Journal of International Arbitration **24(2)**: 129–158, 2007.

Precedent in Investment Treaty Arbitration

A Citation Analysis of a Developing Jurisprudence

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> It is not so much that they necessarily possess a higher intrinsic value than, for instance, eminent juridical opinion, but that they have a more direct and immediate impact on the realities of international life, the attitude of States, and the mind of judges and arbitrators in later cases. Sir Gerald G. Fitzmaurice, 1958.[1]

While there is no doctrine of stare decisis *or binding precedents in international law, the development of an investment treaty case law or jurisprudence is unmistakable, and has not gone unnoticed in recent times, by treaty tribunals, and by those appearing before them. As such, international investment law now effectively develops through this mounting case-law, rendering the precedential value of each decision, award and order, rightly or wrongly, tremendously significant. A review of the decisions, awards and orders rendered by these tribunals, with a view to examine the sources of law cited in their decisions, is now both appropriate and warranted. This article presents a quantitative and qualitative citation analysis of this case law, surveying and reviewing the role that precedent has played in the 207 publicly available decisions, awards, and orders rendered since 1972, including decisions rendered by early ICSID tribunals (where jurisdiction was not predicated on consent in an investment treaty), and ICSID, ICSID (AF), and certain non-ICSID investment treaty tribunals.*

I. Introduction

In 1993, E. Lauterpacht and R. Rayfuse presciently wrote of the approximately thirty-one awards and decisions of the International Centre for Settlement of Investment Disputes (ICSID) produced since 1973, that "[t]hough their number may not appear great, their contribution to both the substance of international investment law and the procedure of international arbitration is of considerable importance."[2] Now more than thirteen years later, ICSID Reports, the introduction of which was touted as greatly facilitating the "development of a coherent case law on the ICSID Convention," is on its eleventh volume.[3] Much like the 497 cases first published in Henry de Bracton's *De Legibus* and the 2000 later published in *Bracton's Note Book*, the awards and decisions set forth in ICSID Reports have established the framework for a system of precedents.[4] Just as the

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[1] Sir Gerald G. Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, *in* Symbolae Verzijl 153, 172 (F. M. Van Asbeck ed., 1958).

[2] R. Rayfuse & E. Lauterpacht, 1 ICSID Rep. ix (1993).

[3] Christoph H. Schreuer, The Icsid Convention: A Commentary 617 (2001).

[4] Frederick Bernays Wiener, *BRACTON: A Tangled Web of Legal Mysteries that Defied Solution for More than Seven Centuries*, 2 Int'l Sch. L. Rev. 129, 136 (1977–78); David J. Seipp, *Bracton: The Year Books, and the Transformation of Elementary Legal Ideas in the Early Common Law*, 7 Law & Hist. Rev. 175 (1989); Paul Vinogradoff, *The Text of Bracton*, 1 L. Q. Rev. 189 (1885).

decided cases cited by Bracton were "not cited as binding precedents, because the doctrine of precedent still lay far in the future, but simply as examples," the awards and decisions reported in ICSID Reports, and elsewhere, are not binding on any future tribunals, but remain persuasive nonetheless.[5] Between 1972 and 2006, ICSID and ICSID Additional Facility (AF) tribunals have rendered 170 publicly available awards, decisions, and orders. And the burgeoning corpus of precedents is likely to continue to grow, as the ICSID registry presently lists a record 103 pending cases.[6] Once described by ICSID counsel as "somewhat of a 'Sleeping Beauty' "[7] during its first three decades of existence, ICSID's last decade has witnessed the emergence of what can only be described as a "case law,"[8] or "jurisprudence."[9] ICSID tribunals are, of course, not alone in contributing to this emerging jurisprudence. As described recently in a comprehensive United Nations Conference on Trade and Development (UNCTAD) research note, the number of known treaty-based cases, as of November 2005, was 219. Of these 219 cases, 132 were brought before ICSID (including ICSID's Additional Facility), while the remaining 87 were brought before other arbitration forums and/or pursuant to other arbitration rules (65 pursuant to UNCITRAL Rules 13 at the Stockholm Chamber of Commerce, 4 at the International Chamber of Commerce, and 5 ad hoc).[10]

Although the then president of the ICJ, Sir Arnold Duncan McNair, observed fifty years ago that "[t]he accumulation of case law proceeds imperceptibly, and we can easily fail to realize how rapid and substantial this process is," the development of an investment treaty case law or jurisprudence has not gone unnoticed in recent times.[11] Over the course of the last five years, as the number of bilateral investment treaty (BIT) awards and decisions have markedly increased, the role of ICSID precedent has been a hot topic at conferences, such as the gatherings in Paris and Geneva in 2004,[12] in

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[5] Wiener, *supra* note 4, at 136; Judith Gill, *Inconsistent Decisions: An Issue to be Addressed or a Fact of Life?*, *in* INVESTMENT TREATY LAW—CURRENT ISSUES vol. 1, 25 (Federico Ortino, Audley Sheppard & Hugo Warner eds., 2006) ("Now, as has already been mentioned, there is no doctrine of precedent in international law, in terms of one tribunal's decision being binding on another tribunal, but, one only has to read the awards given in published cases to see the importance that is attributed to previous decisions by investment arbitration tribunals"); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM. L. REV. 1521, 1612 n. 438 (2005) (referring to interviews with leading investment arbitration practitioners describing prior awards as "whilst not binding, … persuasive").

[6] As of December 1, 2006, there were 103 cases pending, <www.worldbank.org/icsid>.

[7] Eloïse Obadia, *ICSID, Investment Treaties and Arbitration: Current and Emerging Issues*, *in* INVESTMENT TREATIES AND ARBITRATION 67 (Gabrielle Kaufmann-Kohler & Blaise Stucki eds., 2002).

[8] Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction, January 14, 2004, *available at* <http://ita.law.uvic.ca/documents/Enron-Jurisdiction_000.pdf>.

[9] Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18, Procedural Order No. 3, January 18, 2005, *available at* <www.worldbank.org/icsid/cases/tokios-order3.pdf>.

[10] UNCTAD, *Latest Developments in Investor State Dispute Settlement*, IIA MONITOR No. 4, 2–3 (2005). As readily acknowledged in the UNCTAD research note, "the total number of these treaty-based investment arbitrations is impossible to measure," and "the actual number of claims instituted under non-ICSID Rules is very likely larger than what is known." *Id.* at 3.

[11] SIR ARNOLD DUNCAN MCNAIR, THE DEVELOPMENT OF INTERNATIONAL JUSTICE 15 (1954).

[12] Pierre Duprey, *Do Arbitral Awards Constitute Precedents?*, *in* IAI, TOWARD A UNIFORM INTERNATIONAL ARBITRATION LAW? (2005).

London in 2005 and 2006,[13] and in Washington, D.C.,[14] San Francisco,[15] Montreal,[16] New York,[17] and Bretton Woods[18] in 2006. It has also been increasingly discussed and examined in leading treatises and commentaries.[19] As shrewdly put at last year's ICCA Congress by Jan Paulsson "[t]hat a special jurisprudence is developing from the leading awards in the domain of investment arbitration can only be denied by those determined to close their eyes."[20]

Far from a mere academic matter, ICSID awards and decisions increasingly reflect and discuss this developing case law or jurisprudence. It is only expected that arbitrators when faced with difficult issues of law want "to know what others in similar situations have done," and regard "awards by other arbitrators in related cases as veritable precedents," and in this regard, ICSID tribunals are no different.[21] As observed recently by perhaps the most sought-after arbitrator in ICSID cases, Gabrielle Kaufmann-Kohler, "[w]hilst tribunals agree that there is no doctrine of precedent *per se*, they also concur on the need to take earlier cases into account."[22] Aside from relying on prior awards and decisions in practice, ICSID tribunals have begun to discuss the nature of their practices with respect to precedent. The issue of precedent in investment arbitrations has itself been squarely addressed in three of the most recent decisions on jurisdiction emanating from ICSID tribunals.[23]

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[13] Alejandro A. Escobar, *The Use of ICSID Precedents by ICSID and ICSID Tribunals*, Presentation at the British Institute of International and Comparative Law (BIICL) Annual Meeting panel, Used and Abused: The Role of Precedent in Investment Protection Arbitration, June 19, 2005 (on file with author); Christoph Schreuer, *The Interpretation of Investment Treaties: Diversity and Harmonization*, Presentation at Lincoln's Inn, Interpretation under the Vienna Convention on the Law of Treaties: 25 Years On, January 17, 2006; Matthew Weiniger, *Is Past Performance a Guide to Future Performance? Precedent in Treaty Arbitration*, Presentation at the BIICL, Seventh Investment Treaty Forum Public Conference, Procedural Aspects of Investment Treaty Arbitration, September 8, 2006 (on file with author); Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity, or Excuse*, Presentation at the Annual Freshfields Lecture, November 2006 (forthcoming 2007 *in* ARB. INT'L) (draft on file with author).

[14] Christopher S. Gibson, *Precedent in Investor-State Arbitration*, Presentation at the Institute for Transnational Arbitration, The Iran-United States Claims Tribunal at 25: The Cases Everyone Needs to Know for Investor-State and International Arbitration, March 29, 2006 (on file with author).

[15] Andrea Bjorklund, *Investment Arbitration Decisions as De Facto Precedent: Is there a Need for Great Consistency?*, Presentation at A Just World Under Law, Centennial Conference of the American Society of International Law and 16th Annual Fulbright Symposium on Current International Legal Problems, April 7, 2006.

[16] Jan Paulsson, *International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law (Draft)*, Presentation, ICCA Annual Congress 2006, May 21, 2006, *available at* <www.iccamontreal2006.org/english/pdf/program/presentations/Paulsson.pdf>.

[17] Tai-Heng Cheng, *Is there a System of Precedent in Investment Treaty Arbitration?*, Presentation, USCIB Young Arbitrator's Forum, October 22, 2006, *available at* <www.nyls.edu/pdfs/cheng_young%20arbitrators.pdf>.

[18] Andrea Bjorklund, *Investment Arbitration Decisions as De Facto Precedent*, Presentation at the ASIL International Economic Law Group Annual Conference, November 10, 2006, *available at* <www.law.umkc.edu/2006/bjorklund_investment.pdf>.

[19] MEG N. KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, 1136, 4–6 (2006); EMMANUEL GAILLARD, LA JURISPRUDENCE DU CIRDI 15–16, 386, 784, 789–90, 806, 841, 865–69, 897 (2004); CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 617 (2001); FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 183–89 (Emmanuel Gaillard & John Savage eds., 1999).

[20] Paulsson, *supra* note 16, at 12.

[21] Klaus Peter Berger, *The International Arbitrators' Application of Precedents*, 9 J. INT'L ARB. 4, 5, 18 (1992).

[22] Kaufmann-Kohler, *supra* note 13.

[23] El Paso Energy International Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Decision on Jurisdiction, April 27, 2006, *available at* <www.worldbank.org/icsid/cases/ARB0315-DOJ-E.pdf>; Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Decision on Jurisdiction, May 16, 2006, *available at* <http://ita.law.uvic.ca/documents/Suez-Jurisdiction.pdf>; Jan de Nul N.V., Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction, June 16, 2006, *available at* <http://ita.law.uvic.ca/documents/JandeNuljurisdiction061606.pdf>.

The tribunal in one of the cases, *El Paso* (Caflisch, Stern, Bernardini), went so far as to positively affirm the rather established finding that it knew of "no provision, either in the [sic] Convention or in the BIT, establishing an obligation of *stare decisis*."[24] It is not alone in stating as much, as in the last five years, at least seven other ICSID tribunals have repeated similar refrains despite the obvious and well known lack of a binding rule of *stare decisis* in international law. While tribunals are absolutely correct that there exists no obligation of *stare decisis* in the context of investment treaty arbitration, prior decisions and awards cannot now be reasonably described as only a subsidiary source of international law, as they have "attained a very influential position … that is highly reminiscent of *stare decisis* in Common Law Legal systems."[25] Or, borrowing from the civil law tradition, as put recently by one commentator, "[g]radually one may expect the institution of a *jurisprudence constante*, and the emergence of key decisions that are judged to be the influential starting points from which further analysis should flow."[26]

Given that international investment law now principally develops through case law, the precedential value of each decision, award, and order, is, rightly or wrongly, tremendously significant.[27] The disputes routinely involve claims for damages in excess of hundreds of millions of dollars, with considerable policy ramifications, and considerable consequences for the various stakeholders. A review of the decisions and awards rendered by these tribunals, with a view to examine the sources of law cited in their decisions, is now both appropriate and warranted. This article addresses this development by surveying and reviewing the role that precedent has played in the 207 publicly available decisions, awards, and orders issued by tribunals since 1972.[28] The 207 decisions, awards, and orders include: (i) 151 rendered by ICSID tribunals since 1972; (ii) 19 rendered by ICSID tribunals pursuant to the Additional Facility Rules; and (iii) a selection of 37 publicly available decisions and awards from non-ICSID investment treaty tribunals.[29] In so doing, the sources of international law cited by each tribunal are assessed through a quantitative and

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[24] *El Paso*, *supra* note 23, para. 39.

[25] Meg Kinnear, *Treaties as Agreements to Arbitrate: International Law as the Governing Law*, ICCA CONGRESS SERIES NO. 13 (forthcoming 2007); Christian J. Tams, *An Appealing Option? The Debate about an ICSID Appellate Structure*, 57 ESSAYS IN TRANSNAT'L ECON. L. 19 (2006) ("Previous decisions have usually been regarded not as binding, but as *persuasive* precedent"), *available at* <www.wirtschaftsrecht.uni-halle.de/Heft57.pdf>.

[26] Andrea Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, at 17, *available at* <www.law.umkc.edu/2006/bjorklund_investment.pdf>.

[27] Thomas Wälde, *The Present State of Research Carried Out by the English-Speaking Section of the Centre for Studies and Research*, *in* NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW 63, 66 (Hague Academy of International Law, 2006) ("The thesis underlying this report is that modern international investment law develops now mainly out of cases, and less out of treaties."); Andrea Bjorklund, *supra* note 26, at 17 ("The decisions of investment treaty arbitral tribunals are establishing international law as they decide the issues in the particular cases posed to them").

[28] The 207 awards and decisions include non-public decisions from one tribunal, *Holiday Inns*, which while not publicly available, are routinely cited by tribunals. P. Lalive, *The First World Bank Arbitration (Holiday Inn v. Morocco): Some Legal Problems*, 51 BRIT. Y.B. INT'L L. 128 (1980). Otherwise, summaries provided by counsel are not considered in this article. *See* Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, August 2, 2006; Telenor Mobile Communications A.S. v. Republic of Hungary, ICSID Case No. ARB/04/15, Decision on Jurisdiction, September 13, 2006.

[29] Given the lack of a central registry and lack of disclosure of certain non-ICSID decisions and awards, 37 publicly available non-ICSID decisions and awards from 2000 onwards are considered in this article. The number of non-ICSID awards and decisions considered is actually 39, but two of the decisions were jointly rendered in conjunction with an ICSID tribunal, and are included in full on the ICSID reference table, Table A, *infra* note 31.

qualitative citation analysis. In Part II, the notion of precedent is discussed, with a brief consideration of the place of precedent in common law legal systems, international law, and international commercial arbitration. The question of whether or not it is even possible to speak of an investment jurisprudence developing from a series of otherwise disconnected tribunals with ever-revolving members is assessed in Part III. In Part IV, the quantitative and qualitative findings of the citation analysis on the use of precedent by investment treaty tribunals are examined. In Part V, observations on the developing investment treaty jurisprudence are offered, alongside suggestions for improvements in the operation of precedent going forward. While the article is primarily focused on investment treaty awards and decisions, certain decisions of non-investment treaty ICSID tribunals (generally pre-1990) are also considered to the extent that they provide a contrast to the practice of modern day investment treaty tribunals.[30]

The precedents cited in the 207 publicly available decisions and awards by early ICSID tribunals (where jurisdiction is not predicated on consent in an investment treaty) and investment treaty tribunals are set forth in three tables:[31] (i) Table A: Precedents in ICSID Arbitration 1972–2006 (as of December 1, 2006); (ii) Table B: Precedents in ICSID (AF) Arbitration 1978–2006 (as of December 1, 2006); and (iii) Table C: Precedents in Non-ICSID Arbitration 2000–2006 (as of December 1, 2006). As important as the precedents cited, Table D and Table E track the arbitrators that have cited them, in both ICSID and ICSID (AF) arbitrations.[32] Table D examines the arbitrators selected in the 115 concluded ICSID and ICSID (AF) cases, while Table E examines the arbitrators selected in the 103 pending ICSID and ICSID (AF) cases.

II. The Notion of Precedent

A. Precedent in common law legal systems

The doctrine of *stare decisis*, or in its unabridged form, *stare decisis et non quieta movere*, born from Bracton's first collection of English decisions, has long been known in common law legal systems as "that great principle which is the sheet-anchor of our jurisprudence,"

[30] The first investment treaty case decided by an ICSID tribunal was not until 1990 in Asian Agricultural Products Ltd. v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/87/3, 4 ICSID Rep. 245 (1997).

[31] These searchable reference tables, essentially appendices to this article, are available at Jeffery P. Commission, *Precedent in Investment Treaty Arbitration: The Empirical Backing*, 2 Transnat'l Disp. Mgmt. (2007) (forthcoming at time of printing). The tables are organized in reverse chronological order to demonstrate the progress of the precedential value of each award or decision over time. For issue-based tables, *see* Christoph Schreuer's Commentary and the Cumulative Index in ICSID Reports "designed in such a way as to be amenable to developing ICSID case law." J. Crawford & Karen Lee (eds.) in 6 ICSID Rep. 570 (2004). For a complete list of all ICSID decisions and awards, including those not publicly available, *see* Emmanuel Gaillard's La Jurisprudence Du CIRDI, *infra* note 47.

[32] Commission, *supra* note 31. ICSID and ICSID (AF) arbitrators were chosen because of the ready availability of information and details concerning arbitrations provided by ICSID. As the purpose of the analysis was to assess which arbitrators were selected or appointed most frequently, an appointment is counted if in an initial proceeding, on a request for interpretation, on a request for revision, or an annulment proceeding. If the same arbitrator continues on in the same case, his or her appointment is only counted once. Also, for the purposes of this analysis, conciliation tribunals have been consolidated with arbitration tribunals for ease of convenience, as the purpose is to determine which individuals are selected and appointed most frequently.

upon which "the whole elaborate structure of our case law has been built up."[33] The maxim, typically translated as meaning "to abide by the precedents and not to disturb settled points," is premised on the notion that like cases should be treated alike.[34] The term "precedent" itself reflects this notion, defined as "an adjudged case or decision of a court of justice, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law."[35] Of course, not every opinion in a decision or judgment is regarding as binding, as "[i]n order that an opinion may have the weight of a precedent, two things must be concur: it must be, in the first place, an opinion given by a judge, and, in the second place, it must be an opinion the formation of which is necessary for the decision of a particular case; in other words, it must not be *obiter dictum*."[36] The purported values promoted by a system of *stare decisis* include "stability," "certainty and predictability," "reliability, equality and uniformity of treatment," and "convenience and expediency."[37] While the doctrine knows no counterpart in civil law systems, precedents are generally regarded as being persuasive and relied upon explicitly or implicitly in most civil law countries.[38]

B. Precedent in international law

There is no doctrine of *stare decisis* or binding precedents in international law.[39] Article 59 of the Statute of the International Court of Justice explicitly provides that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case." Article 38 of the same Statute states that judicial decisions constitute only "subsidiary means for the determination of rules of law." Yet, while not formally binding, decisions are cited and relied upon with regularity, by both the court itself and by counsel appearing before it. As aptly noted by Hersch Lauterpacht in his observations on the practice of the Permanent Court of International Justice, "[t]hey will be stones in the growing edifice even if in theory the builders are free not to continue to build upon them."[40]

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[33] Henry C. Black, *The Principle of Stare Decisis*, 34 Am. L. Reg. 745 (1886) (citing Bank of Pennsylvania v. Commonwealth, 19 Penn. St. 151); Henry C. Black, *The Doctrine of Stare Decisis*, 23 BAR 312 (1916); Guy Carleton Lee, *Bracton: A Study in Historical Jurisprudence*, 31 Am. L. Rev. 44 (1897).

[34] Black, *The Principle of Stare Decisis*, *supra* note 33, at 745.

[35] Henry C. Black, A Law Dictionary (2d ed. 1910).

[36] Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 Yale L.J. 161 (1930–31) (citing John Chipman Gray, The Nature and Sources of the Law 261 (1921)).

[37] Robert A. Sprecher, *The Development of the Doctrine of Stare Decisis and the Extent to which it Should Be Applied*, 31 A.B.A. J. 501, 505–6 (1945); Michael Zander, The Law Making Process 215, 302–3 (6th ed. 2004) (citing the Legal Process developed by Henry Hart and Albert M. Sacks, which catalogued the values of the common law system of precedent into the following categories: (i) "in furtherance of private ordering"; (ii) "in furtherance of fair and efficient adjudication"; and (iii) "in furtherance of public confidence in the judiciary.").

[38] *See* D. Neil MacCormick Robert S. Summers, Interpreting Precedents 532 (1997) ("In the civil law systems, although courts seldom explicitly acknowledge this, precedents are in practice generally recognized at least as providing strong (but defeasible or outweighable) force, and can also be cited as providing further support for decisions that have other legally justifying grounds of a kind that might seem somewhat shaky but for the support afforded by reference to precedent(s).").

[39] *See* Statute of the International Court of Justice 1244 (Andreas Zimmerman et al. eds., 2006).

[40] John Gardner, *Judicial Precedent in the Making of International Public Law*, 17 J. Comp. Legis. & Int'l L. 251 (1935).

C. Precedent in international commercial arbitration

As in international law more generally, there is similarly no doctrine of binding precedent or *stare decisis* in international commercial arbitration. There is no formal precedent, as "for all the attractions of arbitration in terms of its perceived economy, speed, neutrality and finality it lacks the capacity to create a case law regime which ordinary judicial institutions possess."[41] In order for decisions and awards from commercial arbitrations to act as precedents, three conditions have been recognized as crucial: (i) "the substance of the decisions reached in the awards must not have been reviewed by the courts"; (ii) "the various decisions reached on a particular issue should display some degree of homogeneity"; and (iii) "the decisions should be accessible to the public."[42] While certain international commercial arbitration decisions and awards have satisfied these conditions and developed as practical "persuasive" precedents to some degree, in the spirit of a *lex mercatoria*, they are beyond the scope of this article.[43]

III. Is It Possible to Speak of an Investment Treaty Jurisprudence?

A "consolidating jurisprudence,"[44] an "international common law of investor rights,"[45] "an investment jurisprudence,"[46] or a "common legal opinion or *jurisprudence constante*"[47] —these are just some of the labels that have been given to the burgeoning corpus of precedents emanating from ICSID and other investment treaty tribunals. To speak of investment treaty decisions as creating such a jurisprudence, however, assumes that ad hoc tribunals consisting of forever revolving members are even capable of creating a jurisprudence. As will be developed below, a confluence of conditions have provided for the development of a jurisprudence and a system of persuasive precedent, in ICSID, and other investment

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[41] Detlev F. Vagts, *Arbitration and the UNIDROIT Principles*, *in* Contratación Internacional, Comentarios a los Principios sobre los Contratos Comerciales Internacionales del Unidroit, Universidad Nacional Autónoma de México-Universidad Panamericana 265–77 (1998).

[42] Fouchard, Gaillard, Goldman on International Commercial Arbitration 184 (Emmanuel Gaillard & John Savage eds., 1999); Duprey, *supra* note 12.

[43] While international commercial arbitration has historically shared much in common with investment treaty arbitration, a bifurcation is indisputably underway. Although there remains no appellate mechanism in investment treaty arbitration, the ready availability of awards and decisions, along with a distinguished roster of arbitrators with an esprit de corps, amongst other differences, have transformed the practice and development of investment treaty arbitration, and the impact of its awards and decisions. W. Michael Reisman, *Law, International Public Policy (so-called) and Arbitral Choice in International Commercial Arbitration*, ICCA Congress Series No. 13 (forthcoming 2007) (on file with author) ("the increasing practice of publishing international investment arbitral awards necessarily produces a body of jurisprudence which is available to parties and subsequent tribunals and can be evaluated on its merits by the college of international lawyers and only then given some precedential persuasion. But none of that applies to international commercial arbitration.").

[44] International Thunderbird Gaming Corp. v. Mexico, Arbitral Award (UNCITRAL (NAFTA)), Separate Opinion of Thomas Wälde, January 26, 2006, *available at* <http://ita.law.uvic.ca/documents/ThunderbirdSeparateOpinion.pdf>.

[45] Matthew C. Porterfield, *An International Common Law of Investor Rights*, 27 U. Pa. J. Int'l Econ. L. U. 79, 103 n. 88 (2006).

[46] Thomas Wälde & Todd Weiler, *Investment Arbitration Under the Energy Charter Treaty in the Light of New NAFTA Precedents: Towards a Global Code of Conduct for Economic Regulation*, *in* Investment Treaties and Arbitration, *supra* note 7, at 159.

[47] Emmanuel Gaillard, La Jurisprudence du CIRDI (2004).

treaty arbitrations. The conditions, each of which will be considered in turn, are: (a) the publication and ready availability of awards and decisions; (b) the development of an esprit de corps among ICSID and other investment treaty arbitrators; and (c) a body of treaties and law susceptible to case law development.

A. Publication and ready availability of investment treaty awards and decisions

Put simply, "[j]udicial decisions, particularly when published, become part and parcel of the legal sense of the community."[48] As argued by one commentator, "[t]he only conceivable way of preventing a body of case law from developing in investment arbitration would have involved a total ban on publication."[49] Investment treaty awards and decisions are now readily accessible and available from a number of sources, including but not limited to: (i) ICSID reports, and a number of other printed publications around the world, such as International Legal Materials, Journal de Droit International, and ICSID Review—Foreign Investment Law Journal; (ii) the World Bank's ICSID website; (iii) dedicated investment treaty websites such as investmentclaims, naftaclaims, investment treaty arbitration, and transnational dispute management; and (iv) online at commercial legal service providers such as Kluwer Arbitration, LEXIS, and Westlaw. The recent amendments to ICSID Rule 48 of the Arbitration Rules providing that the Centre shall "promptly include in its publications excerpts of the legal reasoning of the Tribunal" ensure the continued publication of the reasoning of decisions and awards.[50]

B. An esprit de corps among ICSID and other investment treaty arbitrators

The question as to whether or not ad hoc tribunals with ever-changing members can truly create precedent, and a distinct jurisprudence, is not a new one. As to investment treaty decisions and awards emanating from ICSID tribunals, however, the tribunal members are no longer ever-changing. Put simply, their backgrounds, qualifications, experiences in international law and their regular interactions, both professionally and otherwise, have contributed to the development of an esprit de corps amongst ICSID and other investment treaty arbitrators.

1. *Precedent and Ad Hoc Arbitral Tribunals Historically*

Close to 100 years ago, debates preceding the establishment of the Permanent Court of Arbitration and the Permanent Court of International Justice considered this question squarely. At the second Hague Conference in 1907, M. Asser observed that:

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[48] Mohamed Shahabuddeen, Precedent in the World Court (1996) (citing International Law: Being the Collected Papers of Hersch Lauterpacht (E. Lauterpacht ed., 1975)).

[49] Fabien Gelinas, *Investment Tribunals and the Commercial Arbitration Model: Mixed Procedures and Creeping Institutionalisation*, *in* Sustainable Developments in World Trade Law and Jurisprudence 475, 585 (Markus W. Gehring & Marie-Claire Cordonier Segger eds., 2005).

[50] ICSID, Rules of Procedure for Arbitration Proceedings, Rule 48(4).

> The sentences of a Court composed of professional judges would have a judicial character, they would create precedent and make for progress in International Law …
>
> Instead of a Permanent Court, the Convention of 1899 created only a phantom, an impalpable ghost, or, in plain words, it consisted of a Registry and a list.[51]

In the same vein, M. de Martens similarly felt the need to assess the "real nature of this Court, the members of which did not even know each other."[52] In so doing, he came to the conclusion that "[t]he Court of 1899 is only a shadow which, from time to time, materializes, only to fade away once again."[53] Similar observations were made years later, in 1920, by the Advisory Committee of Jurists, in the course of their duty to "consider what, according to the terms of the Covenant, was the nature of this Permanent Court of International Justice, the organization, competence and procedure of which it had to define."[54] The Committee observed that the Permanent Court of Arbitration "was hardly more than a permanent framework, a vast body of arbitrators, from which a number of international tribunals were composed from time to time, only to disappear."[55] As to "jurisprudence" and the development of international law by the Permanent Court of Arbitration in particular, it was observed by the Advisory Committee of Jurists that:

> In the Court of Arbitration, there is no permanent tie between the sitting judges, and consequently, no *esprit de corps* nor progressive continuity in jurisprudence; on the other hand, the Court of International Justice, being composed of judges, permanently associated with each other in the same work, and, except in rare cases, retaining their seats from one case to another, can develop a continuous tradition, and assure the harmonious and logical development of International Law. It is to be feared that the judges of the Court of Arbitration, being inclined to regard the case from a political standpoint, may not give sufficient weight to the rules of Law.[56]

These criticisms, while dated, could in theory at least similarly apply with equal force to investment treaty tribunals created under the auspices of ICSID and other institutions. In practice, however, these criticisms are unconvincing, and no longer relevant, when applied to ICSID and other investment treaty tribunals.

2. *ICSID: Much More than a Registry and a List*

ICSID is far more than a "registry and a list," and is no ordinary institution tasked with administering arbitration and conciliation proceedings; rather it represents a "special case" amongst the various arbitral institutions.[57] As stated by esteemed ICSID arbitrator Ahmed Sadek El-Kosheri, "the ICSID system operates outside the scope of domestic law control in matters necessarily involving a public law entity in its relationship with an investment project involving a national of a member state."[58]

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[51] Procés-Verbaux of the Proceedings of the Advisory Committee of Jurists, Annex No. 1, 695 (1920).
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] Ahmed Sadek El-Kosheri, *ICSID Arbitration and Developing Countries*, 8 ICSID Rev. 104 (1992).
[58] *Id.*

Like the PCA, the ICSID Convention, at Article 12, provides for the maintenance of a Panel of Conciliators and a Panel of Arbitrators consisting of "qualified persons … willing to serve thereon." The persons chosen to be panel members must meet the qualifications set out at Article 14(1):

> Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of paramount importance in the case of persons on the Panel of Arbitrators.[59]

Writing in 1999, the then Secretary-General of ICSID, Ibrahim F.I. Shihata, and Deputy Secretary-General, Antonio R. Parra, offered invaluable insights into ICSID practices generally, including the selection of arbitrators. They noted, amongst other things, that at the end of November 1999: (i) fifty-two arbitral tribunals had been constituted in ICSID proceedings;[60] (ii) over 100 individuals had been appointed as arbitrators, "several of them more than once";[61] (iii) "[t]he largest contingents of arbitrators have been American, British, French, and Swiss, each with about a dozen different persons";[62] (iv) "[v]irtually without exception, the arbitrators, whether from developing or industrial countries, have been lawyers, often very senior lawyers";[63] and (v) "[t]hey have included members of the International Court of Justice; prominent law professors and private practitioners; past supreme court judges; and former chief governmental legal officials."[64]

While much of what Messrs Shihata and Parra observed in 1999 about ICSID historically remains accurate today, certain trends have emerged in the interim.[65] First, the observation that several of the arbitrators are appointed or selected "more than once"[66] remains true, and has become even more pronounced. A review of the 115 concluded cases (ranging from cases registered in 1972 until 2006) reveals that 202 arbitrators accounted for the 361 appointments in concluded cases (see Table 1). Of these 202 arbitrators, 43 of them accounted for 176 of the possible 361 appointments (49 percent). In fact, of the 43 arbitrators most frequently selected, 22 of them account for 115 of the 361 appointments (32 percent).

The appointments made thus far in pending ICSID cases continue this trend. A review of the 103 pending ICSID cases (ranging from cases registered in February 1997 to November 2006) reveals that 137 arbitrators accounted for the 284 appointments in pending cases (see Table 2). Of these 137 arbitrators, 32 of them account for 153 of the

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[59] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 14, March 18, 1965, T.I.A.S. 6090, 575 U.N.T.S.159, 4 I.L.M. 532 (1966).

[60] Ibrahim F.I. Shihata & Antonio R. Parra, *The Experience of the International Centre for Settlement of Investment Disputes*, 14 ICSID REV. 299, 311 (1999).

[61] *Id.*

[62] *Id.* at 312.

[63] *Id.*

[64] *Id.*

[65] *See also* Noah Rubins, Anthony Sinclair & Matthew Hodgson, *ICSID Arbitrators: Is there a Club and Who Gets Invited?*, 1 GLOBAL ARB. REV. (No. 5, 2006) (forthcoming).

[66] *Id.* at 311.

Table 1: Most frequently selected arbitrators in 115 concluded ICSID cases

Name of arbitrator	*Number of times selected as arbitrator*
1. Bernardo M. CREMADES (Spanish)	9
2. Jan PAULSSON (French)	7
3. Albert Jan VAN DEN BERG (Dutch)	7
4. Francisco ORREGO VICUÑA (Chilean)	7
5. Piero BERNARDINI (Italian)	6
6. Karl-Heinz BÖCKSTIEGEL (German)	6
7. Charles N. BROWER (U.S.)	6
8. Sompong SUCHARITKUL (Thai)	6
9. Elihu LAUTERPACHT (British)	5
10. Keba MBAYE (Senegalese)	5
11. Jorgen TROLLE (Danish)	5
12. Andreas BUCHER (Swiss)	4
13. James R. CRAWFORD (Australian)	4
14. Ibrahim FADLALLAH (Lebanese/French)	4
15. Arghyrios A. FATOUROS (Greek)	4
16. Florentino P. FELICIANO (Philippines)	4
17. L.Yves FORTIER (Canadian)	4
18. Andrea GIARDINA (Italian)	4
19. Marc LALONDE (Canadian)	4
20. Rodrigo OREAMUNO (Costa Rica)	4
21. Fuad ROUHANI (Iranian)	4
22. Prosper WEIL (French)	4

possible 284 appointments (54 percent). In fact, of the 32 arbitrators most frequently selected, the top 19 account for 114 of the 284 appointments (40 percent).

Aside from the 32 most frequently appointed arbitrators in pending cases, 105 arbitrators account for the remaining 131 appointments, 26 of whom are serving in two pending arbitrations, 79 of whom are serving in only one pending arbitration.

Admittedly, the present analysis only considers appointments in ICSID cases, and fails to consider the fact that many of these individuals also serve as arbitrators in other investment treaty cases, outside of the ICSID system. A review of recent publicly available awards and decisions, and media surveys of otherwise confidential proceedings reveals as much.[67] If one needed to describe the judiciary of the emerging investment jurisprudence, one need not look any further than these frequently selected arbitrators.

Secondly, while Shihata and Parra noted that the largest contingents of arbitrators had been "American, British, French and Swiss," today's realities reveal a somewhat more

[67] *See* Table C, Commission, *supra* note 31, *Precedent in Non-ICSID Arbitration 2000–2006* (as of December 1, 2006); AMERICAN LAWYER's Summer 2005 Focus Europe survey of both contract and treaty disputes, *available at* <www.americanlawyer.com/focuseurope/scorecard0605.html>.

Table 2: Most frequently selected arbitrators in 103 pending ICSID cases

Name of arbitrator	*Number of times selected as arbitrator*
1. Gabrielle KAUFMANN-KOHLER (Swiss)	13
2. L.Yves FORTIER (Canadian)	10
3. Marc LALONDE (Canadian)	8
4.V.V.VEEDER (British)	7
5. Francisco ORREGO VICUÑA (Chilean)	7
6. Piero BERNARDINI (Italian)	6
7. Charles N. BROWER (U.S.)	6
8. Ahmed Sadek EL-KOSHERI (Egyptian)	6
9. Brigitte STERN (French)	6
10. Albert Jan VAN DEN BERG (Dutch)	6
11. Henri C. ALVAREZ (Canadian)	5
12. Bernardo M. CREMADES (Spanish)	5
13. Pedro NIKKEN (Venezuelan)	5
14. Karl-Heinz BÖCKSTIEGEL (German)	4
15. James R. CRAWFORD (Australian)	4
16. Pierre-Marie DUPUY (French)	4
17. W. Michael REISMAN (U.S.)	4
18. Francisco REZEK (Brazilian)	4
19. Pierre TERCIER (Swiss)	4

internationalized group.[68] For pending arbitrations, of the 32 arbitrators making up 153 of the possible 284 appointments, the largest contingents are: French (5), American (5), Canadian (3), Swiss (3), British (2), Spanish (2), and Italian (2), more or less reflecting Shihata and Parra's assessment.[69] The remaining nationalities represented amongst the 32 most frequently selected arbitrators in pending arbitrations, each with one arbitrator, include: German, Australian, Egyptian, Belgian, Venezuelan, Mexican, Costa Rican, Brazilian, Dutch, and Chilean.[70] The representation of nationalities amongst arbitrators in concluded arbitrations likewise reflects this trend, as of the 43 arbitrators making up 176 of the possible 361 appointments, the largest contingents are: Swiss (5), American (4), French (4), British (3), Canadian (3), Australian (3), Italian (2), and Belgian (2).[71] The remaining nationalities represented amongst the 40 most frequently selected arbitrators in concluded arbitrations, each with one arbitrator, include: Mexican, German, Spanish, Egyptian, Lebanese, Greek, Philippines, Uruguayan, Senegalese, Indian, Costa Rican, Iranian, Austrian, Thai, Danish, Dutch, and Chilean.[72]

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[68] In addition to Tables 1 and 2 set forth herein, N. Rubins' May 2005 chart on the Nationality of ICSID Arbitrators (as of April 2005), confirms this trend. Noah Rubins, *Nationality of ICSID Arbitrators*, 2 TRANSNAT'L DISP. MGMT. 3 (2005).

[69] *See id*. Table 2, most frequently selected arbitrators in pending ICSID cases.

[70] *See id*.

[71] *See id*. Table 1, most frequently selected arbitrators in concluded ICSID cases.

[72] *See id*.

Thirdly, Shihata and Parra's observation concerning the eminent qualifications and background of panel members remains true, as present and past panels continue to include certain international law luminaries, such as former Presidents of the International Court of Justice, of the WTO Appellate body, "the rapporteur of the International Law Commission's draft articles on state responsibility," and "present and immediate past Presidents of the leading international arbitral institutions."[73]

Seven years on, all of the trends that Shihata and Parra initially observed in 1999 regarding the qualifications, nationalities, and frequency of selection of ICSID arbitrators are even more striking, which alongside their regular encounters on tribunals, at conferences, and otherwise, has contributed to the development of an esprit de corps amongst arbitrators in investment treaty cases.

C. A body of law predisposed to development by case law

Despite the fact that each tribunal typically deals with different underlying bilateral or multilateral investment treaties, the "substantive provisions of the treaties are, for the most part, similar in form and content."[74] Thus, while each tribunal is necessarily responsible for deciding the particular dispute pending before it, based upon a particular BIT, any decision or award it renders will also contribute more generally to the growing investment jurisprudence.[75] The structure of each and every BIT typically deals with:

1. Scope of Application;
2. Conditions for the Entry of Foreign Investment;
3. General Standards of Treatment of Foreign Investments—Fair and Equitable Treatment, Full Protection and Security, Unreasonable or Discriminatory Measures, International Law, Contractual Obligations, National and/or Most-Favored Nation Treatment;
4. Monetary Transfers;
5. Operational Conditions of the Investment;
6. Protection Against Expropriation and Dispossession;
7. Compensation for Losses; and
8. Investment Dispute Settlement.[76]

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[73] Paulsson, *supra* note 16, at 5.

[74] A.R. Parra, *Applicable Substantive Law in ICSID Arbitrations Initiated Under Investment* Treaties, 14 ICSID Rev. 299, 313 (1999); J.W. Salacuse, *Towards a Global Treaty on Foreign Investment: The Search for a Grand Bargain*, *in* Arbitrating Foreign Investment Disputes 61 (N. Horn ed., 2004) ("Although the precise provisions of BITs are not uniform, virtually all BITs treat the same issues"); Noah Rubins, *The Evolution of Investment Arbitration in the U.S. FTAs with Singapore and Chile*, 1 Transnat'l Disp. Mgmt. 3 (2004) ("Bilateral investment treaties (BITs) vary somewhat, but share a general structure and most substantive elements").

[75] *International Thunderbird, supra* note 44 ("[I]nvestment arbitration, on the other hand, applies treaty provisions that are general; in their investment protection core content, the investment treaties (with the equivalent of the multilateral treaties now well over 3,500) express common principles and very similar, often identical language. Every interpretation that is public is likely to exercise a general effect and will be taken up by counsel and tribunals in subsequent cases.").

[76] Salacuse, *supra* note 74, at 61.

A review of the provisions of several treaty schemes for investment disputes, such as the U.S. Model BIT, the UK Model BIT, NAFTA, ECT, and the FTAA, reveals as much.[77] Given the similarity in BIT terms, the related claims across arbitrations are also similar.[78] In essence, as observed by Thomas Wälde, "[i]nternational investment law now evolves—after an initial phase of treaty-making—now largely by case law," as "it is in the fire of hotly contested arbitral litigation that case law emerges."[79]

Based on all of the foregoing, one can, and should, speak of a consolidating investment jurisprudence. The evidence of this jurisprudence, labeled by some as "soft precedent," is assessed in detail in the following section, and three online reference tables[80] tracking citations to precedent since 1972 in 207 awards and decisions over approximately 60 pages.[81]

IV. Citation to Precedent in Practice in Investment Treaty Arbitration

Article 53 of the ICSID Convention provides that the "[t]he award shall be binding on the parties," which has been read by many as "excluding the applicability of the principle of binding precedent to successive ICSID cases."[82] Tribunals have similarly repeatedly reiterated that "there is so far no 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."[83] As the body of ICSID case law, and that of other investment treaty tribunals, has grown so have the citations to prior investment treaty decisions and awards. While much has been stated generally about the penchant of investment treaty tribunals, and counsel appearing before them, to address and rely upon previous decisions, there has been, to date, a relative lack of comprehensive analysis of this development.[84] As put recently by Thomas Wälde on the present state of research on new aspects of international investment law, "[t]here is so far no survey of citation practice by recent awards."[85] The analysis that follows is a modest attempt to begin to remedy this lack of analysis and comprehensively examine the citation practices of investment treaty tribunals.

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[77] *See* the 61-page comparison table of the provisions of these treaties in R. Doak Bishop, James Crawford, & Michael Reisman, Foreign Investment Disputes 133 (2005).

[78] As acknowledged by the ICSID Secretariat in its 2004 Discussion Paper on possible improvements to the framework of ICSID arbitration, in its discussion of modifications to Rule 48 on the rendering of the award, "[t]here nevertheless remains the question of the timeliness of publication, an important consideration when many cases involving similar issues are pending". ICSID Secretariat, Possible Improvements of the Framework for ICSID Arbitration, October 22, 2004.

[79] Thomas Wälde, *La Jurisprudence du CIRDI*, 1 Transnat'l Disp. Mgmt. (No. 4, 2004).

[80] Commission, *supra* note 31.

[81] Gill, *supra* note 5, at 25.

[82] Christoph H. Schreuer, The Icsid Convention: A Commentary 1082 (2001).

[83] AES Corp. v. Argentine Republic, ICSID Case No. ARB/02/16, Decision on Jurisdiction, April 26, 2005, para. 23, *available at* <http://ita.law.uvic.ca/documents/AES-Argentina-Jurisdiction_000.pdf>.

[84] Christopher R. Drahozal, *The Iran-U.S. Claims Tribunal and Investment Arbitration: A Citation Analysis*, 3 Transnat'l Disp. Mgmt. (No. 2, 2006).

[85] Wälde, *supra* note 27, at 63, 142–43.

A. Quantitative and qualitative citation analysis of investment treaty awards, decisions, and orders

Given the exponential growth in the number of investment treaty cases, and resulting awards and decisions, it is appropriate now to examine this growing corpus of precedents and to assess the manner in which tribunals have cited to precedents in their reasoning. Citation analysis, well established in certain social science fields, is best understood in the legal context, as "an empirical tool for understanding aspects of the legal system and for improving the performance of the system."[86] While citation analysis has enjoyed considerable application in certain domestic legal systems, notably in the United States,[87] it has not been employed with much rigour to the operations and practices of international courts and tribunals, aside from a handful of noteworthy studies.[88] The most recent and relevant of these studies was presented earlier this year on citation to Iran-United States Claims Tribunal precedent in investment arbitration, by C.R. Drahozal. Drahozal engaged in a citation analysis of "the extent to which Tribunal precedent has been cited in investment arbitration awards and decisions, in particular those administered by the International Centre for the [Settlement] of Investment Disputes" since 1982.[89] His commendable and comprehensive quantitative approach to the "jurisprudential value" of Iran-United States Claims Tribunal decisions and awards revealed "significant citation of precedent from the Iran-United States Claims Tribunals."[90]

This article, however, examines the citation of Iran-United States Claims Tribunal precedent, but also examines every other precedent, or source of law, cited by investment treaty tribunals. This includes citations to decisions of the Permanent Court of International Justice, the International Court of Justice, ad hoc and other arbitral tribunals, the World Trade Organization's dispute settlement and appellate bodies, the European Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights, national courts, and various publicists, amongst others. The article sets forth both quantitative and qualitative approaches to the value of precedent in investment treaty arbitration, assessing the frequency with which tribunals are citing to prior investment treaty awards and decisions, and other sources of international law. This citation

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[86] Richard A. Posner, *An Economic Analysis of the Use of Citations in the Law*, 2 Am. L. & Econ. Rev. 381 (2000).

[87] *See* William E. Landes & Richard A. Posner, *Citations, Age Fame, and the Web*, 29 J. Legal Stud. 319 (2000); Fred R. Shapiro, *The Most-Cited Law Reviews*, 29 J. Legal Stud. 389 (2000); Fred R. Shapiro, *The Most Cited Legal Books Published Since 1978*, 29 J. Legal Stud. 397 (2000); Fred R. Shapiro, *The Most Cited Legal Scholars*, 29 J. Legal Stud. 409 (2000); Ian Ayres & Frederick E. Vars, *Determinants of Citations to Articles in Elite Law Reviews*, 29 J. Legal Stud. 427 (2000); Brian Leiter, *Measuring the Academic Distinction of Law Faculties*, 29 J. Legal Stud. 451 (2000); William M. Landes, Lawrence Lessig & Michael E. Solimine, *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. Legal Stud. 271 (1998); William M. Landes & Richard A. Posner, *Heavily Cited Articles in Law*, 71 Chi.-Ken. L. Rev. 825 (1996); Fred R. Shapiro, *The Most-Cited Articles from the Yale Law Journal*, 100 Yale L. J. 1449 (1991).

[88] Drahozal, *supra* note 84; Nathan Miller, *An International Jurisprudence? The Operation of "Precedent" Across International Tribunals*, 15 Leiden J. Int'l L. 483 (2002); Lyonette Louis-Jacques, *Gaps In International Legal Literature*, 1 Chi. J. Int'l L. 101, 103, 105 (2000) (noting that "inadequacies exist in international legal reference tools, statistical sources, and citation analyses," as "[w]hile citation analyses exist for American legal materials, there are none for foreign and international law.").

[89] Drahozal, *supra* note 84, at 3.

[90] *Id.* at 2.

analysis considers 207 publicly available decisions, awards, and orders issued by tribunals since 1972, and examines the sources of international law referred to and relied upon by each tribunal. The range of decisions, awards, and orders that are analyzed is as follows:

- the 151 publicly available decisions, awards, and orders which have been rendered by ICSID tribunals since 1972;
- the nineteen publicly available decisions, awards, and orders which have been rendered by ICSID tribunals pursuant to the Additional Facility Rules; and
- a selection of thirty-seven publicly available decisions and awards from non-ICSID investment treaty tribunals.

Prior to undertaking a quantitative examination of the citation practices of investment treaty tribunals, it is worthwhile to first consider what investment treaty tribunals have stated about their citation of prior treaty decisions and awards.

B. What ICSID tribunals have said about precedent

In the time since the first-ever ICSID tribunal rendered its decision in 1972, in *Holiday Inns S.A., Occidental Petroleum Co. v. Kingdom of Morocco*, until relatively recently, the role of "precedent" or "*stare decisis*" had not garnered much attention. In the last several years, however, discussion of "precedent" by tribunals in their decisions and awards has increased alongside the increasing number of treaty disputes. While the precise term employed varies, tribunals now routinely discuss the role played by "ICSID's case law,"[91] "[c]ase-[l]aw developed by the ICSID,"[92] "decisions of ICSID Tribunals,"[93] "ICSID cases,"[94] "ICSID's decisions,"[95] and "ICSID jurisprudence"[96] with varying degrees of analysis and explanation.

1. *The First Thirty Years*

"[T]o the Extent to which it is a Precedent":[97] as alluded to above, in the years following the first publicly available ICSID decision—a decision on jurisdiction in *Kaiser Bauxite* in 1975—until 2003, tribunals seldom addressed the issue of "precedent" other than in passing references. In the first publicly available decision to use the term "precedent,"

[91] Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic, Decision on Jurisdiction, January 14, 2004, *available at* <http://ita.law.uvic.ca/documents/Enron-Jurisdiction_000.pdf>.

[92] *El Paso, supra* note 23, para. 39.

[93] SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on Jurisdiction, January 29, 2004, *available at* <http://ita.law.uvic.ca/documents/SGSvPhil-final_001.pdf>.

[94] CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/02/1, May 12, 2005, para. 342, *available at* <http://ita.law.uvic.ca/documents/CMS_FinalAward.pdf>.

[95] Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic, Decision on Jurisdiction (Ancillary Claim), August 2, 2005, para. 25, *available at* <http://ita.law.uvic.ca/documents/Enron-DecisiononJurisdiction-FINAL-English.pdf>.

[96] *Tokios Tokelés*, *supra* note 9, para. 11.

[97] Amco v. Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction, September 25, 1983, 1 ICSID Rep. 389, 401 (1993).

in 1983, the original tribunal in the storied *Amco Asia Corp. v. Republic of Indonesia* (Goldman, Foighel, and Rubin) commented on the parties' numerous references to and reliance on the unpublished award in *Holiday Inns* in the first decision on jurisdiction:

> To refer to the *Holiday Inns* award—in spite of the same not being a binding precedent in this case—here, this agreement is by no means implied; it is expressed, and clearly expressed, no formal or ritual clause being provided for in the Convention, nor needed in order for such an agreement to binding on the parties.[98]

> The tribunal will state again that in spite [sic] of superficial resemblances, the facts in the *Holiday Inns* case and in the instant one are largely different, so that the references to *Holiday Inns* are not really relevant, except that as in said case, the arbitrators extended an arbitration clause to parties which had personally executed it; accordingly, it would not seem to be contrary to that precedent (to the extent to which it is a precedent) to apply an arbitration clause.[99]

Three years later, the tribunal in *Liberian Eastern Timber Corp. v. Republic of Liberia* (Cremades, Pereiral, Redfern) cited the *Amco Asia* tribunal's decision on jurisdiction, finding that it was instructive to consider prior interpretations, "[t]hough the Tribunal is not bound by the precedents established by other ICSID Tribunals."[100] Later that same year, in the decision on the application for annulment of the *Amco Asia* award, the ad hoc committee convened for the annulment (Seidl-Hohenveldern, Feliciano, Giardina) discussed the role of prior decisions or awards. The ad hoc committee referenced the decision of the *Klockner* ad hoc committee, and the decision of the International Court of Justice in the case of the Award of the King of Spain, but like the *LETCO* tribunal, noted that neither decision was "binding on this ad hoc Committee."[101] The ad hoc committee then added that:

> 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.[102]

The ad hoc committee's practice of stating that prior decisions were not binding on it, and that there was not a "rule of *stare decisis*" in the ICSID arbitration system, and then proceeding to share in the interpretation of the prior decision, has been repeated countless times by many tribunals since. The fact that the ad hoc committee felt it necessary to state that "it did not feel compelled to distinguish strictly between the *ratio decidendi* and obiter dicta," presaged an early indication of the flawed application of a common law methodology to come.[103]

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[98] *Id.* at 395.
[99] *Id.* at 401.
[100] Liberian Eastern Timber Corp. [LETCO] v. Government of the Republic of Liberia, ICSID Case No. ARB/83/2, March 31, 1986, 2 ICSID Rep. 343, 352 (1994).
[101] Amco Asia and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Annulment Decision, May 16, 1986, para. 44, 1 ICSID Rep. 509, 521 (1993).
[102] *Id.*
[103] *Id.*

2. *The Last Five Years*

"The Tribunal is of course mindful that decisions of ICSID or other arbitral tribunals are not a primary source of rules."[104] Over the twenty years since the first ad hoc committee's decision in *Amco*, reference to and reliance on prior ICSID decisions, by both parties and tribunals, has greatly increased.[105]

In ICSID decisions and awards that have been rendered since, tribunals have adopted various approaches to acknowledge their increasing citation to precedent. First, certain tribunals make no mention about the doctrine of precedent generally, and simply refer to the "cases" and "precedents" throughout, and make no effort to disguise their outright reliance on the cases. For instance, in the *CMS Gas* tribunal's decision on objections to jurisdiction (Vicuna, Lalonde, Rezek), the tribunal considered twelve prior ICSID cases, noting that "[t]he task of the Tribunal is again rendered easier by the fact that a number of recent ICSID cases have had to discuss and decide on similar or comparable provisions concerning contracts and the scope of the Treaty."[106] In its discussion of one of the jurisdictional objections, the tribunal considered a number of prior ICSID cases, noting the "Lanco precedent," and concluded that "[t]his tribunal shares the views expressed in those precedents."[107]

Secondly, one tribunal, under the heading "Checking the Tribunal's Conclusions," set forth its conclusions without any reliance on prior decisions, and then only afterwards proceeded to examine prior ICSID decisions.[108] In deciding to so, the tribunal in *Gas Natural* (Lowenfeld, Alvarez, Nikken) stated that it had "rendered its decision independently, without considering itself bound by any other judgments or arbitral awards," but "thought it useful to compare its conclusion with the conclusions reached in other recent arbitrations conducted pursuant to the ICSID Arbitration Rules."[109] Unsurprisingly, after reviewing the prior decisions, the tribunal concluded that it was "satisfied that its analyses and decisions, independently arrived at, are consistent with the conclusions of other arbitral tribunals faced with similar issues."[110] And, conveniently, the tribunal confirmed that they had "not found or been referred to any decisions or awards reaching a contrary conclusion."[111]

Thirdly, tribunals have addressed the issue directly in the body of their decisions. The tribunal in *Enron* (Vicuña, Espiell, Tschanz) stated that it was "of course mindful that decisions of ICSID or other arbitral tribunals are not a primary source of rules," noting that the "citations of and references to those decisions respond to the fact that the Tribunal in

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[104] *Enron, supra* note 8, para. 40.

[105] Escobar, *supra* note 13. Escobar noted that the first investment treaty decision was "marked not only by an involved consideration of the text of the treaty in combination with early 20th century cases concerning the international law of State Responsibility, but also by an abundant reference to doctrine."

[106] CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, July 17, 2003, *available at* <http://ita.law.uvic.ca/documents/cms-argentina_000.pdf>.

[107] *Id.*

[108] Gas Natural SDG, S.A. v. Argentine Republic, ICSID Case No. ARB/03/10, Decision on Jurisdiction, June 17, 2005, *available at* <http://ita.law.uvic.ca/documents/GasNaturalSDG-DecisiononPreliminaryQuestionsonJurisdiction.pdf>.

[109] *Id.*

[110] *Id.*

[111] *Id.*

examining the claim and arguments of this case under international law, believes that in essence the conclusions and reasons of those decisions are correct."[112] Even more categorically, the tribunal in *SGS v. Philippines* (El-Kosheri, Crawford, Crivellaro) rendered a decision on objections to jurisdiction that addressed the issue of precedent squarely, as the tribunal did not agree "with the conclusions reached by the *SGS v. Pakistan* tribunal on issues of interpretation of arguably similar language in the Swiss-Philippines BIT."[113] The tribunal reiterated that there was "no doctrine of precedent in international law," "no hierarchy of tribunals," and that "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."[114]

Fourthly, and most recently, certain tribunals have dedicated portions of decisions, typically a paragraph, labeled as "opening considerations,"[115] "introductory matters,"[116] or "general observations,"[117] addressing the relevance of prior ICSID decisions. In particular, tribunals have described such statements under headings such as "[r]elevance of other ICSID Arbitral Tribunals' Decisions on Jurisdiction,"[118] "the relevance of previous ICSID decisions or awards,"[119] and "Significance of the Case Law Developed by the ICSID and Other Tribunals."[120] One such tribunal, in *El Paso* (Caflisch, Stern, Bernardini) considered the issue under the sub-heading of "scope of examination," stating that:

> ICSID arbitral tribunals are established ad hoc, from case to case, in the framework of the Washington Convention, and the present Tribunal knows of no provision, either in that Convention or in the BIT, 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. The present Tribunal will follow the same line, especially since both parties, in their written pleadings and oral arguments, have heavily relied on precedent.[121]

Two other tribunals, both presided over by Kaufmann-Kohler, *Bayindir* (Berman, Böckstiegel) and *Jan de Nul* (Mayer, Stern) employ virtually identical language in stating that the tribunal "agrees" (*Bayindir*) and "considers" (*Jan de Nul*) "that it is not bound by earlier decisions, but will certainly carefully consider such decisions whenever appropriate."[122] A fourth tribunal, *AES* (Dupuy, Bockstiegel, Janeiro) comprehensively dealt with the relevance of other ICSID arbitral tribunal decisions, in eighteen paragraphs over seven pages.[123] Tribunals that have rendered awards and decisions under the auspices of the

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[112] *Enron, supra* note 8, para. 40.
[113] SGS v. Philippines, *supra* note 93, para. 97.
[114] *Id.*
[115] *AES Corp., supra* note 83, para. 17.
[116] *Jan de Nul N.V., supra* note 23, para. 62.
[117] *El Paso, supra* note 23, para. 39.
[118] Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction, November 14, 2005, para. 130.
[119] *Jan de Nul N.V., supra* note 23, paras. 62–63.
[120] *El Paso, supra* note 23, para. 39.
[121] *Id.*
[122] *Jan de Nul N.V., supra* note 23, para. 64.
[123] *AES Corp., supra* note 83.

ICSID Additional Facility, and in ad hoc arbitrations pursuant to UNCITRAL Arbitration Rules, have expressed similar comments.[124]

C. Practice of investment treaty tribunals as to precedent

Article 38 of the Statute of the International Court of Justice, while set forth in the framework of the Court's practice, reflects the prior practice of arbitral tribunals and the PCIJ, and is widely regarded as a complete and full elucidation of the sources of international law.[125] It states, in relevant part, that:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
> (b) international custom, as evidence of a general practice accepted as law;
> (c) the general principles of law recognized by civilized nations;
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

As confirmed early on in the Report of the Executive Directors on Article 42 of the ICSID Convention, "[t]he term 'international law' as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice."[126] Arbitration in the investment treaty context is routinely governed by international law, typically in one of three ways: "(1) through an express choice law of clause in the treaty; (2) by operation of gap-filling rules; or (3) by implication."[127]

As is obvious from even a cursory review of the practices of ICSID tribunals manifested in their awards and decisions, citations to supposedly subsidiary sources, such as judicial decisions, including arbitral awards, predominate.[128] Despite the admonition of at least one ICSID tribunal that decisions of ICSID or other arbitral tribunals are "not a primary source of rules," ICSID tribunals increasingly cite them in much the same manner that common law courts do.[129] A review of the 207 publicly available investment treaty decisions and awards issued from 1972 until December 1, 2006 demonstrates as much. In particular, as the number of investment treaty precedents has grown over time, a number of trends have emerged, each of which will be considered in turn.

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[124] Feldman v. Mexico, ICSID Case No. ARB(AF)/99/1, December 16, 2002, *available at* <http://ita.law.uvic.ca/documents/feldman_mexico-award-english.pdf>; *International Thunderbird, supra* note 44.

[125] Ian Brownlie, Principles of Public International Law 19 (6th ed. 2003); Alain Pellet, *Article 38*, *in* The Statute of the International Court of Justice 677 (Andreas Zimmerman et al. eds., 2006).

[126] Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 4 I.L.M. 524, 530 (1965).

[127] Kinnear, *supra* note 25, at 1.

[128] Kinnear, *supra* note 25, at 8 ("Nonetheless, in practice decisions have attained a very influential position in treaty arbitration that is highly reminiscent of *stare decisis* in Common Law legal systems.").

[129] *Enron, supra* note 8, para. 40.

Table 3: Precedent in ICSID decisions and awards 1990–2001

Year	*Number of decisions and awards*	*Number of citations to ICSID awards & decisions per award*	*Number of ICSID awards and decisions cited in total*	*Average number of citations to ICSID awards and decisions per award or decision*
1990	3	1, 0, 0	1	.33
1991	—	—	—	—
1992	1	1	1	1
1993	1	0	0	0
1994	1	5	5	5
1995	—	—	—	—
1996	1	1	1	1
1997	3	4, 0, 6	10	3.33
1998	2	0, 5	5	2.5
1999	6	5, 3, 3, 1, 2, 1	15	2.5
2000	12	3, 0, 0, 0, 0, 4, 0, 0, 2, 0, 5, 0	14	1.17
2001	11	0, 0, 0, 2, 0, 4, 4, 1, 4, 9, 2	28	2.55

1. *Increasing Citation of ICSID Precedents by ICSID Tribunals*

The increasing number of arbitrations predicated on BITs, and decisions and awards emanating from them, has led to a marked increase of citation to ICSID decisions by ICSID tribunals. As Christoph Schreuer observed in 2001 in his commentary, itself an oft-cited reference in ICSID arbitrations, "[r]eference to previous ICSID decisions used to be relatively scant but has increased with the passage of time."[130] Prior to 1990, there were only a handful of publicly available ICSID awards and decisions rendered, each of which cited few, if any, prior ICSID decisions or awards. In general, the pre-1990 decisions and awards rendered by ICSID tribunals are fact-laden, and replete with references to decisions of the PCIJ, the ICJ, various arbitral awards, decisions from national courts, and various publicists. A review of the ICSID decisions and awards in the time from 1990 until 2002 (Table 3) reveals a slow increase in reference and citation to ICSID decisions and awards as the body of ICSID case law slowly increased alongside.

In the time since 2001, the frequency of citation to ICSID case law has increased exponentially, as is demonstrated in a review of decisions on jurisdiction (Table 4), and final awards (Table 5) over the last five years.[131]

Up until 1994, the highest number of ICSID decisions or awards that had been cited in any ICSID decision or award was two. In the period between 1994 and 2002, the practice of citing to prior ICSID decisions or awards increased slowly, and inconsistently, with tribunals typically citing between two and four decisions on average. As is evident from even a cursory review of the 151 ICSID decisions or awards issued since 1972, as

[130] SCHREUER, *supra* note 3, at 617.

[131] *See* Table A, Precedents in ICSID Arbitration, 1972–2006 (as of December 1, 2006); and Table B, Precedents in ICSID (AF) Arbitration 1978–2006 (as of December 1, 2006), Commission, *supra* note 31.

Table 4: Precedent in ICSID decisions and awards on jurisdiction 2002–2006

Year	*Number of decisions and awards on jurisdiction*	*Number of citations to ICSID awards & decisions per award*	*Number of ICSID awards and decisions cited in total*	*Average number of citations to ICSID awards and decisions per award or decision*
2006	8	7, 19, 6, 10, 10, 8, 20, 10	90	11.25
2005	12	11, 4, 5, 19, 14, 20, 19, 11, 5, 11, 17, 19	155	12.92
2004	10	16, 10, 18, 6, 21, 0, 18, 11, 7, 9	116	11.6
2003	5	12, 18, 0, 8, 5	43	8.6
2002	1	9	9	9

Table 5: Precedent in ICSID awards 2002–2006

Year	*Number of awards*	*Number of citations to ICSID awards & decisions per award*	*Number of ICSID awards and decisions cited in total*	*Average number of citations to ICSID awards and decisions per award*
2006	7	7, 24, 4, 13, 12, 2, 3	65	9.3
2005	2	5, 18	23	11.5
2004	2	0, 9	9	4.5
2003	4	7, 13, 0, 7	27	6.75
2002	2	2, 4	6	3

Table 6: Precedent in ICSID Additional Facility (AF) Awards 2002–2006

Year	*Number of awards*	*Number of citations to ICSID awards & decisions per award*	*Number of ICSID awards and decisions cited in total*	*Average number of citations to ICSID awards and decisions per award*
2006	1	7	7	7
2005	2	5, 17	22	11
2004	2	0, 9	9	4.5
2003	3	7, 13, 7	27	9
2002	2	2, 4	6	3

the number of publicly available awards has increased, so has the practice by ICSID tribunals of citing to prior ICSID decisions and awards.

Decisions under the ICSID Additional Facility Rules since 2002 (Table 6) also evidence frequent citation to prior ICSID decisions and awards.

2. *Increasing Citation of Precedents by Investment Treaty Tribunals Generally*

ICSID tribunals are not alone in their increasing citation to prior investment treaty decisions and awards. A review of decisions and awards rendered since 2000 by

Table 7: Precedent in non-ICSID decisions and awards 2002–2006

Year	*Number of awards and decisions*	*Number of citations to ICSID awards & decisions per award*	*Number of citations to non-ICSID treaty awards and decisions*	*Number of awards and decisions cited in total*	*Average number of citations to treaty awards and decisions per award*
2006	7	29, 6, 11, 5, 22, 10, 10	10, 3, 7, 6, 3, 4, 3	129	18.43
2005	5	3, 6, 7, 9, 0	0, 1, 1, 4, 0	31	6.2
2004	3	3, 14, 8	0, 3, 2	27	9
2003	3	13, 0, 5	1, 0, 0	19	6.3
2002	7	0, 2, 2, 0, 0, 0, 4	0, 2, 3, 0, 1, 1, 0	15	2.14

non-ICSID tribunals in investment treaty disputes (Table 7), such as those constituted in ad hoc arbitrations pursuant to UNCITRAL Arbitration Rules, in ICC arbitrations, SCC arbitrations, or LCIA arbitrations similarly reveals increasing citation to both ICSID decisions and awards, and other investment treaty decisions and awards.

3. *Citation of Precedents from Other Courts and Tribunals by Investment Treaty Tribunals*

As the number of ICSID and other investment treaty precedents have increased, investment treaty tribunals continue to cite to prior awards or decisions, although not to the same degree as in the past.[132] In the last several years, to the extent that tribunals cite to precedents from other courts and tribunals (Tables 8, 9, and 10), they have generally cited to decisions from other investment treaty tribunals, and to decisions of the International Court of Justice.

4. *Citation of Other Sources of International Law by Investment Treaty Tribunals*

Despite citing more and more treaty decisions and awards, treaty tribunals continue to cite to a panoply of sources of international law. In short, the increase in citation to treaty decisions and awards has not diminished citation to other sources recognized in Article 38, such as international conventions, international custom, the general principles of international law, and teachings of the most highly qualified publicists.[133] While it is difficult to discern any general trends in the citation to other sources by treaty tribunals, it is clear that tribunals routinely cite to international conventions (e.g.,Vienna Convention on the Law of Treaties), and the writings of publicists, and infrequently cite to international

[132] *See* Table A, Precedents in ICSID Arbitration, 1972–2006 (as of December 1, 2006); Table B, Precedents in ICSID (AF) Arbitration 1978–2006 (as of December 1, 2006); and Table C, Precedent in Non-ICSID Arbitration 2000–2006 (as of December 1, 2006), Commission, *supra* note 31.

[133] *See* Table A, Precedents in ICSID Arbitration, 1972–2006 (as of December 1, 2006); Table B, Precedents in ICSID (AF) Arbitration 1978–2006 (as of December 1, 2006); and Table C, Precedents in Non-ICSID Arbitration 2000–2006 (as of December 1, 2006), Commission, *supra* note 31.

Table 8: Citations to Other Decisions and Awards in ICSID Awards, Decisions, and Orders 1996–2006

Year	*Number of awards and decisions*	*Number of citations to PCIJ decisions*	*Number of citations to ICJ decisions*	*Number of citations to non-ICSID treaty decisions and awards*	*Number of citations to other arbitral awards*	*Number of citations to national court decisions*	*Number of citations to other fora (WTO, ECHR)*
2006	28	9	32	33	37	22	3
2005	20	8	30	22	21	3	0
2004	14	4	26	17	16	1	0
2003	9	1	5	7	20	1	1
2002	8	2	7	0	1	0	0
2001	11	1	5	0	4	2	0
2000	12	1	6	0	14	3	1
1999	8	1	8	0	4	0	0
1998	2	0	0	0	0	0	0
1997	3	0	0	0	10	0	0
1996	1	0	0	0	0	0	0

Table 9: Citations to other decisions and awards in ICSID (AF) awards and decisions 1999–2006

Year	*Number of awards and decisions*	*Number of citations to PCIJ decisions*	*Number of citations to ICJ decisions*	*Number of citations to non-ICSID treaty decisions and awards*	*Number of citations to other arbitral awards*	*Number of citations to national court decisions*	*Number of citations to other fora (WTO, ECHR, ECJ, IACHR)*
2006	0	—	—	—	—	—	—
2005	1	0	0	0	0	0	0
2004	2	0	1	2	9	2	0
2003	5	1	4	8	14	18	7
2002	3	1	13	5	12	16	17
2001	3	0	4	6	4	5	1
2000	4	1	5	1	3	0	0
1999	1	0	0	0	0	0	0

custom and general principles.[134] While it has been historically true that "ICSID tribunals have frequently applied rules of customary international law," and there are examples of the "practice of ICSID tribunals on general principles of international law," recent decisions and awards evince less reliance on such sources.[135]

[134] *See* Kinnear, *supra* note 25; SCHREUER, *supra* note 3, at 610–16.

[135] Most of the decisions and awards cited by Christoph Schreuer in his treatise on the ICSID Convention regarding reliance on international custom and general principles rely on cases, for the most part, from the 1980s and 1990s.

Table 10: Citations to other decisions and awards in non-ICSID awards, decisions, and orders 2000–2006

Year	*Number of awards and decisions*	*Number of citations to PCIJ decisions*	*Number of citations to ICJ decisions*	*Number of citations to treaty decisions and awards*	*Number of citations to other arbitral awards*	*Number of citations to national court decisions*	*Number of citations to other fora (WTO, ECJ, ECHR)*
2006	8	1	18	29	33	24	26
2005	5	1	4	6	3	24	4
2004	3	1	4	7	15	5	1
2003	3	2	3	1	18	4	0
2002	7	2	8	9	6	4	3
2001	6	3	4	6	6	10	6
2000	5	1	0	2	2	3	9

D. Practice of international courts and tribunals with regard to investment treaty precedents

Historically, international courts such as the ICJ and its predecessor, the PCIJ, have cited and referred to arbitral awards in their decisions, however not often. The ICJ has particularly done so on only five occasions, referring to the *Pious Funds of the Californias*, the *Costa Rica Packet* case, the *Island of Palmas* case, the *Alabama Claims* arbitration, and the *Anglo-French Continental Shelf* arbitration.[136] The ICJ has also referred generally to "jurisprudence of international arbitration," without specific reference to particular tribunals.[137] As for references to ICSID decisions and awards by international courts and tribunals, the ICJ has yet to cite or refer to an ICSID tribunal in any judgment or opinion. However, it is likely due to a number of understandable factors, including: (i) the relatively nascent growth of ICSID decisions; (ii) the ICJ's general disinclination, as the principal judicial organ of the UN, to "engage with other tribunals";[138] and (iii) the fact that "questions relating to major areas of international law, such as those dealing with trade, finance and investments, are never brought" or only rarely before the ICJ, aside from the obvious examples of *Barcelona Traction* and *ELSI*, thereby limiting the possible opportunities for reliance.[139] One may even question whether or not it matters if the ICJ engages ICSID awards and decision, as ICSID jurisprudence has and will develop regardless. A review of decisions of other international courts and tribunals reveals that ICSID decisions are, in the main, principally cited in the decisions of other investment treaty tribunals, and to some degree in certain decisions of the Iran-United States Claims Tribunal. Again,

[136] Brownlie, *supra* note 125.
[137] *Id.*
[138] Nathan Miller, *An International Jurisprudence? The Operation of "Precedent" Across International Tribunals*, 15 Leiden J. int'l L. 483 (2002).
[139] Paulsson, *supra* note 16, at 11.

the lack of citation by other tribunals is likely more a reflection of the fact that each tribunal is generally specialized in a certain subject matter area, and the increase in ICSID and other investment treaty decisions and awards is a relatively recent phenomenon.

V. Observations on the Developing Jurisprudence

Returning again to Sir Arnold McNair's prescient comments about the development of international law, written more than fifty years ago, "[i]t is only by taking a backward glance that we can realize the importance of the accumulation of case law."[140] At that time, he concluded that "[t]he result of this increased volume of case law during the last three-quarters of a century has completely transformed the international corpus juris from a system that rested largely upon textbooks and diplomatic dispatches into a body of hard law, resembling the common law or equity of your country and mine."[141] The same could now be said, to a degree, about the growth of ICSID case law and the role that precedent now plays in the development of international law relating to investments. As such, it is essential at this stage to examine the impact of this corpus of case law on the continued operation of such a system without a hierarchical structure or rule of binding precedent.

A. Increased scrutiny of awards and decisions by tribunals, practitioners, and commentators is essential

Jan Paulsson's recommendation that certain awards will become "ever brighter beacons," while "others flicker and die near-instant deaths," is necessarily dependent on increased scrutiny by the international community, a level of scrutiny which has yet to be seen. As ably put recently by one commentator, Zachary Douglas, "[g]iven the importance of past decisions to the adjudicative process in investment treaty cases, it is critical that the merits and deficiencies of each new award be scrutinized and debated in isolation from the party interests at stake in each particular dispute."[142] A leading case in the investment treaty system should necessarily become so "by virtue of the authority, now laid bare, wielded by their reasoning."[143] It is this reasoning that must be subject to analysis, criticism, and consideration in order for the good awards to in fact chase the bad. If not, the cogent arguments put forth by Argentina in *AES* will prove to be true, as "[r]epeating decisions taken in other cases, without making the factual and legal distinctions … may affect the integrity of the international system for the protection of investments."[144] Such an analysis solely on the reasoning of particular awards should prominently occupy the

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[140] McNair, *supra* note 11.
[141] *Id.*
[142] *Id.* at 27.
[143] Fabien Gelinas, *Investment Tribunals and the Commercial Arbitration Mode: Mixed Procedures and Creeping Institutionalisation*, 3 Transnat'l Disp. Mgmt. 583 (No. 2, 2006).
[144] *AES Corp., supra* note 83, para. 22.

pages of academic journals, and be featured at each of the many annual investment treaty arbitration conferences. While undoubtedly a delicate issue, the use and abuse of precedents must be embraced by the authors of the awards and decisions as a legitimate test on their conclusions, or as put by one ICSID tribunal recently, albeit in a different context, "[c]hecking the tribunal's conclusions."[145] Douglas rightfully bemoaned the general "lack of scrutiny of the burgeoning corpus of precedents," a tendency which if it continues will necessitate recourse to one of the more institutional solutions to issues of inconsistency.[146]

B. Investment treaty precedents should be used and relied upon properly

While Sir Gerald Fitzmaurice's observations from fifty years ago that awards and decisions "have a more direct and immediate impact on the realities of international life" are accurate, it is also true that "repeating decisions taken in other cases, without making the factual and legal distinctions" will affect "the integrity of the international system for the protection of investments," and its jurisprudence.[147] Simply, while "properly used precedent is of assistance," the misuse and mischaracterization of precedent could threaten the system itself.[148] Well-reasoned and genuine disagreements between and amongst tribunals on particular issues of substantive law are to be expected, and are bound to continue to arise given the absence of a binding system of authority—disagreements that the burgeoning system of investment jurisprudence can likely withstand. Thus far, tribunals have rendered conflicting decisions about: (i) particular language of consent clauses, such as "all disputes concerning investments," or "any legal dispute concerning an investment"; (ii) umbrella clauses; (iii) waiting periods; and (iv) the scope of MFN clauses.[149] The development of these inconsistent awards and decisions has led to calls for measures aimed at reconciling the divergent opinions, including: (i) the establishment of an appeals mechanism, either within the ICSID system itself, or for all investment treaty tribunals; (ii) the adoption of some sort of preliminary rulings system; or (iii) the use of official interpretations to ensure consistent interpretations of treaty terms.[150] While each of these proposed solutions would likely improve the likelihood of the emergence of a consistent and coherent case law, the feasibility of each is doubtful, and beyond the scope of this examination.

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[145] Gas Natural SDG, S.A. v. Argentine Republic, ICSID Case No. ARB/03/10, Decision on Jurisdiction, June 17, 2005.

[146] Zachary Douglas, *Nothing If Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex*, 22 Arb. Int'l 27 (2006). The growing corpus of investment treaty precedents would enjoy even further legitimacy if there was less overlap between individuals acting as counsel and also acting as arbitrator. However, this particular issue is alive within the community, and beyond the scope of this analysis.

[147] Fitzmaurice, *supra* note 1, at 172; *AES Corp.*, *supra* note 83, para. 22.

[148] Matthew Weiniger, *Is Past Performance a Guide to Future Performance: Precedent in Treaty Arbitration*, at the BIICL's Seventh Investment Treaty Forum Public Conference: Procedural Aspects of Investment Treaty Arbitration, September 8, 2006.

[149] Christoph Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, 3 Transnat'l Disp. Mgmt. (No. 2, 2006).

[150] *Id*.

Rather, the better, and more likely, approach is that proposed by Paulsson, namely, that "good awards will chase the bad, and set standards which will contribute to a higher level of consistent quality."[151] The survival of good awards, and the scuttling of bad decisions, is however highly dependent on the manner in which they are framed and relied upon by counsel and tribunals in later awards and decisions. As previously mentioned, while relying on prior decisions and awards in much the same manner that common law courts do, investment treaty tribunals and those appearing before them as counsel are not always as faithful to traditional common law techniques of reasoning as could be desired. A continued failure to distinguish between the *ratio decidendi* and *obiter dicta* of prior awards and decisions could threaten the integrity of the tribunals and legitimacy of the investment treaty system itself.[152]

C. Lack of citation, or careless reliance: possible grounds for annulment

Article 52 of the ICSID Convention sets forth the grounds upon which a disgruntled party may seek annulment of an ICSID award, including: "(a) that the tribunal was not properly constituted; (b) that the tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based." One commentator, Christoph Schreuer argues: "whether a decision that relies preponderantly or exclusively on previous decisions might be subject to annulment for that reason may be subject to doubt."[153] He maintains that "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 owns reasons is entirely possible."[154] While the possibility of annulment because of a tribunal's simple reliance on earlier decisions without independent decision-making is likely possible, it is equally likely possible that an annulment could occur if a tribunal did not discuss prior awards.[155] Such an argument could be framed as an excess of powers, a serious departure from a fundamental rule of procedure, or on the basis that the award has failed to state the reasons upon which it based. There has been, as yet, no annulment decisions based on excessive reliance on precedents, or lack of consideration of precedents.

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[151] Paulsson, *supra* note 16, at 13.

[152] Amco Asia and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Annulment Decision, May 16, 1986, para. 44.

[153] Schreuer, *supra* note 149, at 15.

[154] *Id.* at 15.

[155] Wälde, *supra* note 27, at 137 ("Tribunals which deviate from established jurisprudence, without an extensive effort at reasoning, distinction and providing full hearing to the parties on their intention to deviate, might be considered to commit severe procedural and material rule breaches that could bring them into the visor of the—limited—procedures for judicial review and annulment.").

D. An ordering of precedents, ICSID and others

Writing about the thirty-one awards and decisions rendered up from 1973 until 1993, E. Lauterpacht and R. Rayfuse note that "[c]onsiderations of openness and of sound and orderly judicial administration, not to mention the convenience of all concerned, warrant the removal of this material from the realm of haphazard discovery into that of predictable and scholarly availability."[156] Accordingly, under their leadership, the Research Centre for International Law at the University of Cambridge made the effort "involved in collecting and presenting this material in a single publication accompanied by appropriate editorial apparatus such as summaries, tables of cases and very detailed indexes."[157] ICSID Reports, now in its eleventh volume, has itself made an invaluable contribution to the jurisprudence on international investment, a contribution which has now been met by others, such as NAFTA Chapter Eleven Reports.[158] In addition to ICSID Reports, awards and decisions of ICSID and other tribunals regularly appear in (i) a number of publications around the world, such as International Legal Materials, Journal de Droit International, ICSID Review—Foreign Investment Law Journal; (ii) online at the World Bank's ICSID website; (iii) online at websites dedicated to investment treaty awards such as investment treaty arbitration, investmentclaims.com, naftaclaims.com, transnational-dispute-management.com; and (iv) on commercial services such as Kluwer Arbitration, Westlaw, and Lexis.[159] Ready access to ICSID awards and decisions is now virtually assured, and near instantaneous.

If the number of pending ICSID and other arbitrations, awards, and decisions continues to increase at this remarkable pace, it may be time to consider certain tools to assist in locating precedents. Just as the "exploding number of reported cases was by itself a sufficient impetus for the development of legal citation indexes" in certain common law jurisdictions, there is no reason why a modified system could not be established in investment arbitration as a means of ensuring that well-reasoned decisions and awards do not languish in obscurity.[160] If Jan Paulsson's forecast that "there are awards and awards, some destined to become ever brighter beacons, others to flicker and die near-instant deaths" is correct, it would be useful to organize the burgeoning corpus of precedents in an orderly system to ensure that the right awards and decisions flourish.[161] Given the similarity of terms of investment treaties, and the related claims brought in investment

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[156] R. Rayfuse & E. Lauterpacht (eds.), 1 ICSID Rep. at ix (1993).

[157] *Id.* at 1.

[158] Jack Coe, William Dodge & Charles Brower, NAFTA Chapter Eleven Reports, vol. 1, Basic Text (2005). The first volume of Kluwer's NAFTA Chapter Eleven Reports was published in November 2005, and future volumes are to include a "regularly augmented collection of full-text awards and other important decisions issued under the Agreement's investor-state arbitration provisions," offering "a unique guide to emerging jurisprudence in the field", <www.aspenpublishers.com/Product.asp?catalog%5Fname=Aspen&category%5Fname=&product%5Fid=9041122850&Mode=SEARCH&ProductType=P>.

[159] The sites for each of the above-listed resources are as follows: <www.worldbank.org/icsid>; <http://ita.law.uvic.ca/>; <www.investmentclaims.com>; <www.naftaclaims.com>; <www.transnational-dispute-management.com>; <www.kluwerarbitration.com/arbitration/arb/default.asp>; <www.lexis.com/>; <http://westlaw.com>.

[160] Patti Ogden, *Mastering the Lawless Science of Our Law: A Story of Legal Citation Indexes*, 85 L. Lib J. 18 (1993).

[161] Paulsson, *supra* note 16, at 4.

arbitrations, a form of "head note" and "key number" system is both appropriate and fitting. If the award's weight is a function of its reasoning, the reasoning should be made clear. Such a system could note when tribunals distinguished awards or decisions, declined to follow the reasoning of particular awards, or criticized awards.

VI. Conclusion

As alluded to at the outset of this article, the present state of precedent in investment treaty arbitration is in some respects similar to that of precedent in England at the time of Bracton's *De Legibus*, when there was not as yet any doctrine of binding *stare decisis*.[162] As observed by Sir Carleton Kemp Allen, certain of the cases cited by Bracton "themselves carry us back to a stage farther and show us that judges were seeking the guidance of precedent early in the thirteenth century."[163] In today's modern investment treaty tribunals, it is only expected that when faced with a particular legal problem, arbitrators similarly want "to know what others in similar situations have done," as "[i]t is difficult to conceive of a legal system in which precedent plays no part at all."[164] The similarities, however, likely end there. The role that precedent has come to play in investment treaty arbitration today resembles the common law doctrine of *stare decisis* absent certain of the associated values advanced in a common law system of precedent. It will ultimately be up to the community of arbitrators, those appearing as counsel before them, and others involved to ensure that investment treaty precedents are used properly, and not misused or mischaracterized, in order to achieve at least some degree of "reasonable uniformity of decision throughout the … system, both at any given time and from one time to another."[165]

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[162] Wiener, *supra* note 4; Seipp, *supra* note 4.

[163] Sir Carleton Kemp Allen, Law in the Making 189 (1964).

[164] Berger, *supra* note 21, at 18; Zander, *supra* note 37, at 215.

[165] In discussing the many values associated with a common law system of precedent, Hart and Sacks noted the "desirability … of securing a reasonable uniformity of decision throughout the judicial system, both at any given time and from one time to another"—a value which may remain forever elusive in investment treaty arbitration. Zander, *supra* note 37, at 302.