

Arbitral Precedent: Dream, Necessity or Excuse?

The 2006 Freshfields Lecture

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ABSTRACT

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I. INTRODUCTION

ARBITRAL PRECEDENT: what a topic, given that it is common knowledge that international arbitration lacks a doctrine of precedent, at least as it is formulated in the common-law system.¹ Regardless, arbitrators increasingly appear to refer to, discuss and rely on earlier cases.² What motivates arbitrators to refer to earlier cases? Do they merely seek some guidance, an excuse or mask for the deficiencies in their own reasoning, an opportunity to contradict an esteemed colleague, or a chance to give lessons to the arbitration community? Alternatively, do they apply a de facto doctrine of precedent out of a sense of obligation? This lecture explores these questions.

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¹ See e.g. Catherine A. Rogers, 'Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration' in (2003) 39 *Stan. J Int'l L* 1 at p. 37 n. 198; Andrea Kupfer Schneider, 'Getting Along: the Evolution of Dispute Resolution Regimes in International Trade Organizations' in (1999) 20 *Mich. J Int'l L* 697 at p. 710 n. 41; Clyde C. Pearce and Jack Coe, 'Arbitration under NAFTA Chapter Eleven: Some Pragmatic Reflections upon the First Case Filed Against Mexico' in (2000) 23 *Hastings Int'l and Comp. L Rev.* 311 at p. 340 n. 99; Julia Ferguson, 'California's MTBE Contaminated Water: an Illustration of the Need for an Environmental Interpretive Note on Article 1110 of NAFTA' in (2000) 11 *Colo. J Int'l Envt'l L and Pol'y* 499 at p. 505.

² The exponential growth of citations to other cases in investment awards since 2001 is well demonstrated in a study that appeared after the delivery of this lecture by Jeffery P. Commission, 'Precedent in Investment Treaty Arbitration: the Empirical Backing' in *Transnational Dispute Management*, 28 March 2007, at p. 6.

This lecture is divided into three main parts, in addition to this brief introduction and an equally brief conclusion. Following this introduction, Part II discusses some terminology and the role of precedent. Part III evaluates current practice in an effort to establish what arbitrators do. Part IV suggests reasons for why they do it.

II. TERMINOLOGY AND THE ROLE OF PRECEDENT IN DIFFERENT LEGAL SYSTEMS

Before discussing current practice, it may be useful to explain key terminology and the role of precedent in national and international legal systems.

(a) Terminology

The term ‘precedent’ is used in this lecture to refer to a binding precedent under the doctrine of *stare decisis*,³ which literally means ‘to stand by what is decided’. It is also used to cover the notion of *persuasive* precedent,⁴ though some commentators consider this a contradiction in terms.⁵ Still, it is difficult to deny the possibility that *stare decisis* exists in a de jure (formal) form and also a de facto form.⁶ In the former, the court has a legal obligation to follow precedents, whereas in the latter, it follows precedent without legally being bound to do so.⁷ Finally, ‘precedent’ often is used to refer to prior cases generally, without implying that these cases have any binding value.⁸ This lecture avoids this particular usage, instead preferring the simple phrase ‘prior cases’.

³ See *Black's Law Dictionary* (7th edn, 1999), p. 1195, defining precedent as ‘[a] decided case that furnishes a basis for determining later cases involving similar facts or issues; [s]ee *stare decisis*’. See *ibid.* p. 1414, explaining that the doctrine of precedent requires ‘a court to follow earlier judicial decisions when the same points arise again in litigation’.

⁴ *Ibid.* p. 1215. A persuasive precedent is a decision that is not binding but is entitled to respect and careful consideration. On the consideration of reasoned arbitral awards as non-binding persuasive authority, see Thomas E. Carbonneau, ‘Rendering Arbitral Awards with Reasons; the Elaboration of a Common Law of International Transactions’ in (1984–85) 23 *Colum. J. Transnat'l L* 579 at p. 581; Vincenzo Vigoriti, ‘La decisione arbitrale come precedente’ in (1996) 1 *Riv. Dell'arb.* 33 at p. 35; Jean Carbonnier, *Droit civil: Introduction* (1999), p. 276. The force and authority of precedent in civil law comes from the mission of the judge, who has the power to adapt and complete statutes when they are unclear or vague. See Yves Le Roy, *Introduction générale au droit suisse* (2002), p. 164; François Terré, *Introduction générale au droit* (1998), p. 248; Philippe Malinvaud, *Introduction à l'étude du droit* (2005), p. 146.

⁵ See Noah Rubins, ‘In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration’ in (2000) 11 *Am. Rev. Int'l Arb.* 307 at p. 323; Rupert Cross and J.W. Harris, *Precedent in English Law* (4th edn, 1991), p. 5.

⁶ See generally Raj Bhala, ‘The Myth about Stare Decisis and International Trade Law (Part One of a Trilogy)’ in (1999) 14 *Am. U Int'l L Rev.* 845, at pp. 940–942.

⁷ See Bhala, *supra* n. 6 at pp. 940–942. See also Klaus Peter Berger, *International Economic Arbitration* (1993), p. 514; Heinrich Honsell, Nedim Peter Vogt and Thomas Geiser, *Zivilgesetzbuch, Basler Kommentar* (2002), Article 1, para. 39.

⁸ See e.g. Thomas W. Merrill, ‘Golden Rules for Transboundary Pollution’ in (1997) 46 *Duke Lj* 931 at p. 950, referring to the Lake Lanoux arbitration as a ‘less clearly applicable precedent’.

(b) Precedent in National Legal Systems

Within most national legal systems, courts follow earlier cases to some degree.⁹ They may do so out of the intellectual comfort that comes from relying on tested solutions,¹⁰ out of a sense of obligation from the law or out of a fear of being reversed.¹¹ At the same time, virtually all domestic courts alter their line of reasoning and disagree with earlier decisions over time.¹² This should be seen as a positive characteristic of national legal systems, since, as the House of Lords declared in 1966 when it decided that it was no longer bound by its case decisions, ‘too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law’.¹³ As Lord Denning put it eloquently:

[I]f we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on: and that will be bad for both.¹⁴

In sum, national courts follow earlier cases and may also depart from them.

The degree of deference to earlier cases and the level of freedom to depart from prior rulings may vary from one jurisdiction to another, and even within one jurisdiction, depending on the court and the issue involved. In civil law countries, the precedential value of cases may be weaker than in common law countries, though it is nonetheless well established there. Indeed, civil law countries have

⁹ See e.g. James Dennis, ‘Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent’ in (1994) 54 *La. L. Rev.* 1 at p. 3, pointing out how precedent has a leading role in common law systems while it has a supporting role in civil law systems. Different from common law systems, it is necessary in civil law systems for the earlier decision to have a certain degree of rigour and prestige for the later courts to feel bound by it. In Switzerland, for example, the judges will consider the intensity with which the court has examined the case, whether the decision has been published, the expressions used, and the judicial body that has adopted the decision. See Peter Forstmoser, *Einführung in das Recht* (2003), pp. 413–414.

¹⁰ Malinvaud, *supra* n. 4 at p. 145.

¹¹ In some civil law jurisdictions, there is a quasi-*stare decisis* effect. This is the case in Spain where the case law of the Tribunal Supremo is binding, provided that there are two prior decisions with the same line of reasoning. This case law is called *doctrina legal*. See STS 394/1990, 23 June 1990; STS 104/1992, 10 February 1992; STS 622/1994, 25 June 1994; STS 1018/1994, 16 November 1994; STS 167/1997, 6 March 1997; STS 564/2001, 8 June 2001; STS 1173/2006, 27 November 2006. Similarly, in Mexico, this effect has been implemented in article 192 *et seq.* of the Ley de Amparo, which requires five consecutive decisions that follow the same line of reasoning and that were approved by a minimum number of judges. In Germany, a rule affirmed repeatedly by the courts (*ständige Rechtsprechung*) may become a customary rule and will be applied as such by the courts: Karl Larenz and Manfred Wolf, *Allgemeiner Teil des Bürgerlichen Rechts* (2004), s. 3, para. 43. Similarly, in Switzerland, ATF 98 II 15, at pp. 20–21.

¹² e.g. the French Cour de cassation is not legally bound by its prior cases, and it can reverse prior decisions. See Carbonnier, *supra* n. 4 at p. 276; René David, *Les grands systèmes de droit contemporains* (2002), p. 108. See also Patrick Morvan, ‘En droit, la jurisprudence est une source de droit’ in (2001) 87 *Revue de la recherche juridique, droit prospectif* 77 at p. 91; Jean-François Casile, ‘Retour sur les conditions d’existence du revirement de jurisprudence en droit privé’ in (2004) 103 *Revue de la recherche juridique, droit prospectif* 639. In Switzerland, see *infra* n. 18.

¹³ Alfred T. Denning, *The Discipline of Law* (1979), p. 296.

¹⁴ *Ibid.* Introduction, quoting Denning LJ in *Packer v. Packer* [1954] P 15 at 22.

such notions as *arrêt de principe*¹⁵ and *jurisprudence constante*,¹⁶ which are similar to *stare decisis* except that they do not require adherence to a legal principle that has been applied only once before.¹⁷ For example, a departure from previous case law for the Swiss Supreme Court must be grounded in objective reasons such as a better understanding of the intent of the legislators, a change in circumstances, a change in legal conceptions or an evolution of societal mores.¹⁸ In case of doubt, the court tends to maintain the status quo even when a good reason for a change exists.¹⁹

(c) *Precedent in International Law*

What about precedents in international law? I refer here to the International Court of Justice (ICJ) and the World Trade Organization (WTO) Appellate Body, though my comments are valid for other international tribunals as well.²⁰

Article 59 of the ICJ Statute provides that '[t]he decision of the Court has no binding force except between the parties and in respect of that particular case',

¹⁵ See Pierre Tercier and Christian Roten, *La recherche et la rédaction juridiques* (2003), para. 1181, stating that, in Swiss law, *arrêts de principe* provide a new perspective that is sufficiently well developed to constitute a guide in the future, which may be considered as precedent. See also Le Roy, *supra* n. 4 at p. 168. In France, with respect to the decisions of the Cour de cassation, see Terré, *supra* n. 4 at p. 241, Malinvaud, *supra* n. 4 at p. 142 and Carbonnier, *supra* n. 4 at p. 276.

¹⁶ One speaks of *jurisprudence constante* where there is a series of cases that resolve a particular issue in a certain way, which then acts as a guide in the future in resolving that same issue. In Switzerland, the more constant and older the precedent is, the more reluctant the judge will be to reverse it. See ATF 122 I 57 at 59; ATF 120 II 137 at 142; ATF 114 II 131 at 138. See Le Roy, *supra* n. 4 at p. 168. See also *supra* n. 6. For France, see Malinvaud, *supra* n. 4 at p. 142. In Germany, see *supra* n. 6.

¹⁷ In Switzerland, precedent may be fixed by a single decision where there is much uncertainty on a given issue. See Le Roy, *supra* n. 4 at p. 168; Forstmoser, *supra* n. 9 at p. 415. See also Ulrich Meyer-Cording, *Die Rechtsnormen* (1970), p. 69. Similarly, in France, a sole decision may constitute precedent under certain conditions and depending on the decision's quality, but this is not the general rule. See Carbonnier, *supra* n. 4 at p. 271; Michel van de Kerchove, 'Jurisprudence et rationalité juridique' in (1985) 30 *Arch. phil. dr.* 207 at p. 233; Malinvaud, *supra* n. 4 at pp. 142–143.

¹⁸ ATF 127 V 353 at 356; ATF 122 I 57 at 59; ATF 121 V 80 at 85–86; ATF 114 II 131 at 138; Honsell, Vogt and Geiser, *supra* n. 7, Article 1, para. 39; Forstmoser, *supra* n. 9 at p. 413.

¹⁹ ATF 126 I 81 at 93; Forstmoser, *supra* n. 9 at p. 412.

²⁰ Another example is the International Criminal Tribunal for the former Yugoslavia (ICTY), which has not expressly adopted the common law doctrine of precedent, though it has stated, when attempting to reconcile the different uses of precedent in the common law, civil law and public international law systems: 'It is necessary to stress that the normal rule is that previous decisions are to be followed, and departure from them is the exception; [t]he Appeals Chamber will only depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts'. *Prosecutor v. Aleksovski*, Decision on Appeal, IT-95-14/1-T, 24 March 2000, para. 109. However, the ICTR Appeals Chamber has gone a step further and acted as a common law court when it has relied on its prior cases or decisions of the trial courts it oversees, such as in *Kambanda v. Prosecutor*, where it used the standard for accepting a guilty plea that the ICTY Appeals Chamber had established or where it accepted another ICTY Appeals Chamber standard for determining when failure to present an issue during the trial constituted a waiver. See *Kambanda v. Prosecutor*, Decision on Appeal, ICTR 97-23-A, 19 October 2000, paras 15–34, 49–95. See generally Mark A. Drumbl and Kenneth S. Gallant, 'Appeals in the Ad Hoc International Criminal Tribunals: Structure, Procedure, and Recent Cases' in (2001) 3 *J. App. Prac. and Process* 589 at pp. 632–633.

wording found also in the NAFTA.²¹ This language often is read as excluding a formal doctrine of precedent.²² Indeed, there is no de jure *stare decisis* in the ICJ. There is, however, a strong reliance on earlier judicial decisions, which are listed as ‘subsidiary means for the determination of rules of law’ in Article 38 of the ICJ Statute. Practice shows that past decisions are highly persuasive to the court.²³ The court itself explains its approach to prior cases in the following manner:

[I]t is not a question of holding [the parties in the instant case] to decisions reached by the court in previous cases. The real question is whether in this case, there is cause not to follow the reasoning and conclusions of earlier cases.²⁴

The approach is similar to that of the WTO Appellate Body, which stated in the *Shrimp Turtle II* case:

Adopted panel reports are an important part of the GATT acquis ... They create legitimate expectations among WTO Members and, therefore, should be taken into account where they are relevant to any dispute.²⁵

Commentators forcefully assert that the WTO has no formal doctrine of precedent, though it would seem to have such a doctrine in practice.²⁶ Thus, it would appear that at least two major international legal regimes adopt a type of de facto *stare decisis* doctrine.

III. WHAT DO ARBITRATORS DO?

Having discussed what precedent is generally, this part evaluates current practice in the field of international arbitration. The evaluation focuses on three different categories of dispute resolution: (1) international commercial arbitration; (2) sports arbitration; and (3) international investment arbitration. The reference to commercial arbitration in this lecture does not include the arbitrations conducted

²¹ Statute of the International Court of Justice (26 June 1945) 33 UNTS 993, art. 59; North America Free Trade Agreement (NAFTA), art. 1136(1).

²² See e.g. Jose E. Alvarez, ‘The New Dispute Settlers: (Half) Truths and Consequences’ in (2003) 38 *Tex. Int’l LJ* 405 at pp. 406–407; Royal C. Gardner, ‘Taking the Principle of Just Compensation Abroad: Private Property Rights, National Sovereignty, and the Cost of Environmental Protection’ in (1997) 65 *U Cin. L Rev.* 539 at p. 574 n. 180.

²³ See e.g. Alain Pellet, ‘Article 38’ in A. Zimmermann *et al.* (eds), *The Statute of the International Court of Justice: A Commentary* (2006), p. 784; Hugh Thirlway, ‘The Sources of International Law’ in M.D. Evans (ed.), *International Law* (2003), p. 133.

²⁴ *Land and Maritime Boundary between Cameroon and Nigeria* (Preliminary Objections Judgment) [1998] ICJ Rep. 275, para. 28.

²⁵ *United States Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Appellate Body Report, 12 October 1998, WT/DS58/AB/R, para. 108. See also *Japan – Taxes on Alcoholic Beverages*, WTO Appellate Body Report, 4 October 1996, WT/DS8/AB/R, at 15.

²⁶ See e.g. Bhala, *supra* n. 6 at pp. 941–942.

under commercial (in other words, non-ICSID) arbitration rules, which deal with investment disputes.

(a) *International Commercial Arbitration*

When issuing awards in international commercial arbitrations, do arbitrators rely on past awards? Moreover, do they create rules that have effects beyond the dispute submitted to them? I asked one of my research assistants to survey awards in order to answer these two questions. Several hundred awards later, he returned with a long, detailed memorandum that concluded that arbitrators do what they want with past cases and that there is no clear practice in this field. While one theoretically might be able to come up with some classification scheme, this assistant's response captures the basic impression that emerges from a survey of the cases in this field.

Another survey reviewing awards applying the Vienna Sales Convention (CISG) gives the same impression. At first sight, one would expect the Sales Convention to be a field rich with arbitral precedents due to the fact that arbitrators are not limited to national law and that there are easily accessible databases of CISG cases. Surprisingly, a survey of those cases proved the contrary. Out of 500 cases, only about 100 were available in sufficient detail to make a finding possible,²⁷ and out of these, only six referred to past awards.²⁸ Scholarly writings appear to attract more attention from arbitral tribunals than past cases. Admittedly, this may give past cases some indirect influence, as scholars in the field of international sales rely on both court rulings and arbitral awards,²⁹ though one would have expected past cases to have had more of a direct influence.

Still another survey, this time of International Chamber of Commerce (ICC) awards, yielded more nuanced results. Out of the 190 awards reviewed, about 15 per cent cited other arbitral decisions. These citations were mostly made with regard to matters of jurisdiction and procedure, in connection for instance with the timeliness of an objection to jurisdiction,³⁰ and the powers of the tribunal to order provisional measures.³¹ Reference to earlier cases was also made in connection with the determination of the law governing the merits, for instance

²⁷ Research carried out on Pace School of Law's online database of CISG cases: <http://cisgw3.law.pace.edu>.

²⁸ e.g. ICC 7754 (1995), referring *inter alia* to ICC 5428 (1988) and ICC 5540 (1991) as support for the finding that 'the function of damages is to substitute an equivalent to the obligation which was created ...', a view given further comfort through references to scholarly writings and French court rulings; see also ICC 7331 (1994), referring to ICC 3267 (1979) and ICC 3131 (1979) to establish the tribunal's authority to ground its decision on its understanding of the agreement and on general principles of law such as good faith.

²⁹ See e.g. F. Ferrari, H. Flechtner and R.A. Brand (eds), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention* (2004); also P. Schlechtriem and I. Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2005).

³⁰ ICC Award 8420 (1996) in (2000) *XXV 1B Comm. Arb.* 328.

³¹ ICC Award 10973 (2001) in (2005) *XXX 1B Comm. Arb.* 77, referring *inter alia* to ICC Award 4126 (1984), ICC Award 7489 (1992) and ICC Award 3540 (1980).

on party autonomy³² or the methods available to arbitrators to determine the governing law when the parties have made no choice.³³

By contrast, substantive issues rarely prompt reference to arbitral awards. If they do, then it is in conjunction with scholarly writings and court decisions. Whether on substantive or procedural matters, reference to prior cases generally is made out of an abundance of caution.³⁴ The rule relied upon most often arises, in any event, out of the applicable national arbitration law or the relevant institutional rules. Aside from procedural issues, perhaps, one can see no precedential value or self-standing rule creation in commercial arbitration awards.

This conclusion does not ignore the theory of the *lex mercatoria*, the existing studies on ‘arbitral jurisprudence’,³⁵ or the famous *Dow Chemical award*.³⁶ These may well constitute the ‘dream’ component referred to in the title of this lecture.³⁷ Indeed, the rules embodied in commercial arbitral ‘jurisprudence’ or those said

³² ICC Award 6379 (1990) in (1992) XVII *YB Comm. Arb.* 212, referring at p. 214 to ICC Award 1512, though seemingly out of an abundance of caution; see also ICC Award 7047 (1994) in (1996) XXI *YB Comm. Arb.* 79, referring at p. 83 to the ‘*Carte Blanche* arbitration’ (unpublished ICC Award of 25 January 1988) and its subsequent confirmation in *Carte Blanche (Singapore) Pte Ltd v. Carte Blanche International Ltd*, 888 F.2d 260 (2d Cir. 1989).

³³ ICC Award 9302 (1998) in (2003) XXVIII *YB Comm. Arb.* 54 referring at p. 59 to the *Dow Chemical Award*, ICC Award 4131. Other instances of reference to past awards in procedural matters include the following: on the timing of objections to jurisdiction: ICC Award 8420 (1996), in (2000) XXV *YB Comm. Arb.* 11; on the scope of the terms of reference with regard to new claims: ICC Award 6197 (1995) in (1998) XXIII *YB Comm. Arb.* 13; on the arbitrability of disputes: ICC Award 8423 (1994) in (2001) XXVI *YB Comm. Arb.* 153; on the binding power of arbitration clauses over groups of companies: ICC Award 4131 (1982) in (1984) IX *YB Comm. Arb.* 131; on sovereign immunity: ICC Award 3493 (1983) in (1984) IX *YB Comm. Arb.* 111; on the interpretation of pathological clauses: ICC Award 5294 (1988) in (1989) XIV *YB Comm. Arb.* 137, and ICC Award 7920 (1993) in (1998) XXIII *YB Comm. Arb.* 80. In this regard, Jan Paulsson noted that the largest domain where awards were cited by arbitrators concerns the choice of law rule. See ‘*La Lex Mercatoria dans l’arbitrage CCF*’ in (1990) *Rev. Arb.* 55 at p. 80.

³⁴ See e.g. ICC Award 9163 (2001) in (2003) I *Rev. Arb.* 227, citing several ICC awards that have followed a principle already well established through extensive references to French jurisprudence. Also, references to past cases for such matters as the tribunal’s competence to rule on its own jurisdiction (ICC Award 5485 (1987) in (1989) XIV *YB Comm. Arb.* 156), or the parties’ capacity to choose the law governing the contract (ICC Award 6379 (1990) in (1992) XIV *YB Comm. Arb.* 212) seem to be used more as illustrations than as sources of law as these rules apply in any event by operation of the law or rules governing the arbitration.

³⁵ See e.g. *L’apport de la jurisprudence arbitrale* (Dossiers de l’Institut du droit et des pratiques des affaires internationales, ICC Publication 440/1, 1986); Christian Larroumet, ‘A propos de la jurisprudence arbitrale’ in (2006) 348 *Gazette du Palais* 5; Andrea Pinna, ‘La spécificité de la jurisprudence arbitrale’ in *Jusletter*, 16 October 2006.

³⁶ ICC Partial Award 4131, 23 September 1982, in S. Jarvin and Y. Derains (eds), *Collection ICC Arbitral Awards* (1990), p. 151: ‘The decisions of these tribunals [ICC arbitral tribunals] progressively create caselaw which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international commerce, to which rules specific to international arbitration, themselves successively elaborated, should respond’.

³⁷ Depending on the level of legal recognition granted to the *lex mercatoria*, that is to be considered as a legal order on its own, as a sufficient set of rules or as the reflection of usages or general principles of international business law, the concept, in the first sense, or even in the second, can indeed be seen as a dream or as a myth. See Guillaume R. Delaume, ‘Comparative Analysis as a Basis of Law in State Contracts: the Myth of the *Lex Mercatoria*’ in (1989) 63 *Tul. L Rev.* 575; see also Vanessa L.D. Wilkinson, ‘The New *Lex Mercatoria*: Reality or Academic Fantasy?’ in (1995) 12 *J Int’l Arb.* 103.

to be part of *lex mercatoria* are not creations of arbitral case law per se.³⁸ Arbitrators simply apply principles that prevail in national laws and international treaties or general principles of law. A few examples taken from a list drawn up some years ago by Jan Paulsson,³⁹ which Klaus Peter Berger since has expanded,⁴⁰ demonstrate this well: *pacta sunt servanda*, good faith, *force majeure*, respect for international public policy, *venire contra factum proprium* and mitigation of damages.

Much more than such principles, what is truly striking in international commercial arbitration is not the hypothetical rule creation by arbitral precedents, but arbitrators' broad discretion in determining and applying the law that governs the merits of any particular case. Indeed, arbitrators have an inclination to 'transnationalise' the rules they apply, either because they are subject to no meaningful controls when it comes to the merits, they act in a transnational environment, or they are themselves very often from different legal cultures. I have discussed the various methods of transnationalisation already in a separate publication.⁴¹ Regardless of the method, the purpose of transnationalisation is to remove the dispute from the ambit of a possibly inadequate national law.

This inclination towards transnationalisation is in line with the newer version of the *lex mercatoria*, which Emmanuel Gaillard in particular has described *not* as a legal system, but as a *method*,⁴² a way to avoid application of rules that are inconsistent with the needs of international commerce.⁴³ Similarly, one also could

³⁸ Contrary to the first conception of the *lex mercatoria*, seen as a specific legal order, as the demonstration of such specific legal order was based on the existence of transnational law-makers, and among them the international arbitrators. This was the conception defended in 1964 by Berthold Goldman, 'Frontières du droit et Lex Mercatoria' in (1964) 9 *Arch. phil. dr.* 177; and later 'La Lex Mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives' in (1979) 106 *J. Droit Int'l* 475; 'Lex Mercatoria' in (1983) 3 *Forum Internationale* 3; 'Nouvelles réflexions sur la Lex Mercatoria' in C. Dominicé, R. Patry and C. Reymond (eds), *Etudes de droit international en l'honneur de Pierre Lalive* (1993), p. 241; and Clive M. Schmitthoff, 'The Law of International Trade, its Growth, Formulation and Operation' in C.M. Schmitthoff (ed.), *The Sources of the Law of International Trade with Special Reference to East-West Trade* (1964), p. 3.

³⁹ Paulsson, *supra* n. 33.

⁴⁰ Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* (1999).

⁴¹ See Gabrielle Kaufmann-Kohler, 'Le contrat et son droit devant l'arbitre international' in F. Bellanger *et al.* (eds), *Le contrat dans tous ses états* (2004), p. 361.

⁴² See Emmanuel Gaillard, 'Thirty Years of *Lex Mercatoria*: Towards the Selective Application of Transnational Rules' in (1995) 10 *ICSID Review: Foreign Investment Law Journal* 208, and, for the French version: 'Trente ans de Lex Mercatoria. Pour une application sélective de la méthode des principes généraux du droit' in (1995) 122 *J. Droit Int'l* 5 at p. 21. A similar view is adopted by Andreas F. Lowenfeld in 'Lex Mercatoria: an Arbitrator's View' in (1990) 6 *Arb. Int'l* 133 at p. 143. See also Fouchard, Gaillard, Goldman who insist on the meaning of this new approach of *lex mercatoria*: 'it cannot be too strongly emphasized that applying transnational rules involves understanding and implementing a method, rather than drawing up a list of the general principles of international commercial law'. Fouchard, Gaillard, Goldman, *On International Commercial Arbitration* (E. Gaillard and J. Savage (eds), 1999), p. 813.

⁴³ Gaillard, 'Thirty Years of *Lex Mercatoria*', *supra* n. 42 at p. 229: 'The whole aim of transnational rules is not to diminish the role of national laws, but rather to avoid having solutions that have not received sufficient support in comparative law prevail over solutions more generally accepted in the international community'. See also Paulsson, *supra* n. 33 at p. 70; Ole Lando, 'The Lex Mercatoria in International Commercial Arbitration' in (1985) 34 *ICLQ* 747; and Lowenfeld, *supra* n. 42 at p. 148, who asserts that the *lex mercatoria*, if properly used, is supposed 'to clarify, to fill gaps, and to reduce the impact of peculiarities of individual country's laws, often not designed for international transactions at all'.

refer to what Michael Mustill, in his famous article for Lord Wilberforce, called ‘the micro *lex mercatoria*’: ‘a law is newly minted by the arbitrator on each occasion, with every contract the subject of its own individual proper law’.⁴⁴

In short, the arbitrator’s sweeping freedom to apply the law that allows him or her to ‘mint’ the rules to take account of the specificities of each case – or the case-driven propensity to transnationalise the applicable law – are in direct contradiction with the very idea of precedent.

(b) *Sports and Domain Name Arbitration*

The role of precedent is entirely different in sports arbitration. This lecture looks at this both from a quantitative and from a qualitative perspective.

From the quantitative perspective, statistics and history show a strong evolution towards reliance on other sports law cases. A survey of all the cases published by the Court of Arbitration for Sports (CAS) from the first CAS case in 1986 to 2003 shows that only one award in six cited prior cases.⁴⁵ A review of the cases since 2003 shows a drastic change: nearly every award contains one or more references to earlier CAS awards.

The conclusion of this quantitative approach to sports arbitration is further strengthened by the qualitative approach. For example, a 2004 award reads as follows:

In CAS jurisprudence there is no principle of binding precedent, or *stare decisis*. However, a CAS Panel will obviously try, if the evidence permits, to come to the same conclusion on matters of law as a previous CAS Panel. Whether that is considered a matter of comity, or an attempt to build a coherent corpus of law, matters not.⁴⁶

For purposes of this lecture, it *does* matter. The fact is that a coherent corpus of law, some call it *lex sportiva*, is being built.⁴⁷ Two examples support that observation.

The first example is strict liability for doping offences, which involves the principle that a doping offence occurs whenever a prohibited substance is found in an athlete’s body, irrespective of the athlete’s intention or negligence in ingesting the banned substance. A series of CAS awards consistently has upheld

⁴⁴ Michael J. Mustill, ‘The New *Lex Mercatoria*: the First Twenty-Five Years’ in M. Bos and I. Brownlie (eds), *Liber Amicorum for the Rt. Hon. Lord Wilberforce* (1987), p. 157.

⁴⁵ Research carried out on the basis of M. Reeb (ed.), *Digest of CAS Awards 1986–1998* (2001) and M. Reeb (ed.), *Digest of CAS Awards II 1998–2000* (2002).

⁴⁶ *IAAF v. USA Track & Field and Jerome Young*, CAS 2004/A/628, 28 June 2004, unreported, at para. 73.

⁴⁷ See Eric Loquin, ‘L’utilisation par les arbitres du TAS des principes généraux du droit et le développement d’une *lex sportiva*’ in A. Rigozzi and M. Bernasconi (eds), *The Proceedings before the Court of Arbitration for Sport* (2007), p. 99; see also Ken Foster, ‘*Lex Sportiva* and *Lex Ludica*: the Court of Arbitration for Sport’s Jurisprudence’ in I. Blackshaw et al. (eds), *The Court of Arbitration for Sport 1984–2004* (2006), p. 420; James A.R. Nafziger, ‘*Lex Sportiva*’ in (2004) 1–2 *International Sports Law Journal* 3; Jens Adolphsen, ‘Eine *lex sportiva* für den internationalen Sport?’ in *Die Privatisierung des Privatrechts – rechtliche Gestaltung ohne staatlichen Zwang* (2002), p. 281.

this principle.⁴⁸ The World Anti-Doping Code codified this arbitral practice. The official comments to the Code even specifically state that '[t]he rationale for the strict liability rule was well stated by the Court of Arbitration for Sport in the case of Quigley',⁴⁹ and then go on to quote a long passage of that award. The main reason for applying strict liability is fairness to the community of competitors, or in the terms of the award:

It is true that a strict liability test is likely in some sense to be unfair in an individual case ... where the athlete may have taken medication as the result of mislabelling or faulty advice for which he or she is not responsible ... [I]t is a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors. This is what would happen if banned performance-enhancing substances were tolerated when absorbed inadvertently.⁵⁰

As a second illustration of arbitral rule creation in sports, there is the concept of non-significant fault or negligence. According to the Anti-Doping Code, an athlete who tests positive for a prohibited substance will be suspended for two years. This sanction can be reduced if 'he/she bears no Significant Fault nor Negligence'.⁵¹ The drafters of the Code did not define these terms, leaving this task to the arbitrators. Since the adoption of the Code, CAS panels ruling on non-significant fault have systematically considered other awards. Characteristically, the second award rendered under the Code referred to the first one, distinguished it, and concluded that

in the absence any pertinent precedent, the Panel is of the opinion that the application of 'No Significant Fault or Negligence' is to be assessed on the basis of the particularities of the individual case at hand.⁵²

Ever since, CAS panels consistently have adopted the same reasoning. Inevitably, the analysis of the growing number of precedents has become more elaborate. In one of the latest awards, the panel referred to no less than 11 previous precedents before reaching its conclusion.⁵³ In sum, I submit that these cases demonstrate the existence of a true *stare decisis* doctrine within the field of sports arbitration.⁵⁴

⁴⁸ See e.g. *Djamel Bouras v. Fédération Internationale de Judo (FIJ)*, CAS 98/214, 17 March 1999, CAS Digest II 291, at para. 16, which contains a series of awards in support of this principle, i.e. CAS 96/156, 10 October 1997; CAS 95/141, 22 April 1996; and CAS 92/63, 10 September 1992.

⁴⁹ Comment Art. 2.1.1 WADC.

⁵⁰ *USA Shooting & Quigley v. International Shooting Union (UIT)*, CAS 94/129, 23 May 1995, CAS Digest I 187, paras 14 and 15.

⁵¹ Art. 10.5.2 WADC.

⁵² *Diego Hipperdinger v. ATP Tour Inc.*, CAS 2004/A/690, 24 March 2005, available at www.atptennis.com, at para. 75 (emphasis added).

⁵³ *Mariano Puerta v. International Tennis Federation (ITF)*, CAS 2006/A/1025, 12 July 2006, available at www.itftennis.com, at para. 11.2 *et seq.*

⁵⁴ See also Dominique Hascher's observations on *Pamesa Valencia v. Euroleague Basketball*, CAS 2004/A/605 in (2007) 134 *J Droit Int'l* 253.

The phenomenon of rule creation through arbitral awards is even more striking in another type of dispute resolution mentioned here in passing, which is domain name 'arbitration' under the Uniform Domain Name Dispute Resolution Policy (UDRP).⁵⁵ Although not arbitration per se, it is comparable for present purposes. The rules applied in domain name dispute resolution are uniform rules of universal reach issued by a private body, namely, the Internet Corporation for Assigned Names and Numbers (ICANN).

The statistics here are compelling. Out of 110 awards issued in the fall of 2006, 540 citations to prior domain name decisions were made in 85 cases. The decision-makers systematically cite prior cases to support their decisions and to provide pertinent examples from earlier decisions.⁵⁶ This generalised practice is not surprising if one takes into account the limited number and recurrent nature of the issues before domain name panels,⁵⁷ which involve questions such as whether a domain name is confusingly similar to another one,⁵⁸ whether the complainant has a legitimate interest in the domain name,⁵⁹ and whether the infringements were made in bad faith.⁶⁰ In resolving these issues, panels sometimes distinguish the instant case from other cases.⁶¹ On some occasions, they even adopt a solution contrary to their own opinion for the sake of consistency:

In making its finding, the Panel wishes to clarify that its decision ... is based on the need for consistency and comity in domain name disputes 'jurisprudence'. Were it not for the persuasive force of the cited decisions, this Panel would have expressed [a different] view ... Absent the consistency of approach which has found favour with numerous earlier panels, this Panel would have seen no good reason for [the solution it now adopts].⁶²

Another case focuses on the parties' expectations to justify consistency in the following terms:

⁵⁵ On the UDRP process, see e.g. Gabrielle Kaufmann-Kohler and Thomas Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice* (2004), p. 36 et seq.

⁵⁶ See e.g. WIPO Case D2006-0523; WIPO Case D2006-0625; WIPO Case D2006-0699; WIPO Case D2006-0802; WIPO Case D2006-0831; WIPO Case D2006-0837; WIPO Case D2006-0924; WIPO Case D2006-1602.

⁵⁷ A summary of the most recurrent issues has been created by the WIPO Arbitration and Mediation Center to promote consistency and predictability in the dispute resolution system, even if the overview is not binding on the panelists and is said not to be precedential in nature. See WIPO Case D2005-0061 at n. 3. The Overview can be found at www.wipo.int/amc/en/domains/search/overview/index.html.

⁵⁸ WIPO Case D2006-0696; WIPO Case D2006-0731; WIPO Case D2006-0779; WIPO Case D2006-0846; see WIPO Case D2006-0873; WIPO Case D2006-1602.

⁵⁹ WIPO Case D2006-0670; WIPO Case D2006-0731; WIPO Case D2006-0744; WIPO Case D2006-0823; WIPO Case D2006-0855; WIPO Case D2006-0873; WIPO Case D2006-0874; WIPO Case D2006-0879; WIPO Case D2006-0924; WIPO Case D2006-0926; WIPO Case D2006-0964; WIPO Case D2006-1064; WIPO Case D2007-0002.

⁶⁰ See e.g. cases on typo-squatting, WIPO Case D2006-0536; WIPO Case D2006-0779; WIPO Case D2006-0845; WIPO Case D2006-0887. See also cases on cyber-squatting, WIPO Case D2006-0765; WIPO Case D2006-0825.

⁶¹ WIPO Case D2006-0926: 'The WIPO UDRP panel decisions cited by the Complainant are not directly relevant and applicable to the present case for different reasons'.

⁶² WIPO Case D2004-0338. See also WIPO Case D2006-0157.

Parties in UDRP proceedings are entitled to know that, where the facts of two cases are materially indistinguishable, the complaints and responses will be evaluated in a consistent manner regardless of the identity of the panellists; ... when policy disagreements do arise, panellists should pause and consider whether a consensus has emerged that might inform which way they should rule on these types of issues. If such a consensus has emerged, panellists should endeavor to follow that consensus and thus promote consistent application of the UDRP.⁶³

In conclusion, UDRP decision-makers follow earlier cases as binding precedent largely out of the desire to create *consistent* rules.

(c) *Investment Arbitration*

Is investment arbitration closer to commercial arbitration or to sports and domain name arbitration? A review of the practice shows that it is evolving towards a position in between these two extremes.⁶⁴

While tribunals seem to agree that there is no doctrine of precedent per se, they also concur on the need to take earlier cases into account. Some link the absence of a doctrine of precedent to Article 53 of the ICSID Convention, according to which 'the award shall be binding on the parties'.⁶⁵ This does not appear to be an extremely convincing basis to deny the existence of any form of precedent in this field. Granted, nothing in the Convention's *travaux préparatoires* suggests that the doctrine of *stare decisis* should be applied, though nothing in the *travaux préparatoires* suggests that it should *not* be applied.⁶⁶ In lieu of many others, a quotation from the recent award in *El Paso v. Argentina* (which is reiterated in *Pan American v. Argentina* and *BP v. Argentina*⁶⁷) will suffice to illustrate the general consensus:

⁶³ WIPO Case D2004-0014 and WIPO Case D2005-0061 at n. 3. *See also* WIPO Case D2000-1774 at n. 3 and WIPO Case DWS2002-0001, stating: 'Although Panels are not bound to follow the decisions of prior Panels, it nevertheless is appropriate to determine whether a majority view has developed among other Panels that have considered the same issue. Not only do such decisions frequently have persuasive weight and authority, but also, they reflect a consensus that is worthy of some deference. Divining and following such a consensus helps to ensure consistency among UDRP decisions, a critical component of any system of justice. Otherwise, and given the lack of an appellate remedy, the expected result in any given case would be random based on the identify [sic] of the Panelists, which would undermine the credibility of the entire UDRP process'.

⁶⁴ After the delivery of the Freshfields lecture, the following studies became known or were published on precedent in investment arbitration: Christoph Schreuer and Matthew Weiniger, 'Conversation Across Cases: Is there a Doctrine of Precedent in Investment Arbitration?' in C. MacLachlan, L. Shore, M. Weiniger and L. Mistelis (eds), *International Investment Arbitration: Substantive Principles Investment Treaty Law* (forthcoming 2007); Jeffery P. Commission, 'Precedents in Investment Treaty Arbitration: a Citation Analysis of a Developing Jurisprudence' in (2007) 24 *J. Arb. Int'l* 129 and Commission, *supra* n. 2.

⁶⁵ Emphasis added. *See e.g.* Christoph Schreuer, *The ICSID Convention: a Commentary* (2001), p. 1082.

⁶⁶ *See* Christoph Schreuer, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration' in (2006) 3–2 *Transnational Dispute Management* 11. Pierre Duprey, 'Do Arbitral Awards Constitute Precedents? Should Commercial Arbitration be Distinguished in this regard from Arbitration Based on Investment Treaties?' in E. Gaillard (ed.), *Towards a Uniform International Arbitration Law?* (2005), p. 267.

⁶⁷ *BP America Production Co. and others v. Argentine Republic*, ICSID Case ARB/04/8, Decision on Jurisdiction, 27 July 2006; *Pan American Energy LLC and BP Argentina Exploration Co. v. Argentine Republic*, ICSID Case ARB/03/13, Decision on Jurisdiction, 27 July 2006.

ICSID arbitral tribunals are established ad hoc, ... and the present Tribunal knows of no provision, ... establishing an obligation of *stare decisis*. It is nonetheless a reasonable assumption that international arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by other arbitration organs, especially those set by other international tribunals.⁶⁸

To what practical result does this approach lead? Because space is limited, this lecture illustrates the result with three issues: (1) the umbrella clause; (2) the most favoured nation clause; and (3) the notion of fair and equitable treatment. Each issue is discussed below.

(i) *Umbrella clause*

A review of the relevant decisions raises three considerations. First, there would seem to be a significant inconsistency between the two SGS awards. Secondly, there are a number of decisions that adopt a restrictive approach towards umbrella clauses, such as *Salini v. Jordan*,⁶⁹ *Joy Mining v. Egypt*,⁷⁰ and more recently the *El Paso v. Argentina* and *Pan American v. Argentina* decisions, which stated that:

an umbrella clause cannot transform any contract claim into a treaty claim, as this would necessarily imply that any commitments of the State in respect to investments, even the most minor ones, would be transformed into treaty claims.⁷¹

Thirdly, the analysis reveals that other tribunals, such as the ones in *Eureko v. Poland*,⁷² *Noble Venture v. Romania*⁷³ and *Siemens v. Argentina*⁷⁴ have adopted the opposite view and have accepted that the concept of an umbrella clause 'is usually seen as transforming municipal law obligations into obligations directly recognizable in international law'.⁷⁵ In sum, the tribunals are divided when it comes to the umbrella clause, and no clear rule has emerged. Some tribunals have noted that their decisions were dependent on the terms of the bilateral investment treaty (BIT) involved. However, this explanation does not provide a satisfactory justification for all of the discrepancies.⁷⁶

Might the explanation for these discrepancies concern the dividing line between commercial and public international law arbitrators, or, if you prefer,

⁶⁸ *El Paso Energy International Co. v. Argentine Republic*, ICSID Case ARB/03/15, Decision on Jurisdiction, 27 April 2006, para. 39.

⁶⁹ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case ARB/02/13, Award, 31 January 2006.

⁷⁰ *Joy Mining Machinery Ltd v. Arab Republic of Egypt*, ICSID Case ARB/03/11, Award on Jurisdiction, 6 August 2004.

⁷¹ *El Paso Energy v. Argentine Republic*, Decision on Jurisdiction, *supra* n. 68 at para. 82.

⁷² *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005.

⁷³ *Noble Ventures, Inc. v. Romania*, ICSID Case ARB/01/11, Award, 12 October 2005.

⁷⁴ *Siemens A.G. v. Argentine Republic*, ICSID Case ARB/02/08, Award, 6 February 2007.

⁷⁵ *Noble Ventures v. Romania*, *supra* n. 73 at para. 53.

⁷⁶ It is true, though, that there is no inconsistency in the interpretation of the *same* treaty provisions so far. Overall, the umbrella clause contained in the United States-Argentina BIT, for instance, which has been put to the test on a number of occasions, has been subject to a quite consistent restrictive interpretation.

'publicistes' and 'privatistes'? The question implies that the *privatistes* may be more lenient and flexible than the *publicistes* when it comes to treaty interpretation because they import contract interpretation standards. This possible explanation seems to miss the mark; an analysis of the composition of the different tribunals does not lead to any conclusive results. Therefore, there must be another explanation for the inconsistency.

Underlying this matter is, of course, the debate of the overall object and purpose of BITs. Should interpretative doubts be resolved in favour of the investor? The *SGS v. Philippines* tribunal,⁷⁷ for instance, answered in the affirmative, while the *El Paso* arbitrators favoured a balanced interpretation.⁷⁸ Implied in the purpose of the BIT lies the more general political or philosophical-ethical question of the balance of global economy, of which foreign direct investment is an important part. Is there presently an imbalance between the protection of property or investment and the protection of other public goods? This is a vast issue that this lecture does not attempt to address. It is an issue that may well contribute to shaping investment law in coming years.

(ii) *Most favoured nation clause*

Turning to the most favoured nation (MFN) clause and its application to dispute resolution, one can distinguish between two schools, the *Maffezini* and the *Plama* schools. At first sight, they seem to conflict, *Maffezini* being for the application of the MFN clause to dispute resolution rights and *Plama* against it. Upon a closer look, however, they appear to supplement rather than contradict each other.

Indeed, *Maffezini*⁷⁹ concerned MFN clauses in the presence of an ICSID dispute resolution provision and sought to avoid a waiting period or similar requirement. The *Maffezini* tribunal expressly limited the potential impact of the MFN clause in the following terms:

[If the Treaty] provides for a particular arbitration forum, such as ICSID, for example, this option cannot be changed by invoking the clause, in order to refer the dispute to a different system of arbitration. Finally, if the parties have agreed to a highly institutionalized system of arbitration that incorporates precise rules of procedure, which is the case, for example, with regard to the North America Free Trade Agreement and similar arrangements, it is clear that neither of these mechanisms could be altered by the operation of the clause because these very specific provisions reflect the precise will of the contracting parties.⁸⁰

⁷⁷ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case ARB/02/6, Decision on Jurisdiction, 29 January 2004, at para. 116.

⁷⁸ *El Paso Energy v. Argentine Republic*, Decision on Jurisdiction, *supra* n. 68, at para. 70.

⁷⁹ *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case ARB/97/7, Decision on Jurisdiction, 25 January 2000; *Siemens A.G. v. Argentine Republic*, ICSID Case ARB/02/8, Decision on Jurisdiction, 3 August 2004; *Camuzzi Int'l S.A. v. Argentine Republic*, ICSID Case ARB/03/7, Decision on Jurisdiction, 10 June 2005; *Gas Natural SDG v. Argentine Republic*, ICSID Case ARB/03/10, Award, 17 June 2005; *National Grid v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case ARB/03/19, and *AWG Group Ltd v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 3 August 2006.

⁸⁰ *Emilio Agustín Maffezini v. Kingdom of Spain*, *supra* n. 79, at para. 63.

By contrast, *Plama* dealt with attempts to import, in whole or in part, the ICSID dispute settlement mechanism into a treaty that either provided for another dispute settlement method or limited the scope of the ICSID arbitration clause.⁸¹ According to the *Plama* tribunal, there is a presumption that an MFN clause does not extend to dispute resolution matters, except when the contracting parties have expressed a contrary interest.

Hence, in theory there appears to be a clear distinction between the two schools. In practice, however, I would submit that they can easily be reconciled. Indeed, in actual application, they can be combined without conflicting. The rule that appears to emerge from this combination is the following: MFN clauses *can* be used to overcome waiting periods and similar admissibility requirements, but *not* to replace, in whole or in part, the dispute resolution mechanism provided in the treaty upon which jurisdiction is based. In sum, unlike with umbrella clauses, arbitral practice appears to be evolving towards a consistent rule.

(iii) *Fair and equitable treatment*

As a third and last illustration of the emergence of rules in ICSID arbitration, this part focuses on the principle of fair and equitable treatment. Before doing so, however, it should be mentioned that a review of the decisions regarding expropriation also shows that consistent case law is being developed in that area and that tribunals tend to follow in the footsteps of their predecessors. This is obvious as far as regulatory expropriation is concerned, where the approach is to assess the legitimacy of the aim of the measure, the degree of impact upon the investor, and proportionality.⁸² In particular, one clearly sees the influence of previous case law in this context, especially the influence of *Tecmed* and *Waste Management*.⁸³ However, it is too early to assess whether this influence is comparable in its effects to the doctrine of precedent or if it simply denotes a trend that still needs confirmation.

In an article published in 2005,⁸⁴ Christoph Schreuer reviewed the evolution of the fair and equitable treatment standards from their inception with the *Neer*

⁸¹ *Plama Consortium Ltd v. Republic of Bulgaria*, ICSID Case ARB/03/24, Decision on Jurisdiction, 8 February 2005; *Salini SpA and Italstrade SpA v. Hashemite Kingdom of Jordan*, ICSID Case ARB/02/13, Award, 31 January 2006; *Telenor Mobile Communications AS v. Republic of Hungary*, ICSID Case ARB/04/15, Award, 13 September 2006.

⁸² See e.g. *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case ARB(AF)/00/2, Award, 29 May 2003; *Waste Management, Inc. v. United Mexican States*, ICSID Case ARB(AF)/00/3, Award, 30 April 2004; *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Award, 26 January 2006; *Methanex v. United States*, UNCITRAL (NAFTA), Final Award, 3 August 2005; *EnCana Corp. v. Republic of Ecuador*, LCIA Case UN3481, UNCITRAL, Award, 3 February 2006; *Saluka Investments BV (The Netherlands) v. Czech Republic*, Partial Award, 17 March 2006; *Azurix Corp. v. Argentine Republic*, ICSID Case ARB/01/12, Award, 14 July 2006; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case ARB/02/1, Decision on Liability, 3 October 2006; *Telenor Mobile Communications AS v. Republic of Hungary*, *supra* n. 81.

⁸³ See *supra* n. 82.

⁸⁴ See Christoph Schreuer, 'Fair and Equitable Treatment' in (2005) 6 *J World Investment and Trade* 3.

case in 1926⁸⁵ to the *Gami* case in 2004.⁸⁶ Schreuer shows in this study a clear progression over time towards more exacting requirements imposed on the host state. Supplementing the analysis with awards rendered in the last two years, such as *Thunderbird v. Mexico*,⁸⁷ *Saluka v. Czech Republic*,⁸⁸ *LG&E v. Argentina*,⁸⁹ *PSEG v. Turkey*⁹⁰ and *Siemens v. Argentina*,⁹¹ yields the following results:

- Tribunals, in this area as in all others, pay great attention to the wording and the purpose of the treaty concerned, as well as to the facts.
- However, beyond these case specifics, one can see some standards emerging. The need for stability of the legal and business framework in the host state has been affirmed repeatedly⁹² and, in the words of the *LG&E* tribunal, is ‘an emerging standard of fair and equitable treatment in international law’.⁹³ For example, the *PSEG* tribunal recently confirmed that the fair and equitable treatment obligation was seriously breached by what has been described as the ‘roller-coaster’ effect of the continuing legislative changes found in that case.⁹⁴
- The same applies to the fact that tribunals have consistently abandoned the requirement of bad faith on the part of the host state. As underlined by the *Azurix* tribunal in 2006, ‘Except for *Genin*, there is a common thread in the recent awards under NAFTA and *Tecmed* which does not require bad faith or malicious intention of the recipient State as a necessary element in the failure to treat investment fairly and equitably’.⁹⁵ This statement recently has been repeated in the *Siemens* award in virtually the same words.⁹⁶
- Similarly, the legitimate expectations of the foreign investor are now a key element against which the behaviour of the host state is assessed.⁹⁷ The tribunal in *PSEG* underlined the significance of the investor’s legitimate

⁸⁵ *Neer Case (United States v. Mexico)*, 4 RIAA 60 (Gen. Cl. Comm’n 1926).

⁸⁶ *Gami Investments, Inc. v. United Mexican States*, UNCITRAL, 15 November 2004.

⁸⁷ *Thunderbird v. United Mexican States*, *supra* n. 82.

⁸⁸ *Saluka Investments BV (The Netherlands) v. Czech Republic*, *supra* n. 82.

⁸⁹ *LG&E v. Argentine Republic*, *supra* n. 82.

⁹⁰ *PSEG Global v. Republic of Turkey*, ICSID Case ARB/02/5, Award, 19 January 2007.

⁹¹ *Siemens v. Argentine Republic*, *supra* n. 74.

⁹² See e.g. *Metalclad Corp. v. Mexico*, ICSID Case ARB(AF)/97/1, Award, 30 August 2000; *Maffezini v. Kingdom of Spain*, *supra* n. 79; *MTD Equity Sdn Bhd and MTD Chile S.A. v. Chile*, ICSID Case ARB/01/7, Award, 25 May 2004; *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award, 14 March 2003; *Tecmed v. United Mexican States*, *supra* n. 82; *Azurix v. Argentine Republic*, *supra* n. 82.

⁹³ *LG&E v. Argentine Republic*, *supra* n. 82 at para. 125.

⁹⁴ *PSEG v. Republic of Turkey*, *supra* n. 90 at paras 250 and 255.

⁹⁵ *Azurix v. Argentine Republic*, *supra* n. 82 at para. 372.

⁹⁶ ‘It emerges from this review [of the cases invoked by the parties] that, except for *Genin*, none of the recent awards under NAFTA and *Tecmed* require bad faith or malicious intention of the recipient State as a necessary element in the failure to treat investment fairly and equitably, and that, to the extent that it has been an issue, the tribunals concur in that customary international law has evolved’. *Siemens v. Argentine Republic*, *supra* n. 74 at para. 299.

⁹⁷ See Stephen Fietta, ‘Expropriation and the Fair and Equitable Standard: the Developing Role of Investors’ Expectations’ in (2006) 23–25 *J Int’l Arb.* 375.

expectations, which, ‘as the Tribunal in *Tecmed* concluded, requires a treatment that does not “detract from the basic expectations on the basis of which the foreign investor decided to make the investment”’.⁹⁸

These standards seem sufficiently established to influence future tribunals. At the same time, it is true that they are rather broad and imprecise, which will leave enough room for future tribunals to use their own discretion in applying these standards. Broad standards are malleable and leave room for interpretation. By comparison, established jurisprudence on umbrella clauses – where the choice is between yes or no – would be much more constraining. This may be one of the reasons why it may take longer to achieve.

(d) *Summing Up Current Practice: Significant Variations*

To sum up this section on current practice, there are significant variations between the different categories of disputes:

- there is no meaningful precedential value of awards in commercial arbitration;
- there is strong reliance on precedents in sports arbitration, which comes close to a true *stare decisis* doctrine; and
- in investment arbitration, there is a progressive emergence of rules through lines of consistent cases on certain issues, though there are still contradictory outcomes on others.

IV. WHY ARBITRATORS DO WHAT THEY DO

Why are there such differences in the degree to which arbitrators rely on prior cases? This question is the focus of this part of the lecture. To this question, there are two types of answers: a general one and answers specific to each field.

(a) *A General Explanation Linked to the State of Development of the Law*

For the general answer, it may be helpful to seek some guidance from legal philosophers about the relationship between law and the practice of following precedents. Lon Fuller, one of the most influential American legal philosophers, wrote a famous essay in which he sets out how one may fail to make law.⁹⁹ In this essay, a well-meaning king tries to respond to the need for proper regulation expressed by his subjects, and he tries to make law. However, he fails in this endeavour because he either decides cases on a completely ad hoc basis and thus

⁹⁸ *PSEG v. Republic of Turkey*, *supra* n. 90 at para. 240, quoting para. 154 of *Tecmed v. United Mexican States*, *supra* n. 82.

⁹⁹ This essay is included in Lon L. Fuller, *The Morality of Law* (rev. edn, 1969), pp. 33–41, as the first main section of ch. II.

in a wholly unpredictable manner or, when he means to create rules, he applies them in an entirely inconsistent fashion. Fuller explains that, in both cases, the king fails to make law because predictability and consistency are indispensable elements of law.¹⁰⁰ A rule of law is only a rule of law if it is consistently applied so as to be predictable. As Matthew Kramer, who teaches legal philosophy in Cambridge, would say, ‘a higgledy-piggledy arrangement would be antithetical to the rule of law’.¹⁰¹

The creation of rules that are consistent and predictable is part of what Fuller calls the ‘inner (or internal) morality of law’.¹⁰² When making law, decision-makers have a moral obligation to strive for consistency and predictability, and thus to follow precedents.¹⁰³ It may be debatable whether arbitrators have a *legal* obligation to follow precedents – probably not – but it seems well settled that they have a *moral* obligation to follow precedents so as to foster a normative environment that is predictable.

This moral obligation is not the same under all circumstances or in all fields. Its scope depends, among other factors, on how well developed the applicable body of rules is. Norberto Bobbio, one of Italy’s most revered twentieth century scholars, has shown that the development from a nascent body of rules to a full-blown legal system follows several stages.¹⁰⁴ In the earlier stage, one witnesses the emergence of a dispute resolution body. In the later stage, a central law-creating institution takes shape, in addition to the adjudicative body.¹⁰⁵ The modern state

¹⁰⁰ *Ibid.* pp. 38–39: ‘Rex’s bungling career as legislator and judge illustrates that the attempt to create and maintain a system of legal rules may miscarry in at least eight ways ... The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are ... the enactment of contradictory rules ... [It] does not simply result in a bad system of law; it results in something that is not properly called a legal system at all’. For further developments on and a clarification of Fuller’s principles of legality, see Matthew H. Kramer, *Objectivity and the Rule of Law* (forthcoming 2007), ch. 2, referring to ‘regularity and uniform applicability’ as forming part of ‘the set of conditions that obtain whenever any legal system exists and operates’.

¹⁰¹ Kramer, *supra* n. 100. See further Matthew H. Kramer, *In Defense of Legal Positivism* (1999), p. 142–146, referring to a ‘bewilderingly higgledy-piggledy array of contrary signals and interventions’ incompatible with the concept of law, and Michel van de Kerchove and François Ost, *Legal System Between Order and Disorder* (1994), p. 135, elaborating on the ‘principle of unity binding different elements together so as to make them into a system’, which is defeated by an inconsistent application of rules.

¹⁰² Fuller refers to the avoidance of the eight ways to fail to make law as the ‘the eight demands of the law’s inner morality’, in his ch. II, entitled ‘The Morality that Makes Law Possible’. See Fuller, *supra* n. 99, at p. 46.

¹⁰³ *Ibid.* p. 42: ‘The inner morality of law ... embraces a morality of duty and a morality of aspiration. It ... confront[s] us with the problem of knowing where to draw the boundary below which men will be condemned for failure, but can expect no praise for success, and above which they will be admired for success and at worst pitied for the lack of it’. Fuller further speaks, at p. 43, of a ‘moral duty to try to be clear’ and a ‘moral duty with respect to publication’; the same moral duties apply to the other requirements of the internal morality of law. As Kramer, *supra* n. 100, concludes, ‘Fuller contended that his eight principles constitute the “inner morality of law” and that they therefore establish an integral connection between the legal domain and the moral domain’.

¹⁰⁴ Norberto Bobbio, ‘Ancora sulle norme primarie e norme secondarie’ in (1968) 59 *Rivista di Filosofia* 35 (translated into French as ‘Nouvelles réflexions sur les normes primaires et secondaires’ in Ch. Perelman (ed.), *La règle de droit* (1971), p. 104.

¹⁰⁵ *Ibid.* p. 51 (original Italian version): ‘Ebbene: il passaggio da un sistema sociale primitivo all’ordinamento giuridico è avvenuto in un primo tempo con l’istituzione del giudice e solo in un secondo tempo del legislatore’.

is the epitome of a system having reached the later stage.¹⁰⁶ International law is considered to be just beyond the first stage and moving towards the second one.¹⁰⁷

In essence, the less developed the body of rules is, the more important the role of the dispute resolver will be with respect to the creation of rules.¹⁰⁸ To put it simply, rule creation through dispute settlement depends on the need for predictability.¹⁰⁹ When arbitrators apply a national law in commercial arbitration, that law is sufficiently developed to be predictable, and the arbitrators' role does not involve developing rules belonging to this national law. This is the role of the national legislators. When arbitrators apply a body of rules that is less developed and is still in the process of being formed, their role with respect to the establishment of predictable rules is much more important. This is so today in sports law and investment law.

This is the general answer to the question of why arbitrators do or do not refer to precedents. Before moving on to the specific answers, the question arises whether this general explanation is equally applicable to all three categories of disputes reviewed here: commercial, sports and investment disputes. Is the situation changed by the fact that investment treaty tribunals are treaty-based international or at least hybrid tribunals that are part of the international legal system, as opposed to private arbitral tribunals governed by national law in commercial and sports arbitration? The answer seems to be in the negative. While it may reinforce the need for internationally consistent solutions, the international nature of the dispute resolution mechanism does not fundamentally alter things. What really matters are the stage of development of the law and the need for overall consistency and predictability.

(b) *Some Field-Specific Explanations*

The role of arbitrators also depends on other factors, which are specific to the field in which they act. In commercial arbitration, there is no need for developing

¹⁰⁶ See e.g. Joseph Raz, 'The Institutional Nature of Law' in (1975) 38 *Modern Law Review* 491: 'Many, if not all, legal philosophers have ... agreed that one of the defining features of law is that it is an institutionalized legal system [with] norm-applying institutions such as courts ... and norm-creating institutions such as constitutional assemblies, parliaments, etc ... [T]he existence of *norm-creating* institutions [is] characteristic of modern legal systems' (emphasis added).

¹⁰⁷ Bobbio, *supra* n. 104 at p. 51.

¹⁰⁸ *Ibid.* pp. 51–52: 'Il giudice, una volta istituito, assume di solito anche la funzione della produzione normativa ad integrazione o addirittura in concorrenza col diritto consuetudinario proprio di un sistema primitivo. In tal modo riunisce in sé entrambe le funzioni della conservazione e della trasformazione del sistema. Solo quando, attraverso un processo ulteriore di divisione del lavoro, si formano in società più evolute organi cui viene attribuita la competenza specifica della produzione normativa, il giudice diventa l'organo specifico della conservazione del sistema.'

¹⁰⁹ On the need for predictability in the international arena, see e.g. Gunther Teubner, 'Un droit spontané dans la société mondiale' in Ch.-A. Morand (ed.), *Le droit saisi par la mondialisation* (2001), p. 199 ('Les exigences sociales pesant sur ce droit auto-créé par la société mondiale ne sont plus essentiellement celles de la régulation politique des processus sociaux, mais proviennent des besoins juridiques originels de sécurité et de règlement des conflits'). See also Pierre Lalive, 'Tendances et méthodes en droit international privé' in (1977) 155 *Hague Academy of International Law, Collected Courses* 69.

consistent rules through arbitral awards because the disputes are most often fact- and contract-driven. The outcome revolves around a unique set of facts and upon the interpretation of a unique contract that was negotiated between private actors to fit their specific needs. Unsurprisingly, awards are published only sporadically in this context, unlike sports and investment arbitration, where publication has become the rule.

By contrast to the situation in commercial arbitration, in sports arbitration the development of consistent rules through arbitral awards is greatly needed. The rules applied in international sports arbitration mostly are those of sports governing bodies, such as international federations. They emanate from entities with a monopolistic position. Although these federations are private entities, their rules resemble administrative and sometimes criminal rules, and deal with the same recurrent issues.

As a result, there is a strong requirement of a level playing field and fairness to athletes, or in legal terms, equal treatment. In pragmatic terms, this requirement becomes strikingly obvious if one bears in mind that the athlete's performance on the playing field is measured by universal sports standards. The stopwatch is the same wherever and whenever a race takes place. The equality in front of the stopwatch must be replicated when it comes to the application of legal rules.¹¹⁰

With regard to investment law, there would appear to be a strong need for consistent rule creation. There are numerous similarities between investment and sports arbitration. For instance, both involve review of the decisions or actions of a governing body, be it a government or a sports federation. Yet the need for consistency is not as strong in investment disputes as in sports disputes. Indeed, there is not the overall expectation of equal treatment or consistency among investors as there is for athletes. It is true that investors come from one country and invest in another under one treaty. In addition, it is true that there are many countries and that there are many treaties that are not all the same. Nevertheless, there are recurring issues in investment arbitration as well, which must be resolved by the application of one and the same rule of law. For the predictability of investments and the credibility of the dispute resolution system, that rule cannot change from one proceeding to another.

Hence, more consistency must be the goal. As was shown above, rules gradually have emerged on certain issues. Others could have been added, for example, the admission in principle of a distinction between treaty and contract claims¹¹¹

¹¹⁰ One notes, not surprisingly, that the same concern for equality before the law is very much present in the case law of the European Court of Human Rights.

¹¹¹ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case ARB/97/3, Decision on Annulment, 3 July 2002; *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case ARB/00/06, Decision on Jurisdiction, 16 July 2001; *Salini Construttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case ARB/00/4, Decision on Jurisdiction, 23 July 2001; *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case ARB/03/3, Decision on Jurisdiction, 22 April 2005. More recently acknowledged by the tribunal in *BP America v. Argentine Republic*, *supra* n. 67, at para. 97 and *Pan American Energy v. Argentine Republic*, *supra* n. 67. See also *Siemens v. Argentine Republic*, *supra* n. 74.

or certain aspects of expropriation.¹¹² Other questions still are unsettled.¹¹³ Will those also reach consistent solutions over time? Optimists will answer in the affirmative, arguing that rule creation cannot be linear and that the road is necessarily bumpy, with dead-ends and u-turns. Pessimists will respond in the negative, pointing to more fundamental disagreements. Pragmatists will look for ways to foster consistency. What ways are there?

Can the ICSID annulment mechanism be of assistance in bringing about consistency? This would appear to be the case with respect to jurisdictional issues. However, because of the relatively narrow scope of the annulment grounds, it is unlikely to produce consistent outcomes on the merits. The recent decision in *Patrick Mitchell v. Congo*¹¹⁴ has even shown that the annulment mechanism can sometimes introduce more confusion than consistency.¹¹⁵ Even if this is a one-time mishap, it demonstrates the difficulties in seeking to achieve consistency through an annulment body that is not permanent. Another possibility that could bring consistency is the idea of an appeals facility in ICSID arbitration.¹¹⁶ However, this idea appears to have been abandoned, which is a positive development since its drawbacks clearly outweighed its advantages.

Another approach to foster consistency may be for arbitral tribunals systemically to rely on the rules applied in a consistent line of cases and to depart from them only for very compelling reasons. This would actually be a *stare decisis* doctrine applied not to a single decision, but to a line of cases, or a *jurisprudence constante*. With time, this practice could even develop into customary international law.¹¹⁷ It would imply not only a well established practice but also an *opinio juris*, namely, the belief among states, investors and arbitrators that, in the absence of compelling reasons to do otherwise, a tribunal must follow the solution arising from a consistent line of earlier cases.

Reasonable minds may differ on whether such a *stare decisis* practice is workable in a decentralised mode of regulation, with ad hoc tribunals only and no central, supervising institution binding them together. Indeed, in national legal systems, the doctrines of *stare decisis* and *jurisprudence constante* generally are deemed to imply

¹¹² See *Azurix v. Argentine Republic*, *supra* n. 82; *Telenor v. Republic of Hungary*, *supra* n. 81; *LG&E v. Argentine Republic*, *supra* n. 82; *Siemens v. Argentine Republic*, *supra* n. 74.

¹¹³ As discussed *supra* for the umbrella clause and the MFN clause, see *supra* nn. 69 to 81 and accompanying text.

¹¹⁴ *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case ARB/99/7, Decision on the Application for the Annulment of the Award, 1 November 2006.

¹¹⁵ Emmanuel Gaillard, 'A Black Year for ICSID' in *New York Law Journal*, 1 March 2007, reprinted in (2007) 134 *J. Droit Int'l* 359.

¹¹⁶ See transcript of the second conference of the British Institute of International and Comparative Law's Investment Treaty Forum on Appeals and Challenges to Investment Treaty Awards: 'Is it Time for an International Appellate System?', 7 May 2004, published in (2005) 2 *Transnational Dispute Management*.

¹¹⁷ *Thunderbird v. United Mexican States*, Separate Opinion (Dissent in Part) of Thomas Wälde, 26 January 2006, at para. 16.

a hierarchy among courts.¹¹⁸ If one has doubts, still another possibility to consider would be to introduce a system of preliminary rulings like the one practised before the European Court of Justice pursuant to Article 234 of the EC Treaty. This system works well in harmonising European law; it also may work well in providing consistency with investment law.¹¹⁹

V. CONCLUSION

In conclusion, I emphasise three main points:

First, as arbitration expands in numerous areas and as economic activities become more diverse and complex, we must increasingly differentiate between types of disputes and users.

Secondly, whether the development of binding rules through arbitral decisions is desirable or not depends on necessity, namely, the need for certainty and predictability, as well as the need for consistency or equal treatment. Such needs clearly exist in areas where the law is not yet well developed.

Thirdly, we are at a time when we probably have reached or perhaps passed the peak of globalisation and trade liberalisation, with the breakdown of the Doha Rounds, increasingly protectionist regulators, and the accession of trade sceptics to the US Congress. We are at a time of painful transition from a bipolar world to a multipolar regime. This is a time when, because of the changing environment, the predictability and consistency of the rule of law are more important than ever.

Finally, it is important to remember that the credibility of the entire dispute resolution system depends on consistency, because a dispute settlement process that produces unpredictable results will lose the confidence of the users in the long term and defeat its own purpose.

These final points lead to the overall conclusion that ‘arbitral precedent’ is a necessity for certain types of disputes, if not only for the sake of the rule of law.

¹¹⁸ In addition to a proper reporting system. So *e.g.* John H. Baker, *An Introduction to English Legal History* (3rd edn, 1990), for whom ‘[t]he duty of repeating errors is a modern [*i.e.* nineteenth century] innovation’, which may have resulted from the improved quality of law reports, but was more likely a result of the hierarchical system of appellate courts established in the nineteenth century. For civil law references, see Terré, *supra* n. 4 at p. 237. Boris Starck, Henri Roland and Laurent Boyer, *Introduction au droit* (2000), pp. 331–332; Marianne Saluden, ‘La jurisprudence, phénomène sociologique’ in (1985) 30 *Arch. phil. dr.* 191 at p. 195; van de Kerchove, *supra* n. 17 at p. 233; Carbonnier, *supra* n. 4 at p. 271; Le Roy, *supra* n. 4 at p. 168. In principle, lower courts are deemed to follow the decisions of a higher court. However, in some countries, lower courts are allowed to disagree with higher courts, though only when strict conditions are met. See *e.g.* Geneva Court of Justice, SJ 1987 232 at 235–236, where the court stated that it would not follow the precedent of the Swiss Supreme Court if there were serious and objective reasons that suggested that the previous reasoning was wrong.

¹¹⁹ Gabrielle Kaufmann-Kohler, ‘Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are there Differences?’ in E. Gaillard and Y. Banifatemi (eds), *Annulment of ICSID Awards* (2004), p. 221. See Schreuer and Weiniger, *supra* n. 64; Schreuer, *supra* n. 66.