to resolve the difficult legal questions discussed by the *SGS* v. *Pakistan* Tribunal and also in the present decision.[97]

The consistency of decisions has become a prominent issue in investment arbitration.[98] There have been a number of instances in which tribunals sitting in different cases have come to conflicting conclusions on identical questions. Four examples may suffice to illustrate this point:

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[95] *SGS v. Philippines*, Decision on Jurisdiction, 29 January 2004.

[96] *SGS v. Pakistan*, Decision on Jurisdiction, 6 August 2003, *ICSID Reports* 8: 383.

[97] *SGS v. Philippines*, at para. 97. Footnotes omitted.

[98] In addition to conflicting answers to similar questions in different cases there is the occasional problem of conflicting outcomes of parallel proceedings concerning the same dispute. *See* especially *Ronald S. Lauder v. The Czech Republic*, Final Award, 3 September 2001, *ICSID Reports* 9: 66 and *CME v. The Czech Republic*, Partial Award, 13 September 2001, *ICSID Reports* 9: 121.

1. Many BITs in their consent clauses contain phrases referring to "all disputes concerning investments" or "any legal dispute concerning an investment". Tribunals have given conflicting meanings to these.[99]
2. Umbrella clauses have received divergent interpretations in the practice of tribunals.[100]
3. A common condition in BITs for the institution of arbitration proceedings is the observance of so-called waiting periods. This means that an amicable settlement must have been attempted through consultations or negotiations for a certain period of time. The reaction of tribunals to these provisions has not been uniform. In some cases the tribunals found that noncompliance with the waiting periods did not affect their jurisdiction.[101] In other cases they reached the opposite conclusion.[102]
4. Most BITs and some other treaties for the protection of investment contain most favoured nation (MFN) clauses. This has led to the question of whether the effect of MFN clauses extends to the provisions on dispute settlement in these treaties. Tribunals have given conflicting decisions on this point.[103]

III. Consistency and Harmonization

Fortunately the problem of inconsistency is not pervasive. Most tribunals carefully examine earlier decisions and accept these as authority most of the time. But sometimes they disagree with them and make their disagreement

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[99] *Salini Costruttori SpA et Italstrade SpA c/Royaume du Maroc*, Decision on Jurisdiction, 23 July 2001, *Journal de Droit International* (2002): 196, *ICSID Reports* 6: 400, para. 61; *Compania de Aguas del Aconquija, S. A. & Vivendi Universal (formerly Compagnie Generale des Eaux) v. Argentine Republic*, Decision on Annulment, 3 July 2002, *ICSID Reports* 6: 340, para. 55; *SGS v. Pakistan*, Decision on Jurisdiction, 6 August 2003, *ICSID Reports* 8: 383, para. 55; *SGS v. Philippines*, Decision on Jurisdiction, 29 January 2004, *ICSID Reports* 8: 518, paras. 131–5.

[100] *SGS v. Pakistan*, Decision on Jurisdiction, 6 August 2003, *ICSID Reports* 8: 383 at paras. 163–73; *SGS v. Philipines*, Decision on Jurisdiction, 29 January 2004, *ICSID Reports* 8: 518, paras. 125, 128; *Joy Mining v. Egypt*, Award, 6 August 2004, para. 81; *CMS v. Argentina*, Award, 12 May 2005, paras. 296–303; *Eureko v. Poland*, Partial Award, 19 August 2005, paras. 244–60; *Noble Ventures v. Romania*, Award, 12 October 2005, paras. 42–62; *El Paso v. Argentina*, Decision on Jurisdiction, 27 April 2006, paras. 66–86; *Pan American Energy v. Argentina*, Decision on Preliminary Objections, 27 July 2006, paras. 92–115.

[101] *Ethyl Corp. v. Canada*, Decision on Jurisdiction, 24 June 1998, *ICSID Reports* 7: 12 at paras. 76–88 and in *Ronald S. Lauder v. The Czech Republic*, Final Award, 3 September 2001; *Wena Hotels v. Egypt*, Decision on Jurisdiction, 29 June 1999, *ICSID Reports* 6: 74, 87; *SGS v. Pakistan*, Decision on Jurisdiction, 6 August 2003, *ICSID Reports* 8: 383, para. 184.

[102] *A. Goetz v. Burundi*, Award, 10 February 1999, *ICSID Reports* 6: 5, at paras. 90–3; *Enron Corp. and Ponderosa Assets, L.P. v. Argentina*, Decision on Jurisdiction, 14 January 2004, para. 88.

[103] *Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, *ICSID Reports* 5: 396, paras. 38–64; *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, paras. 32–110; *Salini v. Jordan*, Decision on Jurisdiction, 29 November 2004, paras. 115, 119; *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, paras. 216–26; *Gas Natural v. Argentina*, Decision on Jurisdiction, 17 June 2005, paras. 24–31, 41–9.

known. In addition, the growing number of simultaneous cases makes it increasingly likely that tribunals may reach conflicting results without realizing it. Therefore, the problem of conflicting awards is a reality and has led to a discussion on how to address the problem.

A. *Interpretative Statements by States*

Occasionally the two States parties to the BIT may issue a joint statement without binding force on a question of interpretation pending before a tribunal. In *CME* v. *Czech Republic*[104] the BIT between the Czech Republic and the Netherlands provided for "consultations" with a view to resolving any issue of interpretation and application of the Treaty. Pursuant to this procedure, the Netherlands and the Czech Republic issued 'Agreed Minutes' containing a 'common position' on the BIT's interpretation, after the Tribunal had issued a partial award.[105] The Tribunal took this joint statement into account as supporting its view.[106]

Unilateral assertions of the disputing State party, on the meaning of a treaty provision, made in the process of ongoing proceedings are of limited value. Such a statement will be perceived as self-serving since it is probably determined by the desire to influence the tribunal's decision in favour of the State offering the interpretation.

Alternatively, the non-disputing State party to a BIT may give a unilateral statement on the interpretation of the treaty. Such a statement may or may not confirm the position of the disputing State party to the treaty. In *Aguas del Tunari* v. *Bolivia*,[107] the Claimant had submitted statements made by Ministries of the Government of the Netherlands to the Parliament of the Netherlands.[108] In addition, the Tribunal wrote to the Legal Adviser to the Foreign Ministry of the Netherlands enquiring about certain aspects of the BIT's interpretation.[109] The Tribunal found the information thus obtained not helpful.[110] It said:

> ... the Tribunal can find no subsequent practice ... which establishes an agreement of the parties regarding the interpretation of the BIT. In addition, the response from the Netherlands provides no additional information of the type suggested by Article 31 of the Vienna Convention on the Law of Treaties as being possibly relevant and upon which a general interpretative position might be based.[111]

In one case the government of the Claimant's nationality took the unusual step of writing to ICSID to voice its disapproval of an interpretation given by an

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[104] *CME v. The Czech Republic*, Final Award, 14 March 2003, *ICSID Reports* 9: 264.
[105] paras. 87–93.
[106] paras. 437, 504.
[107] *Aguas del Tunari v. Bolivia*, Decision on Jurisdiction, 21 October 2005.
[108] paras. 249–57.
[109] paras. 47, 258–9.
[110] paras. 260–3.
[111] para. 262.

ICSID tribunal. In *SGS* v. *Pakistan*[112] the Swiss Government in a letter to ICSID's Deputy Secretary-General stated that the Swiss authorities were wondering why the Tribunal had not found it necessary to enquire about their view of the meaning of the provision in the Pakistan-Switzerland BIT in spite of the fact that the Tribunal attributed considerable importance to the intent of the Contracting Parties in drafting it. The Swiss authorities were alarmed by the interpretation given by the Tribunal to the provision. The letter added that the interpretation ran counter to the intention of Switzerland when concluding the Treaty and was neither supported by the meaning of similar articles in BITs concluded by other countries nor by academic comments.[113]

It is obvious from these examples of practice that occasional views expressed by States parties to treaties on the meaning of particular provisions are not a viable method to achieve uniformity of interpretation.

B. *Institutionalized Mechanisms*

1. *Official Interpretations*

Plans to create institutionalized mechanisms to achieve uniform interpretations have yielded limited results so far. The NAFTA has a mechanism whereby the Free Trade Commission (FTC), a body composed of representatives of the three States parties, can adopt binding interpretations of the treaty.[114] The FTC has made use of this method in July 2001 in interpreting the concepts of 'fair and equitable treatment' and 'full protection and security' under Article 1105 of the NAFTA.[115]

NAFTA tribunals have accepted this interpretation as binding.[116] The Tribunal in *Methanex* v. *United States*[117] said:

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[112] *SGS v. Pakistan*, Decision on Jurisdiction, 6 August 2003.

[113] *See* Stanimir A. Alexandrov, 'Breaches of Contract and Breaches of Treaty', *The Journal of World Investment & Trade* 5 (2004): 555, at 570–1; Emmanuel Gaillard, 'Investment Treaty Arbitration and Jurisdiction Over Contract Claims -the *SGS* Cases Considered', in *International Investment Law and Arbitration*, Todd Weiler (ed.) (London: Cameron May, 2005), 325, at 341–2.

[114] NAFTA Article 2001(1): The Parties hereby establish the Free Trade Commission, comprising cabinet-level representatives of the Parties or their designees.

NAFTA Article 1131(2): An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

[115] FTC Note of Interpretation of 31 July 2001.

[116] *See Mondev International Ltd. v. United States of America*, Award, 11 October 2002, *ICSID Reports* 6: 192, paras. 100 *et seq.*; *United Parcel Service of America, Inc. v. Canada*, Award, 22 November 2002, *ICSID Reports* 7: 288, para. 97; *ADF Group, Inc. v. United States of America*, Award, 9 January 2003, *ICSID Reports* 6: 470, paras. 175–8; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, Award, 26 June 2003, *ICSID Reports* 7: 442, paras. 124–8; *Waste Management, Inc. v. United Mexican States*, Award, 30 April 2004, paras. 90–1. *See also United Mexican States v. Metalclad Corp.*, Judgment, Supreme Court of British Columbia, 2 May 2001, *ICSID Reports* 5: 236, paras. 61–5.

[117] *Methanex v. United States*, Award, 3 August 2005.

> With respect to Article 1105, the existing interpretation is contained in the FTC's Interpretation of 31st July 2001. Leaving to one side the impact of Article 1131(2) NAFTA, the FTC's interpretation must also be considered in the light of Article 31(3)(a) of the Vienna Convention as it constitutes a subsequent agreement between the NAFTA Parties on the interpretation of Article 1105 NAFTA.[118]

BITs do not normally have institutional mechanism to obtain authentic interpretations of their meaning. But the United States Model BIT of 2004 provides for a mechanism that is similar to the one in the NAFTA:

> *Article 30(3)*: A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.

This method is efficient, but has a serious drawback. States will strive to issue official interpretations to influence proceedings to which they are parties. As the example of the July 2001 interpretation of the FTC under NAFTA demonstrates, the home States of disputing investors are less interested in interpretations favourable to their nationals in pending disputes than in interpretations that favour State respondents generally. It is obvious that a mechanism whereby a party to a dispute is able to influence the outcome of judicial proceedings, by issuing official interpretation to the detriment of the other party, is incompatible with principles of a fair procedure and is hence undesirable.

2. *Appeals Procedures*

Another perceived solution is the creation of an appeals facility that would open the possibility to review decisions thereby increasing the chances of a consistent case law. A number of US treaties foresee this possibility in the form of an appellate body or similar mechanism.[119] The United States Model BIT of 2004 contains the following provision in an Annex:

> *Annex D Possibility of a Bilateral Appellate Mechanism:* 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.

This idea of a bilateral appeals mechanism has found entry into the US BIT with Uruguay.[120]

It is doubtful whether appellate bodies established under different bilateral treaties would lead to a coherent case law. Separate mechanisms for different

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[118] Part II, Chapter, at para. 23.

[119] Generally *see* Barton Legum, 'The Introduction of an Appellate Mechanism: the U.S. Trade Act of 2002', in *Annulment of ICSID Awards*, Emmanuel Gaillard and Yas Banifatemi (eds.) (New York, NY: Juris Publishing, 2004), 289.

[120] *See* 2004 Uruguay-US BIT, *ILM* 44 (2005): 268, 296, Annex E.

treaties, even if used regularly, will only have a limited impact. The issues in question, such as the proper interpretation of umbrella clauses or the reach of MFN clauses, recur in the context of many treaties. A harmonizing effect will be achieved only if the institutional mechanism applies to all or at least many treaties.

A similar idea though directed at a multilateral appeals mechanism is reflected in the CAFTA-DR Free Trade Agreement (FTA)[121] as well as in US FTAs with Singapore[122] and Chile.[123] To this effect the FTA with Chile provides:

> 10. If a separate multilateral agreement enters into force as between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment agreements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body review awards rendered under Article 10.25 in arbitrations commenced after the appellate body's establishment.[124]

ICSID at one point floated a draft that foresaw the creation of an appeals facility at ICSID. A Discussion Paper of October 2004[125] pointed to the danger of inconsistencies, and offered the prospect of a single appeal mechanism as an alternative to multiple mechanisms. An annex to the paper presented possible features of an ICSID Appeals Facility. Submission to the Appeals Facility would have to take place by treaty. It would be available for ICSID as well as for non-ICSID awards rendered in investor-State arbitrations. An appeal would be heard by an appeal tribunal consisting of three members and selected for each case from a panel of 15 persons. The appeal would have to be based on an error of law or fact or one of the grounds for annulment set out in Article 52 of the ICSID Convention. The appeal tribunal would have the power to uphold modify or reverse the award concerned.

In a subsequent Working Paper of May 2005[126] the idea of an appellate mechanism was dropped, at least for the time being, since "it would be premature to attempt to establish such an ICSID mechanism at this stage".

The project of a multilateral appeals mechanism at ICSID would have created certain problems. Article 53 of the ICSID Convention says that an award shall not be subject to any remedy except those provided for in the Convention.

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[121] Central America-Dominican Republic Free Trade Agreement, 5 August 2004, Article 10.20(10).

[122] Singapore-US FTA, 1 January 2004, Article 15.19(10).

[123] Chile-US FTA, 1 January 2004.

[124] Article 10.19(10).

[125] ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration* (Discussion Paper of 2 October 2004) <www.worldbank.org/icsid/improve-arb.pdf> (accesssed on 1 December 2006).

[126] ICSID Secretariat, *Suggested Changes to the ICSID Rules and Regulations* (Working Paper of the ICSID Secretariat, 12 May 2005) <ita.law.uvic.ca/documents/052405-sgmanual.pdf> (accessed on 1 December 2006).

In addition, the appeals mechanism would have excluded the application of the annulment procedure under Article 52 of the ICSID Convention. Any attempt to amend the ICSID Convention would be far too complex to be realistic. The idea was that bilateral treaties providing for appellate mechanisms would operate in partial derogation of the ICSID Convention. While this avenue may be feasible under the law of treaties, it is questionable whether an organ created by a multilateral convention is the right body to take the initiative towards the derogation of that convention by way of bilateral or regional treaties.

An appeal before three arbitrators selected from a panel of fifteen would not have guaranteed any uniformity of decisions. The different composition of appeals tribunals would not offer a guarantee against inconsistency.

Another problem would be the avoidance of national setting aside procedures for non-ICSID awards. The legal bases for these setting aside procedures are national arbitration laws. It would be necessary to ensure that, where an appeal is available under the international procedure, there would be no possibility to turn to a national court for the setting aside of the award. Equally, it would be important to shield the decisions of the appeal tribunal from review by national courts. Any other solution would lead to an undesirable situation of competing and possibly conflicting appeals procedures.

3. *Preliminary Rulings*

An appeals facility is not necessarily the best mechanism to achieve coherence and consistency in the interpretation of investment treaties. Appeal presupposes a decision that will be attacked for some alleged flaw in order to be repaired. Rather than try and fix the damage after the fact through an appeal, it is more economical and effective to address it preventively before it even occurs.

A method to secure coherence and consistency that has been remarkably successful is to allow for preliminary rulings while the original proceedings are still pending.[127] Under such a system a tribunal would suspend proceedings and request a ruling on a question of law from a body established for that purpose. This procedure has been very successfully used in the framework of the European Community to secure the uniform application of European Community Law by domestic courts. It is contained in Article 234 (formerly

[127] The idea has been put forward before: *see* Gabrielle Kaufmann-Kohler, 'Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are there Differences?', in *Annulment of ICSID Awards*, Emmanuel Gaillard and Yas Banifatemi (eds.) (New York, NY: Juris Publishing, 2004), 189. *See also* Gabrielle Kaufmann-Kohler, 'In search of Transparency and Consistency: ICSID Reform Proposal', *Transnational Dispute Management* 2(5) (2005): 8.

177) of the Treaty establishing the European Community[128] and provides for preliminary rulings by the European Court upon the request of domestic courts.[129]

Adapted to investment arbitration this method could provide for an interim procedure whenever a tribunal is faced with a fundamental issue of investment treaty application, a situation where it wants to depart from a decision by a previous tribunal or where there are conflicting previous decisions. In such a situation the tribunal might be required to suspend proceedings and request a ruling from the central decision maker. Once that ruling has been forthcoming the original tribunal would continue its proceedings. This method has turned out to be very successful to ward off inconsistency and fragmentation.

A number of details would have to be worked out. One is under what circumstances a tribunal would request a preliminary ruling and whether it would be under an obligation to do so. Another would be whether these rulings would bind the tribunal or would merely constitute recommendations. Not least, the composition of a body charged with giving preliminary rulings would need to be discussed.

Preliminary rulings would leave Article 53 of the ICSID Convention untouched. They would not affect the principles of expediency and finality, two of the chief assets of arbitration. And they would help to prevent the development of inconsistencies rather than create a costly and time consuming repair mechanism.

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[128] Treaty Establishing the European Community, Article 234:

> 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 and of the ECB; the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

[129] From among the numerous writings on preliminary rulings under the EC Treaty *see e.g.*, Mads Andenas (ed.), *Article 177 References to the European Court - Policy and Practice* (London: Butterworths, 1994); David Anderson, *References to the European Court* (London: Sweet and Maxwell, 1995); Alan Dashwood and Angus Johnston, (eds.), *The Future of the Judicial System of the European Union* (Oxford: Hart Publications, 2001); Gráinne de Búrca, G. and Joseph H. H. Weiler, (eds.), *The European Court of Justice* (Oxford: OUP, 2001).