Reform of Investor-State Dispute Settlement: Lessons from International Uniform Law

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I. INTRODUCTION

The UNCTAD International Investment Arbitration Issues Note, “Reform of Investor-State Dispute Settlement: In Search of a Roadmap” (the Issues Note), which provides the theme for this special issue of Transnational Dispute Management, lists several concerns that have been raised about adjudication in the investor-state dispute settlement (ISDS) system. This article focuses on responses to one category of concerns, which the Issues Note labels “problems of consistency and erroneous decisions”.

The Issues Note observes that “Those arbitral decisions that have entered into the public domain have exposed recurring episodes of inconsistent findings . . . [including] divergent legal interpretations of identical or similar treaty provisions as well as differences in the assessment of the merits of cases involving the same facts.” The lack of broadly effective review mechanisms (whether appellate in character or otherwise) means that inconsistent or simply erroneous decisions cannot be corrected. As a result, the Issues Note concludes, erroneous and inconsistent
decisions have “led to uncertainty about the meaning of key treaty obligations and lack of predictability of how they will be applied in future cases.”

To confront the concerns it describes, the Issues Note identifies five broad “paths for reform”. Two of these would address problems of consistency and erroneous decisions: introduction of an appeals facility and establishment of a standing international investment court. The merits of such initiatives are debatable, but even assuming that they would be effective in improving adjudication, they are unrealistic in the short- or medium-term. Similarly, the redrafting of International Investment Agreements (IIAs) to make them clearer, more specific, and more uniform would likely improve the quality and consistency of arbitral determinations, as would the enactment of a global treaty or model law that clarifies the nature of the substantive rights and obligations created by international investment law. Whether such initiatives are more achievable than the creation of an appellate body is also debatable, but for present purposes this debate is irrelevant. In this article, I assume that the current legal environment is fixed. I hope to show that measures that are less drastic and more realistic than introduction of an appeals facility or standing court, and more easily attainable than the redrafting of IIAs or the promulgation of new hard or soft law instruments, would still be effective.

To this end, I look to the experience of the international uniform law movement and the associated scholarly literature. “International uniform law” is a broad term that encompasses a large number of hard law and soft law initiatives intended to harmonize or unify national laws on the global scale. It is often closely associated with nongovernmental and intergovernmental

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1 Issues note (n 1) at 3-4. There is some dispute as to the degree of inconsistency in ISDS decision-making. On some legal issues, ISDS tribunals are remarkably consistent, given that there is no mechanism to enforce consistency. In others, differences stubbornly remain. As Kaufmann-Kohler replied to the question of whether there is consistency in investment arbitration, “Yes and no.” Kaufmann-Kohler (n 2) at 138.


3 I use “International Investment Agreement” as a broad umbrella term to encompass all international agreements related to cross-border investment, whether bilateral or multilateral and whether contained in a treaty (as is usual) or some other instrument.

4 On soft law codifications and international investment law generally, see Andrea K Bjorklund, “Assessing the Effectiveness of Soft Law Instruments in International Investment Law” in Andrea K Bjorklund and August Reinisch (eds), International Investment Law and Soft Law (Edward Elgar 2012).

5 I make no claim to be the first to draw lessons for ISDS from the uniform law experience. However, such treatments have focused on the drafting of soft law instruments such as model laws, and have generally restricted themselves to considering the lessons learned from the promulgation of commercial law instruments. See, eg, Giuditta Cordero-Moss, “Soft law codifications in the area of commercial law” in Andrea K Bjorklund and August Reinisch (eds), International Investment Law and Soft Law (Edward Elgar 2012) 109. In this article, I argue for the value of considering the uniform law experience in general, and draw some specific examples from international uniform law initiatives in family and human rights law, as well as commercial law. I also look more broadly at a range of initiatives that might provide support for consistent and high-quality interpretation of IIAs.

6 For the purposes of this article, I exclude from consideration arguably the most important locus of international uniform rulemaking, the European Union. The EU has too significant a supervisory structure (including a kind of transnational judicial hierarchy with the European Court of Justice at its apex) to be comparable to ISDS.
organizations like UNCITRAL, UNIDROIT, and the Hague Conference on Private International Law. However, uniform law efforts have also originated in business groups like the International Chamber of Commerce, and in academic bodies such as the Lando Commission that drafted the Principles of European Contract Law.

International uniform law is most advanced in commercial fields, mainly because commercial interests were the first social entities to participate in large-scale globalization. Globalization of commerce has led to “an urgent need for a corresponding legislative policy designed to regulate such transnational commerce.” Some of the best-known uniform law initiatives deal with commercial law, such as the UN Convention on Contracts for the International Sale of Goods (CISG), the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles), and the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law).

Today, however, the uniform law movement spans every facet of private law, as well as some public law fields. As with commercial law, unification of other areas of private law may be necessary simply to keep pace with the increasing number of private legal relationships that cross borders. For example, the Hague Conference on Private International law has promulgated a series of conventions that deal with family law issues relating to children, most prominently the Hague Convention on the Civil Aspects of International Child Abduction (Hague Abduction Convention). These conventions were considered necessary to confront the challenges posed by increasing numbers of cross-border marriages and increasing numbers of migrants with children. Familial globalization had to be addressed by legal globalization. Similarly, the

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9 The United Nations Commission on International Trade Law, which has been involved with a large number of uniform law treaties and model laws, most prominently the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the UNCITRAL Model Law on International Commercial Arbitration.
10 The International Institute for the Unification of Private Law, which has also drafted several uniform law instruments, such as the UNIDROIT Principles of International Commercial Contracts.
11 The most notable uniform law products of the ICC are the INCOTERMS, which provide uniform rules for delivery of goods, and the Uniform Customs and Practices for Documentary Credits.
12 Officially, the Commission on European Contract Law. For a brief history of the Lando Commission, see, eg, Danny Busch, Indirect Representation in European Contract Law (Kluwer 2005) at 198-200.
United Nations Convention Relating to the Status of Refugees (Refugee Convention) was a
reaction to increased numbers of refugees leaving their countries of origin and traveling all over
the globe. In all of these sectors, private actors may benefit from adoption of uniform
international rules specifically adapted to cases with cross-border aspects.

It is worth considering why the experience of international uniform law initiatives is
relevant to ISDS, because the two are not obviously analogous. Indeed, the list of differences is
extensive. “Uniform law” encompasses a wide range of initiatives in various fields of (mostly
private) law, while international investment law—despite its much-ballyhooed indeterminacy—
is a relatively coherent field within public international law. International investment law is
applied almost exclusively by non-state arbitral tribunals, while uniform law instruments are
generally implemented in national legislation and applied by national courts. With uniform law
initiatives, there is typically an initial rulemaking event (a diplomatic conference, meetings of a
 scholarly or bureaucratic drafting party, etc.) that results in an agreed text, while in international
investment law, IIAs are individually negotiated by the states party to them and their contents
have evolved over time. Most importantly, in uniform law, there is typically a single, global
uniform text to be applied in the form of a convention, model law, or set of principles, while in
ISDS, there is no single text; instead, a multiplicity of bilateral and multilateral IIAs coexist,
many of which are worded differently and most of which do not spell out with specificity the
content of the rights and obligations they create.

Yet there are also important similarities between international uniform law and
international investment law. Both are associated with loose coalitions that share an ideal of
unity that struggles against a reality of diversity. The various rights and obligations created by
IIAs—while they might differ depending on the text of the relevant treaties—are expressly
intended to partake of a common set of public international law norms. This set of norms is less
definite but (at least in theory) no less unified than uniform texts like the CISG or the Hague
Abduction Convention.

International uniform law and ISDS share essentially the same goal. The fundamental
purpose of both ISDS and uniform law initiatives is to reduce the importance of national borders
in cross-border relationships by creating a fair, even, and predictable playing field for private
parties, regardless of their nationality and regardless of the location of their activities. To achieve
this goal, it is crucial that the instruments containing the law—whether they are treaties, model
laws, or informal bodies of rules—be interpreted in a sufficiently consistent manner. 17 Such
consistency is a requirement of both fairness and effectiveness in adjudicative systems.

International uniform law and ISDS also face the same basic challenge: how to deliver
that degree of consistency without the factors that normally stabilize adjudication in national
court systems. In both, “the judicial pyramid is essentially flat.” 18 A multitude of tribunals, with
diverse perspectives, each with no power to overrule the others and with no common system of

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17 The uniform law literature, unsurprisingly, describes this goal in terms of “uniform interpretation” or “uniform
application”. In the ISDS literature, the preferred term is “consistent”. As will be discussed below, in neither system
is the goal absolute uniformity of outcomes, so there is no significant difference between uniformity and
consistency. In this article, I adopt the ISDS terminology.

precedent, are all charged with interpreting the same, limited set of rights and obligations. For uniform law, the inevitable result, given the variety of national laws and national legal cultures in which judges are trained, is that courts interpret uniform law instruments in a divergent manner, tending toward interpretations that align with their own familiar national laws. Since the entire purpose of international uniform law is to create a globally uniform set of rules, some critics have argued that the exhibition of such a “homeward trend” by national courts can nullify the benefits that a uniform law would theoretically provide.19

With international uniform law initiatives, the population of tribunals interpreting a given instrument (the “interpretive community”) is significantly larger, more diverse, and more uneven in quality than the relatively small population of investment arbitrators. It encompasses courts of all levels from a wide range of states, along with (for some uniform law instruments) national regulatory agencies and international commercial arbitration tribunals.20 However, both the ISDS and uniform law interpretive communities share the important characteristic that they encompass lawyers who were raised in different national cultures and were trained in different legal traditions.

The risk that uniform law treaties will not be interpreted uniformly in practice is a preoccupation of uniform law advocates.21 It is frequently stated—practically a mantra—that achieving agreement on a single text is, at best, only the first step toward actual unification of the law. Andersen concludes that, while the enactment of uniform laws “is often the crowning achievement of efforts of comparative and harmonized law . . . it is not in the creation of texts which call themselves ‘uniform’ that any actual uniformity in law is created, but rather in the

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19 See, eg, Gilles Cuniberti, “Is the CISG Benefiting Anybody?” (2006) 39 Vanderbilt Journal of Transnational Law 1511 at 1516 (“[N]ot only do vague rules not provide precise answers and thus reduce legal certainty, but if contained in an international instrument, they are also likely to be interpreted differently by courts and thus jeopardize the actual harmonization of the field.”). For a summary ultimately rejecting such arguments, see Larry DiMatteo et al, Law of International Sales: A Critical Analysis of the CISG (Cambridge University Press 2005) at xi.

20 Application of these instruments by national courts has been described as “the Achilles’ heel of international law”. Anthea Roberts, “Comparative international law? The role of national courts in international law” (2011) 60(1) International and Comparative Law Quarterly 57 at 58-59.

successful uniform application of such texts.” Accordingly, the international uniform law community has been highly motivated to address the problem of inconsistent adjudication of international law instruments. The theoretical literature is both broad and deep, and the practical literature benefits from a wide range of different initiatives that have been attempted to promote consistent and high-quality interpretation of uniform law instruments.

This article is organized around three “questions asked” with respect to ISDS. For each, it describes the “answers” yielded by the experience of the international uniform law movement, and proposes how the insights gained might be put into practice in ISDS. The first two questions are doctrinal in character. Part II poses the question: what degree of consistency between ISDS tribunals should be the goal? Part III asks: what should be the role of precedent in a decentralized, non-hierarchical interpretive community? On both of these issues, the international uniform law literature provides doctrines that are both normatively attractive and feasible in ISDS.

The third question is more practical. Part IV asks: which non-binding aids to interpretation are most effective in promoting quality and consistency? A wide range of interpretive aids exist for various international uniform law instruments, providing an opportunity to identify best practices. In general, the international uniform law experience shows that substantial improvements in consistency and quality of decision-making can be realized even without the establishment of centralized administrative or appellate bodies.

II. HOW CONSISTENT SHOULD DECISIONS BE?

Consistency is an obvious virtue in any system of adjudication. The principle that “like cases should be treated alike” is a cornerstone of the rule of law and of fairness in dispute resolution. A decision that is inconsistent with earlier decisions may cause injustice to those who have ordered their affairs in reliance on the earlier cases. Inconsistent enforcement of laws is also inefficient. It “generates unpredictability, which may impose significant costs on economic agents when planning economic activities. These costs are especially salient in commercial fields of law.” As noted above, the entire purpose of both ISDS and uniform law is to reduce unfairness and uncertainty in cross-border activities, in turn reducing risk and promoting a greater flow of both people and assets across national boundaries.

Moreover, inconsistent outcomes can undermine the credibility of a legal system and threaten its legitimacy. Legitimacy has two distinct aspects. First, a dispute resolution system

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23 The legal theory literature is plentiful, but the two best-known treatments of this subject can be found in Ronald Dworkin, Taking Rights Seriously (Harvard University Press 1977) and Lon Fuller, “The Forms and Limits of Adjudication” (1978) 92 Harvard Law Review 353.

must be internally legitimate in the eyes of its users, who must consent to use it and accept its outcomes; second, it must be legitimate in the sense of coherence and generating the rule of law through its decisions on the whole.\textsuperscript{25} Sufficient quality and consistency of decision-making are vital for both kinds of legitimacy. Since arbitration is by its nature a voluntary enterprise, that requires the cooperation of both parties and states for its continued viability, the need to preserve the system’s legitimacy is particularly pressing.

ISDS case law and literature recognize these concerns. Writes Kaufmann-Kohler, “it is important to remember that the credibility of the entire dispute resolution system depends on consistency, because a dispute settlement process that produces unpredictable results will lose the confidence of the users in the long term and defeat its own purpose.”\textsuperscript{26} Kurtz concurs: “Ultimately . . . it is the coherence and integrity of reasoning employed by arbitral tribunals that is of greatest import to states parties (with the highest potential to foster deeper commitment to the system).”\textsuperscript{27} Similarly, the tribunal observed in \textit{Suez/Vivendi v Argentina}:

\ldots considerations of basic justice would lead tribunals to be guided by the basic judicial principle that ‘like cases should be decided alike,’ unless a strong reason exists to distinguish the current case from previous ones. In addition, a recognized goal of international investment law is to establish a predictable, stable legal framework for investments, a factor that justifies tribunals in giving due regard to previous decisions on similar issues.\textsuperscript{28}

At the same time, there is such a thing as too much consistency. Variation in the content of provisions across different IIAs means that absolute consistency would be bad law as well as bad policy.\textsuperscript{29} Even in uniform law, where the existence of a single, global text means that absolute uniformity has a theoretical legal justification, the literature recognizes that absolute uniformity, in the sense of identical outcomes reached in all analogous cases, is probably undesirable and certainly impossible. As Flechtner puts it, Article 7(1) of the CISG, which

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\item These two conceptions of legitimacy are commonplace in the legal theory literature. Applying them to international arbitration, see Pierre Tercier, “La légitimité de l’arbitrage” [2011] 3, Revue de l’Arbitrage 653.
\item \textit{Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA (Claimants) v The Argentine Republic (Respondent)}, Decision on Liability, ICSID Case No ARB/03/19 (July 2010) at para 189.
\item The argument that consistency is a red herring because IIAs differ is frequently raised. It is to some extent uncontroversible, but can be taken too far—even with the same treaties, there have been inconsistent results. Bjorklund gives, as two salient examples, inconsistencies among tribunals applying the same provisions of NAFTA Chapter 11, and tribunals applying the same provisions of the US-Argentina BIT in the arbitrations that arose in the wake of the Argentine financial crisis. Andrea K Bjorklund, “Investment Treaty Arbitral Decisions as \textit{Jurisprudence Constante}” in Colin Picker et al (eds), \textit{International Economic Law: The State and Future of the Discipline} (2008) at 270-71. See also Kaufmann-Kohler (n 26) at 376.
\end{enumerate}
requires courts to consider “the need to promote uniformity in its application”, does not “mandate a doomed quest for an unobtainable [and] . . . ultimately harmful ideal.”

An overweening emphasis on consistency would fail to recognize the particularities of individual cases. It might also stifle healthy evolution of the law by inhibiting innovation among ISDS tribunals; the uniform law literature recognizes that some diversity can be beneficial because it promotes a “laboratory of the states” on the international level, leading to innovation and, over time, better laws. Moreover, “simple consistency in outcome is effectively value neutral.” Too much rigidity can lock into place interpretations that are biased, incoherent, or just sub-optimal. There is also no normative rationale for privileging the decision of the first tribunal that happens to pronounce on a given legal issue.

Within national jurisdictions, different courts inevitably interpret the same laws differently. Even if it were desirable, absolute consistency simply “will not function” in a legal context. Empirical research, especially in the United States, has confirmed this intuition. For example, in a recent study, Niblett considered decisions of the California Court of Appeals on the enforceability of arbitration provisions in consumer and employment contracts. This is an area of law in which the general contours of the test are well-settled, but leave wide scope for individual discretion by judges (a description that also applies to many of the substantive doctrines in international investment law). The study revealed that cases were inconsistent with


\[31\] As Denning memorably put it, “If lawyers hold to their precedents too closely, forgetful of the fundamental principles of truth and justice which they should serve, they may find the whole edifice comes tumbling down about them.” Lord Denning, The Discipline of the Law (Butterworths 1979) at 292.

\[32\] With respect to ISDS, see, eg, TW Wälde, “The Present State of Research” in New Aspects of International Investment Law 2004 (Brill 2006) (“Arbitral jurisprudence can be compared to a competitive market: various solutions to arising interpretative challenges compete for attention and acceptance; there is experimentation going on. The most persuasive solutions will generate a momentum that leads to ‘jurisprudence constante’. ”).


\[35\] Cf SGS v Philippines, where the Tribunal noted that, since “[i]n there is no hierarchy of international tribunals . . . there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals.” SGS Societe Generale de Surveillance S.A v Republic of the Philippines, ICSID Case No ARB/02/6, Decision of Tribunal on Objections to Jurisdiction (29 January 2004) at para 97.

\[36\] Some argue that divergences among different state courts interpreting uniform laws are in essence no different from the divergences among courts within a state. See, eg, Roger Goode, Herbert Kronke and Ewen McKendrick, Transnational Commercial Law (Oxford University Press 2007) at 723-724.

prior analogous decisions in about 23% of case-precedent pairs where direct comparisons could be made.38

On the global level, the factors that contribute to a lack of interpretive uniformity are multiplied. There is no comprehensive code, no global appellate court to strike down aberrant interpretations, no system of binding precedent, and no shared legal culture with common interpretive methods. Especially where a treaty or model law is enacted in multiple linguistic versions, each equally authoritative, differences in the meaning of the different language versions may make uniform interpretation impossible.39

In addition, the text of a provision may be open to multiple, equally reasonable interpretations. As Roberts notes, “. . . even when States agree on a treaty text, they may have adopted vague or ambiguous wording precisely to permit conflicting interpretations to be maintained, as captured by Allott’s description of a treaty as a ‘disagreement reduced to writing’.”40 Ambiguities of this sort are often the results of compromises in the negotiations, but may also reflect a desire by the drafters of the uniform instrument to enact open-textured rules.41

In the uniform law context, such rules are typically based on factors like good faith,
reasonableness, and commercial practice. They are specifically intended to give adjudicators flexibility to do justice in individual situations; when such provisions are interpreted, perfect consistency is not just impossible but actually harmful.42

Much the same has been said of the open-textured provisions common in IIAs, especially those of the “first generation” of investment treaties negotiated from the 1950s to the 1990s.43 As Bjorklund notes, “Some of the most frequently involved treated provisions—especially the obligation to afford fair and equitable treatment—are amorphous and contextually variable. Other treaty provisions, such as the obligation to provide most-favored-nation treatment, are ambiguous and controversial in their scope and effect.”44

Moreover, a uniform law instrument can at best unify the law only as it pertains to the specific sphere of application of the agreed-upon text. Since uniform law instruments are necessarily enacted piecemeal, there will always be transactions or situations that are related to the field of law encompassed by the uniform law instrument, but fall outside its sphere of application. In uniform law contexts, such matters will inevitably have to be dealt with under applicable national laws.45 The same phenomenon occurs in ISDS, where general public international law (itself often uncertain) fills gaps in IIAs and supplements them when issues arise that are within the scope of the IIA but which its text does not resolve.46

In addition, rules of evidence and procedure may have more impact on who wins and who loses a lawsuit than the underlying substantive law. Procedural and evidentiary rules vary greatly from state to state, and national courts all invariably apply their own procedural law. Differences in procedural law among states are therefore a source of divergence in outcomes that no amount of unification of substantive law can remedy.47 Similarly, in ISDS, the flexibility of procedures (whether as a result of parties’ exercise of their autonomy or of the varying preferences of tribunals) can lead to different pleading or evidentiary practices in different arbitrations, even where tribunals do subscribe to consistent interpretations of treaty texts.

Finally, in uniform law, one has to account for the varying capacities of different states to actually implement the uniform laws to which their governments agree. For example, Estin writes that “The goal of developing a truly global children’s law presents enormous challenges in light of the stark differences in the capacities of different nations to implement legal protections for children’s welfare.”48 In ISDS, the disparities in training and available resources between

42 H Allen Blair, “Hard Cases under the Convention on the International Sale of Goods: A Proposed Taxonomy of Interpretive Challenges” (2011) 21 Duke Journal of Comparative and International Law 269 at 312 (“... tribunals interpreting open-textured provisions should not diminish the value that such provisions provide to parties by attempting to render them, under the guise of interpretation, more definite for future cases.”).
47 Ferrari (n 45) at 689-690.
48 Estin (n 16) at 65.
different arbitral tribunals are far smaller than the differences between national courts; however, the same point holds.

For all these reasons, absolute “as-applied” consistency is neither possible nor desirable. ISDS awards should not so much be “consistent” and “more consistent”. But how much more? A looser standard must be identified, one which implies that something less than absolute consistency still deserves the label “consistent”.

In uniform law circles, the standard that has been advanced is usually called “functional uniformity”. Functional uniformity requires two things: first, disparate adjudicative tribunals must employ the same approach in interpreting the text; second, the outcomes achieved in different jurisdictions must be sufficiently similar that the instrument’s goals are advanced. Thus, for example, an interpretation of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) would be functionally uniform if it reduces legal impediments (including unpredictability) to the international use of arbitration as a final and binding system of dispute resolution, regardless of the nationality of the parties or the location of their assets; similarly, an interpretation of the Refugee Convention would be functionally uniform if it observes international minimum standards of treatment for refugees, regardless of their state of origin or the state in which they seek asylum.

A “good yardstick” for measuring functional uniformity is whether the interpretation reduces the motivation of parties to forum shop. In connection with the Convention for the Unification of Certain Rules for International Carriage by Air (Warsaw/Montreal Convention), Sundberg writes that “a margin of imperfection is not necessarily an actual defect as long as it does not invite plaintiffs to go ‘shopping’ for the most generous jurisdictions. Details can be allowed to vary if the basic conceptualism is maintained.” This is not to say that consistent

49 Cf Kaufmann-Kohler (n 26) at 376 (“. . . more consistency must be the goal”).
52 See, eg, Joshua D H Karton and Lorraine de Germiny, “Has the CISG Advisory Council Come of Age?” (2009) 27(2) Berkeley Journal of International Law 448 at 457 (arguing that a functionally uniform interpretation of the CISG would be one that reduces impediments to cross-border trade in goods).
53 Andersen (n 22) at 51.
55 Jacob WF Sundberg in Air Charter 1963, quoted in OC Giles, Uniform Commercial Law (AW Sijtjoff 1970) at 23 fn 4. See also John Honnold, Uniform Law for International Sales under the 1980 UN Convention (Kluwer 1991) at 142 (“The settlement of disputes would be complicated and litigants would be encouraged to engage in forum shopping if the courts of different countries persist in divergent interpretations of the Convention.”).
interpretation of uniform law texts can entirely eliminate forum shopping,56 or even that it ought to be eliminated,57 but if an interpretation does serve to reduce forum shopping, it is likely to be one that advances uniformity.

The same standard—functional consistency—and the same yardstick—reduction of forum shopping—can be applied mutatis mutandis to ISDS.

First, investment treaty tribunals should all employ the same approach to determining the content of the rights and obligations created by IIAs. To a degree, this is already the case, with tribunals regularly invoking article 38 of the ICJ Statute as to the sources of international law and provisions of the Vienna Convention on the Law of Treaties, especially articles 31 and 32, as to the rules for interpreting treaties. However, these provisions are notoriously broad,58 and a number of questions relating to interpretive methods remain unresolved (perhaps most notably the status of precedents). Tribunals nevertheless must do more to take these rules seriously. Writes Kurtz:

. . . there is a distinct and peculiar ‘moving target’ quality to the hermeneutics of investment arbitration with arbitral tribunals often paying simple lip service to the customary rules on treaty interpretation. . . . All too often arbitral tribunals simply choose and move between different interpretative schools without rational explanation or analysis.”59

Second, when doubt exists as to the proper interpretation of an IIA, tribunals should adopt interpretations that advance the goals of the particular treaty and of international investment law generally. The goals of international investment law in general, and of ISDS in particular, are to ensure fair and predictable treatment of foreign investments.60 Their purpose is not to promote investment per se (still less, to protect the assets of any particular investor), although of course the promotion of investment is an expected and welcome consequence. International investment law is not intended to displace, in a wholesale manner, sovereign states’ ability to regulate investments within their borders. Rather, the concept underpinning investment law, just like the concept underpinning the enforcement of contracts and the judicial review of regulations in all domestic systems, is to ensure the predictable and fair enforcement of both state-imposed and privately-created obligations in the expectation that a private market will

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56 See generally Ferrari (n 45).
57 Some argue that forum shopping is a necessary consequence of counsel’s duty to zealously represent the interests of their clients. For a good review of the arguments on both sides, see the debate between Juenger and Opeskin in a symposium issue of the Sydney Law Review, (1994) 16 Sydney Law Review.
60 As the Suez/Vivendi tribunal put it, “a recognized goal of international investment law is to establish a predictable, stable legal framework for investments.” Suez/Vivendi (n 28) at para 189.
flourish as a result. Accordingly, tribunals faced with vague or ambiguous treaty provisions or faced with inconsistent authority, should prefer interpretations that advance the goals of predictability and fairness in the treatment of foreign investments. To put it another way, a functionally uniform interpretation of an IIA provision would be one that minimizes the impact of an investor’s foreignness on the treatment of its investment.

Finally, the yardstick of reducing forum shopping can be adapted for the ISDS context in two ways. The first is that, to the extent that different IIAs contain identical or equivalent provisions, interpretations should be adopted that would be the same regardless of the nationality of the investor and the identity of the host state. That is, if the parties’ legal positions remained the same but their identities changed, the same outcome should be reached. The second analogue to forum shopping in ISDS has to do with the selection of arbitrators. Functionally consistent adjudication would reduce the incentive of parties to appoint a particular arbitrator because of her opinion on the meaning of common IIA provisions. In other words, it should not be possible to predict, based on the composition of the tribunal alone, that a particular interpretation of the treaty will be reached.61

III. TO WHAT EXTENT SHOULD ADJUDICATORS FOLLOW PRECEDENTS?

In the absence of a formal judicial hierarchy, the single most important factor in promoting consistent adjudication is for tribunals to take prior decisions into account. This point is emphasized repeatedly in both the ISDS and uniform law literature.62 Indeed, there appears to be universal agreement among uniform law scholars that national courts and arbitral tribunals must, in each case where interpretation is called for, consult case law from all over the world interpreting the uniform law instrument in question.63 Andersen asserts (with respect to the CISG) that “There can be no questioning the duty to consider foreign sources or precedents.”64

61 To be clear, I am not advocating that the ISDS system should try to eliminate differences between individual arbitrators in terms of their perspectives and general judicial philosophies. Parties should continue have the freedom to choose arbitrators who are not only expert in the relevant law and practice, but who also have a philosophical orientation that would predispose them to the appointing party’s legal position.

62 The argument is so frequently repeated that it is difficult to formulate a complete list of commentators expressing it. Some recent examples referring to the CISG include: Honnold, (n 55) at 125 (“The Convention's requirement of regard for ‘uniformity in its application’ calls for tribunals to consider [foreign] interpretations of the Convention.”); Andersen (n 37); Harry M Flechtner, “Funky Mussels, A Stolen Car, and Decrepit Used Shoes: Non-Conforming Goods and Notice Thereof Under the United Nations Sales Convention (“CISG”)” (2008) 26 Boston University International Law Journal 1 at 2 (2008) (“There is consensus among CISG commentators that one important tool in fulfilling [the requirement of uniformity] is consultation of past CISG decisions, particularly those rendered by tribunals in jurisdictions other than that of the interpreter.”); Aneta Spaic, “Approaching Uniformity in International Sales Law Through Autonomous Interpretation” (2007) 11 Vindobona Journal of International Commercial Law and Arbitration 237 at 240; Peter Schlechtriem and Ingeborg Schwenger (eds), Commentary on the UN Convention on the International Sale of Goods (CISG) (2nd edn, Oxford University Press 2005) at 64-65. Note that the CISG contains an express provision, article 7(1), requiring courts to have regard to the “international character” of the CISG and to “the need to promote uniformity in its application. This provision is universally agreed by commentators to require consultation of a broad range of foreign precedents, in addition to any domestic case law.

63 See, eg, Roberts (n 20) at 82-83.

64 Andersen (n 37) at 49.
In ISDS, numerous commentators and tribunals have argued that tribunals should look to precedents\(^{65}\) and have observed that they do in fact often rely on precedents.\(^{66}\) This is unsurprising since, “[i]n countless domains, imperfectly informed individuals and institutions adopt a heuristic in favor of following the majority of relevant others.”\(^{67}\) Informal pressures will encourage arbitrators to consider prior cases: “Informal pressure will arise from arbitrators’ interests in protecting their reputations for expertise, and hence future engagements as arbitrators. Clients might reasonably expect arbitrators to know how cases involving similar factual issues, or similar legal doctrines, have been decided.”\(^{68}\) Social factors within the investment arbitration community may also encourage arbitrators to consider prior decisions.\(^{69}\)

Since the word “precedent” can have so many different meanings, a brief detour to clarify terminology is called for. I use “precedent”, standing alone, to refer to any prior decision that might have some utility in deciding later cases. It thus includes any prior decision that is relevant either because it considers similar sets of facts or because it considers similar legal issues.\(^{70}\)

“Binding precedent” refers to prior decisions that must be followed in certain subsequent proceedings. The concept of binding precedent encompasses two distinct circumstances. First, it refers to rules of vertical precedent whereby lower courts are required to follow the decisions of courts superior to them in the judicial hierarchy of their legal systems.\(^{71}\) Although binding

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\(^{65}\) See, eg, Kaufmann-Kohler (n 26) at 374 (concluding that “It may be debatable whether arbitrators have a legal obligation to follow precedents – probably not – but it seems well settled that they have a moral obligation to follow precedents so as to foster a normative environment that is predictable.” (emphases in original)).

\(^{66}\) See, eg, Bjorklund (n 44) at 1287; Ole Khristian Fauchald, “The Legal Reasoning of ICSID Tribunals – An Empirical Analysis” (2008) 19(2) European Journal of International Law 301 at 341; Schreuer (n 21) at 11; Laird and Askew (n 4) at 300-301; El Paso Energy International Co v Argentine Republic, ICSID Case No ARB/03/15, Decision on Jurisdiction (27 April 2006) at para 39; Funnekotter v Zimbabwe, Award, ICSID Case No ARB/05/6 (22 April 2009) at para 105, 108; Saipem SpA v Bangladesh, ICSID Case No ARB/05/07, Decision on Jurisdiction (21 March 2007) at para 67.


\(^{68}\) Bjorklund (n 29) at 277.


\(^{70}\) In adopting this definition, one of the confusions I hope to avoid is the distinction between statements in prior decisions that are part of the “holding” or ratio decidendi—and therefore binding on subsequent lower courts, in the operation of stare decisis in common law systems—and those that might be dismissed as obiter dictum. This distinction plays no role in my discussion of precedent.

\(^{71}\) This type of authority has also been labeled “hierarchical precedent”. Evan H Caminker, “Why Must Inferior Courts Obey Superior Court Precedents?” (1994) 46 Stanford Law Review 817. The notion of binding precedent as it operates in common law jurisdictions is nonsensical without the operation of judicial hierarchies, as has been acknowledged by courts. See, eg, Hart v Massanari, 266 F.3d 1155, 1164 (9th Cir. 2001), where the US Court of Appeals for the 9th Circuit observed that a “settled judicial hierarchy” is vital to the development of a system of precedent. As Judge Kosinski wrote for the court in Hart, “The various rules pertaining to the development and
precedent is often thought of as a common law concept, some civil law systems also recognize decisions of higher courts that are formally or informally binding on courts below them in the judicial hierarchy. 72 The second kind of binding precedent constitutes rules of horizontal precedent whereby courts are required to follow the decisions of prior panels of the same court. This is perhaps the purest form of *stare decisis*. 73 It is most common in intermediate appellate courts in common law jurisdictions. For example, panels of the various United States Courts of Appeals must follow the decisions of earlier panels from the same circuit, even if they believe them to be incorrectly decided. 74

Both types of binding precedent have no application in ISDS and no application to foreign precedents in international uniform law. 75 What they share is the notion that the rightness or wrongness of a prior decision is entirely irrelevant to its consequences for subsequent cases; all that matters is that a particular court has in the past pronounced on the legal doctrine at issue. Thus, binding precedent is conceptually distinct from all forms of persuasive precedent and the two should not be confused; instead, it might be more helpful to think of binding precedent as applying to legal determinations in the same way that *res judicata* applies to factual determinations—the matter has been decisively adjudicated and cannot be reopened. 76

The term *stare decisis* is also used to refer to a different kind of horizontal precedent, those situations in which courts are not bound by prior decisions of the same court, but where such prior decisions should be given significant weight. This principle applies to trial courts and to the highest courts of many common law jurisdictions. 77 In this form of precedential authority, which has been called “traditional *stare decisis*”, precedent is seen as a “principle of policy . . . not an inexorable command.” 78 Prior decisions should normally be followed in order to promote
stability and predictability in the law. This form of precedent, too, has no place in investment treaty arbitration, since ISDS arbitral panels have no continuing existence once they have issued a final award. It is, of course, possible for tribunals to issue multiple awards in a single dispute, but factual and legal determinations from an earlier award would be binding on a later award due to res judicata, not because they would constitute precedents.

Finally, I follow the normal terminology and use the term “persuasive precedent” to refer to all prior relevant decisions that are neither binding precedent nor traditional stare decisis. In such cases, “The degree of persuasiveness of such a holding will vary with a number of factors, including (though not limited to) the thoroughness of the opinion announcing the holding, the expertise (if any) of the court announcing the decision, and the relative place of the court announcing the decision within the overall judicial structure.” In other words, persuasive precedents are those that are followed based on the substantive merits of the decision and the status of the court that rendered it. The existence of persuasive authority reverses the burden of persuasion—a later court will follow the prior decision unless it the later court finds it to be clearly incorrect.

The phrases “persuasive precedent” and “persuasive authority” are much misused. Frequently, these expressions are used loosely to refer to any prior decision that a later court thinks was correctly decided and should be followed on that basis. The problem with this lax terminology is that it would render persuasive authority no different from other sources of interpretive guidance such as academic articles or reports of law reform commissions. The key word in the phrase is authority, not persuasive. If prior cases are persuasive, but no more, then they are just stand-ins for arguments, no different from a clever submission from well-prepared counsel. They might serve as support for a legal interpretation, but they cannot be authority for that interpretation. Citation of such precedents amounts to no more than information-gathering, either to lend extra heft to a decision the has already been reached, or to canvass the available resources in an attempt to determine the “best” rule.

But resort to precedent is not just persuasion. Persuasive authority, like binding authority, turns on who interpreted the law, not just about what interpretation was given and for what reasons. Within national systems, non-binding judicial decisions, such as those from other federal sub-units, are entitled to weight not only because they are sensible but because they came from a court, with an institutional legitimacy and law-making powers comparable to those of the subsequent court. They should be followed unless a subsequent court finds that the precedent is inapplicable or clearly incorrect. That is why precedents are called “case law”. American judge and scholar Richard Posner makes the distinction well, in the context of an argument that US courts should feel free to refer to the decisions of foreign courts when interpreting US laws, but should never cite them as authorities, even merely “persuasive” ones:

[O]ften a court will cite a decision that lacks [binding] authority because it was rendered by a court in a different jurisdiction. . . . Apart from the intrinsic persuasiveness of the decision, the fact that it is a decision by a sister court carries some weight. . . . the earlier case is cited for the fact that the court has ruled one way or

79 Dobbins (n 73) at 1462.
another, regardless of how persuasive the court's reasoning is. It is cited because it is a precedent. It is quite something else to cite a decision by a foreign or international court not as a precedent but merely because it contains persuasive reasoning (a source or informational citation), just as one might cite a treatise or a law review article because it was persuasive, not because it was considered to have any force as precedent or any authority.  

The insight of the uniform law movement has been to extend this true conception of persuasive precedent to the entire international adjudicative community (foreign courts and arbitral tribunals) that are engaged in the common task of interpreting the uniform law instrument. That is, in the uniform law literature, foreign precedents are accorded a position distinct from and superior to other non-binding sources of interpretive guidance. Thus, while national courts are never bound by foreign case law, commentators, international organizations, and even governments agree that courts interpreting international uniform law instruments must “consider”, “take into account”, or “have regard to” the decisions of foreign and international tribunals.

Conceptually, according such a status to foreign court decisions is made possible by the fact that different national courts and arbitral tribunals applying international uniform law instruments are all interpreting the same text, which is the “law of the land” in every jurisdiction. Their decisions are therefore not wholly foreign. Even US Supreme Court justice Antonin

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81 Due to the confusion over the meaning of persuasive precedent, some uniform law scholars describe the desired doctrine as “inspirational precedent”. See, eg, Andersen (n 37) at 58. I do not like this term because it makes it sound like courts should merely be “inspired” by the wisdom of the foreign decision. I find it better to (perhaps quixotically) attempt to restore the correct understanding of “persuasive precedent”.


85 Andersen (n 37) at 49.

86 CISG, art 7.

87 Filip de Ly, “Uniform Interpretation: What is Being Done? Official Efforts” in Franco Ferrari (ed), The 1980 Uniform Sales Law: Old Issues Revisited in the Light of Recent Experiences (Sellier 2003) at 357 (arguing that foreign case law on a uniform law is not actually foreign, since uniform law is “the law of the land”, wherever it comes from).
Scalia, famously hostile to citation of foreign authority in constitutional cases, has acknowledged the importance of citing foreign cases when interpreting uniform law treaties.

What a duty to engage with the global interpretive community means in practice is more contested. At minimum, it requires an investigation into what others have already done, i.e., whether and how other states’ courts have interpreted a provision at issue. If this investigation reveals that something approaching an international consensus has emerged, the court should follow it absent a compelling reason to proceed in a different direction. If there is not an international consensus, the court should consider the opposing camps and justify a decision to prefer one interpretation over the other(s).

In other words, uniform law commentators agree that, at minimum, courts should follow consistent lines of decision if they exist. This concept is akin to the French law doctrine of jurisprudence constante, whereby subsequent courts follow an interpretation that persists through a mutually consistent line of cases. This doctrine serves the same purpose as stare decisis: “unification and stability of judicial activity”. Like stare decisis, it traditionally presupposes the existence of a judicial hierarchy. Jurisprudence constante is, essentially, “stare decisis applied not to a single decision, but to a line of cases.” In recent years, the jurisprudence constante model has gained a great deal of currency in ISDS circles. It has been endorsed by commentators and tribunals, and apparently also the ICSID Secretariat. For

88 See, eg, his dissents in Thompson v Oklahoma 487 U.S. 815 at 830 (1988) (“The views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.”) and in Atkins v Virginia, 536 U.S. 304 at 348 (2002) (“Equally irrelevant are the practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people.”).
89 See, eg, Olympic Airways v Hasain 540 U.S. 644 at 658 (2004), which turned on an issue of interpretation of the Warsaw Convention. In dissent, Justice Scalia criticized the majority decision for “its failure to give any serious consideration to how the courts of our treaty partners have resolved the legal issues before us.”
90 Ferrari (n 83) at 204-205.
91 Given the demands of international interpretive uniformity, domestic law can never provide such a “compelling reason”.
92 Similar concepts exist, with greater or lesser degrees of formalization, in other civil law systems. See Kaufmann-Kohler (n 26) at 359 fn 11.
93 Bjorklund (n 29) at 265 (citing Michel Troper and Christophe Grzegorczyk, “Precedent in France” in D Neil MacCormick & Robert S Summers (eds), Interpreting Precedents (Ashgate 1997) 103 at 137).
94 Ibid at 377-378.
95 Ibid at 377.
96 Bjorklund (n 29) at 272.
98 In the Sempra case, the ICSID Secretary-General wrote to the members of the tribunal, “requesting them to confirm her understanding that the Tribunal, like other ICSID tribunals, gives due consideration to published decisions . . . .” As Rigo notes, this was an “unprecedented step which shows the institutional interest of ICSID in the development of consistent case law.” Andres Rigo Sureda, “Precedent in Investment Treaty Arbitration” in Christina Binder et al (eds) International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer (OUP 2009) 830 at 837 and fn 38.
example, the *Saipem* award describes the tribunal’s opinion that “subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases.”

All of these exercises must be distinguished from an apparently similar phenomenon, which is the use of precedents for inspiration or information-gathering. Many ISDS tribunals engage with precedents only to this extent. For example, the *CMS* tribunal observed that its task was “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.”

Similarly, the tribunal in *Gas Natural* declared 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.”

For courts or arbitral tribunals to survey the world of precedents simply for inspiration is a tempting notion, founded in the common sense intuition that more information is better than less. Such exercises also make adjudicators more thoughtful and more attuned to the variety of possible doctrines and their relationship to underlying values and policy goals:

To the extent that judges can enter into more conversations with a wider array of thinkers around the world about the nature of justice, fairness, liberty, and equality, the better off they (and we) will be. After all, by their very nature, such conversations are beneficial. Judges who are more thoughtful philosophically and more learned are preferable to judges who are less so.

In the uniform law context, the institutional competence of judges to conduct such investigations into international and foreign law is a significant constraint, especially given limited judicial resources. As Kerch observes, the most “commonsensical justification” for considering foreign precedents is simply that it improves the quality of judges’ interpretations; however, “Framing the question in this manner evinces a strong faith in judges’ abilities to act as expert administrators as part of a quasi-autonomous problem-solving class.” This faith may be misplaced in many domestic contexts, even at the appellate level. By contrast, in ISDS, arbitrators tend to be elite specialists with greater knowledge of the legal issues and greater resources at their disposal than most national court judges. Indeed, the dominance of a small number of arbitrators in investment disputes is explicable partly by the concern that appointing an unknown arbitrator entails a significant gamble on the arbitrator’s competence.

Nevertheless, resort to precedent in aid of consistent adjudication must go beyond such information-gathering. When adjudicators canvass precedents in such a manner, they slip too

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99 *Saipem v Bangladesh* (n 65) at para 67.
100 *CMS Gas Transmission Co v Argentina*, ICSID Case No ARB/01/8, Decision on Objections to Jurisdiction (17 July 2003) at para 63.
101 *Gas Natural SDG, SA v Argentine Republic*, ICSID Case No ARB/03/10, Decision on Preliminary Questions on Jurisdiction (June 17 2005) at para 36. Conveniently enough, this research led the tribunal to conclude 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.” Ibid at para 52.
103 Ibid at 356.
easily into “cherry-picking”\textsuperscript{104} or “fig-leafing”\textsuperscript{105}—that is, deploying precedents to provide an authoritative gloss to an already-determined position. Such treatment of precedents may be more pernicious than beneficial. One would expect parties to use precedents strategically. (Arguably, the lawyer’s professional obligation to zealously represent the client’s interests demands no less.) However, if tribunals cite precedents in a purely strategic manner, this undermines rather than promotes consistency and breeds cynicism among users of the process. It also compromises the otherwise salutary effect of systems of precedent, that they separate the prior decisions worth following from those that are best forgotten.\textsuperscript{106}

How may these principles be applied to ISDS? In a nutshell, tribunals should treat the decisions of previous ISDS tribunals as persuasive precedents. That is, they should see them as possessing authority separate from the substantive merits of the decision. Where a prior award is relevant—where it interpreted the same provision in the same IIA, or an identical or equivalent provision in a different IIA—the award is entitled to precedential status. The justification for according awards such status, equivalent to that of a sister court in a national common law legal system, is that their decisions constitute sources of international law under ICJ Statute article 38(1)(d),\textsuperscript{107} albeit “subsidiary” sources with no “binding force”.\textsuperscript{108} They are, quite literally, case law.\textsuperscript{109} What is more, all ISDS tribunals are, like national courts interpreting a uniform text, fellow members of an interpretive community. Although their awards are only binding on the parties to the individual dispute, no ISDS award is a “foreign” award from the point of view of subsequent tribunals.

The primary consequence of conceiving of prior ISDS awards as persuasive precedents is that it clarifies tribunals’ duty to do more than simply “pay due consideration” to prior awards. When a tribunal is presented with a prior decision, it has only three options: follow the precedent, explain why it was wrongly decided, or distinguish it on the basis that the facts or the terms of the relevant treaties and contracts differed in legally significant ways.

\textsuperscript{104} Roberts (n 20) at 90.
\textsuperscript{105} Posner (n 69). See also Justice Scalia’s dissent in \textit{Roper v Simmons} 543 U.S. 551 (2005): “To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.”. US Chief Justice John Roberts echoed this concern at his Senate confirmation hearing: “Looking at foreign law for support is like looking out over a crowd and picking out your friends. . . . [Y]ou can find anything you want.” Ann Althouse, “Innocence Abroad”, The New York Times (19 September 2005) at A25.
\textsuperscript{107} Statute of the International Court of Justice, 26 Jun, 1945, 59 Stat 1055. The precise status of international judicial decisions as sources of public international law is controversial, but there is no need to wade into that controversy here. There is no doubt that in principle the decisions of international arbitral tribunals have \textit{some} legal status, and that in practice international tribunals regularly refer to prior decisions. See, eg, Tai-Heng Cheng, “Precedent and Control in Investment Treaty Arbitration” (2007) 30 Fordham Journal of International Law 1014 at 1026-30.
\textsuperscript{108} ICJ Statute, art. 59.
\textsuperscript{109} Cf Stephan Schill, \textit{The Multilateralization of International Investment Law} (CUP 2009) at 338 (Investment tribunals “increasingly use precedent as embodying the standard interpretation of investment treaties. . . . Far from constituting merely a subsidiary source of international law, precedent in these cases assumes the function of a primary source of international law.”).
Where possible, tribunals should distinguish adverse precedents, rather than simply disagreeing with them. In common law systems, the distinguishing of precedents plays an important role in softening the potential rigidity of binding precedent. As Bjorklund observes, “When decisions have formal precedential value under a regime of stare decisis, prior decisions are sometimes not as controlling as one might think. One of the first things common law students learn is how to distinguish cases, whether on factual or legal bases.”

Such a practice is more likely to generate useful information that will help the body of international investment law evolve toward greater specificity without sacrificing coherence. Whichever path it takes, the tribunal must justify its choice in its award. This will promote the Darwinian effect of precedent system—that, over time, only the most fit precedents survive and spawn long lines of progeny. It is exactly this notion that the Saipem tribunal was invoking when it held that, by referring to precedents, it was discharging its “duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.” Of course, some tribunals take a contrary view; in Romak v Uzbekistan, the tribunal held that, “Ultimately, the Arbitral Tribunal has not been entrusted, by the Parties or otherwise, with a mission to ensure the coherence or development of ‘arbitral jurisprudence’.”

As noted above, persuasive precedent in this model should be distinguished from jurisprudence constante. Under persuasive precedent, precedential effect attaches to individual awards, not just consistent lines of decisions. This difference leads some commentators to conclude that the jurisprudence constante model is preferable. Bjorklund argues that, since the field of international investment law is relatively new, “Assigning too great a role to any one decision could lead to the establishment of norms that might soon be viewed as undesirable.” However, the existence of a proper system of persuasive precedent would not require ISDS tribunals to follow “any one decision”; it would merely require them to justify any refusal to follow the precedent decision. Persuasive precedent provides greater impetus to the healthy evolution of international investment law than jurisprudence constante, since it encourages more thorough discussions in awards of the relative merits of opposing precedents. It would also contribute to greater certainty and transparency in the short term because there would be no need

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10 Bjorklund (n 29) at 272.
11 In the context of common law system of precedent, Gennaioli and Shleifer have shown that, when judges with different policy values decide cases, overruling—ie, explicitly deciding inconsistently with precedents—is less likely to generate efficient legal rules than distinguishing. Nicola Gennaioli and Andrei Shleifer, “The evolution of the common law” (2007) 115 Journal of Political Economy 43; Nicola Gennaioli and Andrei Shleifer, “Overruling and the instability of law” (2007) 35(2) Journal of Comparative Economics 309. Cf Schill, who argues that, instead of openly disagreeing with prior awards, ISDS tribunals usually “substitute open dissent by other strategies that uphold the unity of the system of international investment law.” Schill (n 108) at 339-340.
12 Saipem SpA v Bangladesh, ICSID Case No ARB/05/07, Award (30 June 2009) at para 90.
13 Romak S.A. (Switzerland) v The Republic of Uzbekistan PCA Case No AA280, Award (26 November 2009), at para 171 See also AES Corporation v The Argentine Republic, ICSID Case No ARB/02/17, Decision on Jurisdiction (26 April 2005), at paras 30-31 (concluding that “Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem.”)
14 Bjorklund (n 44) at 1295.
to decide whether a sufficient number of sufficiently consistent prior cases exists to constitute a jurisprudence constante.

Some have also argued that, as the body of ISDS case law grows, the opposite problem may occur—that the sheer number of cases will make thorough research impractical, and that in every case conflicting precedents will exist that each side will rely on. But this apparent conundrum arises every day in common law courtrooms, and no one would argue that the mere existence of contrary precedents degrades the rule of law. Instead, common law courts rely on well-established heuristics to choose among potentially conflicting precedents.

The most important such heuristic is that acceptance of a court’s interpretation by subsequent courts is the best indication that the principle contained in it is wise. ISDS tribunals can and should give greater weight to precedents that have been followed by consistent lines of progeny, just as is true of “leading cases” in common law systems. The existence of such leading cases also makes researching a large body of case law feasible. If no leading case can be found, tribunals faced with inconsistent precedents should choose among them according to the same kinds of factors that national courts typically apply. Precedent decisions that interpret the same treaty (or a treaty with identical language) should be preferred, along with those that are more recent, those that were written by particularly respected or influential arbitrators, and, of course, those whose reasoning is most persuasive.

IV. WHAT AIDS TO ADJUDICATION ARE MOST EFFECTIVE?

The international uniform law community has experimented with a wide range of different mechanisms to blunt the impact of the homeward trend and encourage consistent and high-quality interpretation. Given wide acknowledgement that opportunities to amend treaties and model laws will be infrequent and that establishing international appellate structures will rarely be politically feasible, much of the focus has been on providing authoritative aids to interpretation, in the hopes that judges will make use of such resources.

What these aids to interpretation have in common is that none has a “judicial” character—that is, they do not resolve individual disputes, nor do they assess compliance with treaty regimes, although they may take the form of advisory opinions that can be used to resolve a legal issue raised in a particular case. Otherwise, they vary. They may have a top-down character, especially when an international organization associated with a particular regime takes on the responsibility of producing aids to interpretation, or may simply aggregate the collective wisdom of an interpretive community in the manner of a case digest or meta-study. They may be written in the legislative style of a codification (such as Restatements in the mold of the American Law Institute) or be more discursive. Some are individual efforts, some are the products of unofficial collaborations, and some are issued or endorsed by official bodies. Some guides are comprehensive treatments that are published and then updated infrequently if at all (such as treatises, guides to enactment, and official commentaries), while others are intended to

115 See, eg, Bjorklund (n 29) at 266.
progress and evolve (such as case digests and guidance notes issued on an ongoing basis). Some are systematic, while others consider individual legal issues. Some are purely descriptive, while others have a prescriptive or norm-generating element. (Restatements may awkwardly straddle the line between these two options.)

To see what models might be most appropriate for the ISDS context, it is worth canvassing some of the aids to interpretation that have been disseminated to support different uniform law instruments.

Sometimes, the organization that drafted the uniform law instrument will publish an official commentary or “guide to enactment”. For example, UNCITRAL publishes its Model Law on International Commercial Arbitration together with an “explanatory note” prepared by the UNCITRAL Secretariat that, among other things, provides interpretive advice on provisions of the Model Law.UNCITRAL has also commissioned an official guide to the New York Convention, which is currently in preparation. Such guides are often issued by organizations that did not themselves oversee the drafting of the instrument but instead were created by the same treaty regime (“treaty monitoring bodies”). A successful example is the Handbook on Procedures and Criteria for Determining Refugee Status (1979, 1992) published by the United Nations High Commissioner for Refugees to aid state courts in interpreting the Refugee Convention.120 No equivalent document exists with respect to international investment law.

Where official commentaries exist, courts are apt to refer to them. In this case, the well-documented American experience with the Uniform Commercial Code (UCC) is instructive. Although the official comments to the UCC have been criticized in various respects, they undoubtedly “provide a relatively cohesive and uniform elaboration of purposes, policies and applications of the UCC.”121 Perhaps more importantly, because the UCC official comments accompany the official legislative product and are widely promulgated among all members of the bench and bar, “they enjoy a perceived stature beyond their actual importance, which aids uniformity.”122 Long experience “has shown that courts defer . . . to the guidance [official] Comments offer as to the proper application of Code provisions.”123 Their comprehensiveness and status have made the UCC official comments “by far the most useful aids to interpretation and construction,” which American courts have taken to “like a duck to water.”124

In international law, commentaries adopted by treaty monitoring bodies, especially with respect to international human rights instruments, have frequently been cited by national courts.

119 Whiteman and Nielsen (n 115) at 362-64.
120 Available at www.unhcr.org/3d58e13b4.html.
122 Ibid.
interpreting treaty provisions. A telling example has to do with the CISG. No systematic official commentary has ever been published on the CISG, under the auspices of UNCITRAL or otherwise. However, the UNCITRAL Secretariat did prepare a commentary to its 1978 draft version of the convention. The commentary was never adopted by the UNCITRAL member states, nor was it updated to take account of several important differences in the final text of the CISG. The Secretariat Commentary has also been heavily criticized in several respects. Nevertheless, it is frequently cited by national courts and arbitral tribunals, and has on several occasions been described erroneously as an official commentary.

In addition to having a proven measure of effectiveness, such official commentaries are may also be easier to promulgate than other interpretive aids. While they make some years to draft, they do not require an indefinite commitment of funds and manpower. The primary drawback to official commentaries is that they must be officially approved. When treaty regimes are involved, that can require the agreement of the treaty member states, a prospect that can be as politically daunting as amending the treaty itself. Although negotiations between subject-area experts may be less fraught than those between diplomatic representatives, such a process will nevertheless require lengthy and expensive negotiations. Moreover, the necessary compromises and horse-trading can detract from the coherence and comprehensiveness of the official comments. The resulting document can raise as many questions as it answers.


126 An official UNCITRAL commentary on the CISG has been proposed multiple times. See, eg, Michael Joachim Bonell, “A Proposal for the Establishment of a “Permanent Editorial Board” for the Vienna Sales Convention” in UNIDROIT (ed), International Uniform Law in Practice (UNIDROIT 1988) at 241.


128 See Murray (n 120) at 377 (citing various decisions and academic articles that refer to the Secretariat Commentary as “official comments”).

129 Ibid at 378-79 (calling an official commentary the “most workable” solution to the problem of inconsistent interpretation of the CISG.


131 Cost has been cited as a major reason why UNICTRAL has never promulgated an official commentary to the CISG. Bonell (n 125) at 242.

132 As Bonell notes, the text of the CISG, itself, is full of compromises. “In view of the considerable differences in the legal traditions and/or in the socio-economic structures of the States participating in the negotiations, some issues had to be excluded from the scope of the CISG at the outset. Additionally, with respect to a number of other items, the conflicting views could only be overcome by compromise solutions leaving matters more or less undecided.” Michael Joachim Bonell, “The CISG, European Contract Law and the Development of a World Contract Law” (2008) 56 American Journal of Comparative Law 1 at 3.

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Of course, systematic commentaries need not have an official imprimatur. Most such volumes are written by academics (either working individually or in small groups) and may serve the same function as official commentaries. In a few areas, academic writings have been enormously influential among courts and, thereby, a boon to consistent interpretation. To take just one example, since its initial publication in 1991, Hathaway’s treatise *The Law of Refugee Status* has been cited more than 800 times by courts in a variety of countries (although primarily in common law jurisdictions).\(^\text{133}\) In ISDS, some academic treatises enjoy a comparable status, such as the Schreuer commentary on the ICSID Convention.\(^\text{134}\)

Such commentaries may also be taken on as a project by a private body, which either writes the commentary collaboratively or delegates it to one or a few authors then approves the final product. A good example of a commentary published by a private body is the *Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* published by the International Council for Commercial Arbitration (ICCA), a group composed primarily of private practitioners.\(^\text{135}\)

The line between a commentary and a soft law codification is not always clear. Commentaries often have a prescriptive or norm-generating element, whether they written in a more discursive form (as in the traditional treatise style) or adopt a propositional style similar to that used in codes.\(^\text{136}\) Commentaries often attempt a synthesis of the law, as opposed to being organized around an article-by-article or issue-by-issue commentary a statutory or treaty text.\(^\text{137}\) Treatises written by individuals or groups also have a mixed normative/descriptive character, which is probably inevitable: “Even a basic summary of the law is different to the law summarized, because the exercise of cognitive compression that is entailed in summation always involves a degree of judgment about what to put in—or leave out of—the final work.”\(^\text{138}\)

The propositional or code-like style is most associated with the Restatement projects of the American Law Institute, but has also been employed in a variety of international soft law instruments, perhaps most notably the UNIDROIT Principles.\(^\text{139}\) Academic writings that do not purport to constitute “soft law” are often themselves prescriptive, whether they adopt the quasi-

\(^{133}\) Email to the author from James Hathaway (Oct 25, 2012), on file with author.  
^{134} Schreuer et al (n 46).  
^{135} Kluwer 2011. ICCA also publishes, through Kluwer, an annual Yearbook of Commercial Arbitration that collects and digests, and translates into English statutes, court decisions, and arbitral awards.  
^{136} Although modern restatements are invariably accompanied by explanatory comments, illustrative hypothetical examples, and references to the case-law authorities on which their propositions are based. Kit Barker, “Centripetal Force: The Law of Unjust Enrichment Restated in England and Wales” (forthcoming 2013, Oxford Journal of Legal Studies) 15, available on SSRN.  
^{139} Indeed, the UNIDROIT Principles have been frequently referred to as an “international restatement”. See, eg, Michael Joachim Bonell, *An International Restatement of Contract Law: The Unidroit Principles Of International Commercial Contracts* (3rd edn, Hotel Publishing 2005); Anna Veneziano, “The Soft Law Approach to Unification of International Commercial Contract Law: Future Perspectives in Light of UNIDROIT’s Experience” (2013) 58 Villanova Law Review 521 at 525 (stating that “the PICC are not limited to offering a ‘restatement’ of existing practices in international trade, but in some cases introduce innovative provisions”).
statutory style of the Restatements or a style more associated with treatises. For convenience, I call all such commentaries that are written in the style of a codification and that have at least some prescriptive element “restatements.”

Restatements are often treated as having greater authority than treatises. They draw their authority partly from the fact that they synthesize and summarize existing authority. They are therefore especially appropriate for areas of law that have been elaborated largely through published decisions and accordingly continue to be uncertain—a description that applies not only to private law fields in common law jurisdictions but also to international investment law.

Much of this will sound familiar to scholars and practitioners of international investment law. The propositional style of restatements makes easy to apply to novel factual scenarios, in itself a boon to consistency. However, since restatements invariably contain a prescriptive element, they also depend on the expertise and prestige of the authors and of the bodies that approve them.

The primary alternative to the systematic commentary or restatement is the promulgation of guidance on specific legal issues. Such narrower opinions are largely the province of academic commentators. However, a number of international uniform law instruments are supported by official or unofficial consultative bodies that issue interpretive guidance on an ongoing basis. Such advisory bodies are particularly common in human rights treaty monitoring. A prominent example is the UN High Commission for Refugees, which issues regular “guidance notes” about interpretation of the Refugee Convention; the UNHCR’s Executive Committee also provides occasional interpretive guidance in the form of “ExCom Conclusions”.

Advisory bodies may also come out of private initiatives. For example, the International Chamber of Commerce Banking Commission may be analogized to a treaty-making body because it drafts and adopts soft law instruments such as the Uniform Customs and Practices on

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141 See, eg, the recent effort to restate the English law of unjust enrichment, itself a field of law that is relatively new, fast-evolving, and hotly contested. Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012).

142 The 1923 report of the committee recommending the creation of the American Law Institute described several factors that showed the need for restatements of US common law, including a general lack of judicial agreement on relevant principles, lack of precision in the use of legal terms, the drawing of irrational and unprincipled distinctions between similar cases, and the burgeoning volume of reported decisions. *Report of the Committee on the Establishment of a Permanent Organization for Improvement of the Law Proposing the Establishment of an American Law Institute* (1923) 66-95.


144 Judicial and quasi-judicial bodies may also issue advisory opinions on individual legal questions. However, such opinions are outside the scope of this article. For a brief summary of advisory jurisdiction in international judicial bodies, Whiteman and Nielsen (n 115) at 364-68

145 O’Byrne (n 124) at 339-41.
Documentary Credits (UCP). The Banking Commission also issues advisory opinions on the operation of the UCP and other sets of rules for credit instruments. The commission’s opinions are widely used by practitioners, and most of the international banks have accepted and followed them in practice.¹⁴⁶

In addition, an entirely private academic initiative, the International Sales Convention Advisory Council (CISG Advisory Council), issues advisory opinions about the CISG.¹⁴⁷ The CISG Advisory Council has no rulemaking power; however, its opinions, written in the propositional style of a restatement and supported by extensive explanations and citations to case law, have been influential in academic circles and have been cited (albeit sparsely) in national court and arbitral proceedings.¹⁴⁸

A less “authoritative” type of aid to interpretation is the case law digest or academic bibliography. At minimum, no effective system of precedent can exist unless a significant number of decisions are published and made publicly available, a problem that is particularly salient in international arbitration, where awards are often presumptively confidential. As Bjorklund notes, “A foundational requirement is the continued development of a transparency norm in the arbitration of international investment disputes. If the awards are not in the public domain their influence is necessarily limited.”¹⁴⁹

Even if precedents are accessible, that does not mean that they are easily accessible. Simply providing convenient access to a range of judicial or academic opinions, presented in a systematic and objective way and translated as necessary, can be a significant boon to consistent interpretation. It helps adjudicators to make use of materials written in a foreign language or from within an unfamiliar legal system. More importantly, without high-quality digests, the time and difficulty of finding, deciphering, and comparing a range of precedents from around the world might make even the most conscientious adjudicator abandon the undertaking. Digests also reduce the risk that adjudicators will cherry-pick a handful of non-representative foreign judgments with which they happen to agree.

For this reason, various public and private initiatives exist to provide convenient access to precedents. For example, there is now an abundance of material collecting and digesting CISG case law.¹⁵⁰ Most prominent is the UNCITRAL Digest, part of the online CLOUT (Case Law On

¹⁴⁷ See www.cisgac.com. On the role and effectiveness of this body, usually referred to as the CISG Advisory Council or CISG-AC, see Karton and de Germiny (n 52) at 70.
¹⁴⁹ Bjorklund (n 29) at 274.
¹⁵⁰ As Rogers and Kritzer point out, “[T]he examination of case law does not reduce the importance of legislative history and scholarly commentaries when interpreting the law.” Vikki M Rogers and Albert H Kritzer, “A Uniform International Sales Terminology” in Ingeborg Schwenzer and Günter Hager (eds), Festschrift Für Peter Schlechtriem (Mohr Siebeck 2003) 223 at 227. It is therefore unfortunate that the legislative history of the CISG and scholarly commentaries on it have not been collected and digested in so comprehensive a manner as the case law. Probably the best archive of such sources is on the Pace University CISG website, which organizes commentaries according to the CISG article analyzed, http://www.cisg.law.pace.edu/cisg/text/cisg-toc.html.
UNCITRAL Texts) database.\textsuperscript{151} This digest is both comprehensive and easily accessible by practitioners; it includes a searchable archive of case abstracts, organized by article number, and reports of national correspondents. As the introduction to the Digest makes clear, the benefits of such projects go beyond their use by courts:

\begin{quote}
[T]he goal of uniform interpretation benefits greatly from the adequate diffusion of judicial decisions and arbitral awards, presented in a systematic and objective way. The positive effects of such material are manifold and reach beyond providing guidance during dispute resolution. For example, it provides valuable assistance to drafters of contracts under the Convention and facilitates its teaching and study. Moreover, it highlights the international nature of the Convention’s provisions and thus fosters participation to the Convention by an even larger number of States.\textsuperscript{152}
\end{quote}

Case law and other materials on the Refugee Convention, similarly web-searchable, are collected in the \textit{Refworld} website maintained by the UN High Commissioner for Refugees.\textsuperscript{153} UNCITRAL’s website on the New York Convention aspires to do the same.\textsuperscript{154} A private initiative from McGill University also collects decisions interpreting the UNICTRAL Model Law on International Commercial Arbitration.\textsuperscript{155}

To what extent do aids to interpretation already exist for international investment law? No official commentary exists for any investment treaty, although some comprehensive academic commentaries and treatises are influential. Some international institutions, such as UNCTAD,\textsuperscript{156} the Organization for International Cooperation and Development (OECD),\textsuperscript{157} and the International Law Association’s Committee on International Law on Foreign Investment\textsuperscript{158} have issued more narrow commentaries or are preparing soft law instruments,\textsuperscript{159} but thus far none has been widely influential.

\footnotesize
\textsuperscript{151} On the usefulness of the CLOUT database, see Perales (n 21). Other free databases include UNILEX, a collection of case abstracts arranged by article and produced by the Centre for Comparative and Foreign Law Studies in Rome (available at http://www.unilex.org.). In addition, several universities have set up websites collecting and presenting case law and commentary on the CISG. The most comprehensive of these is run by the Pace University Institute of International Commercial Law (http://www.cisg.law.pace.edu/cisg/text/cisg-toc.html). Others include http://www.uc3m.es/cisg/, http://www.jura.uni.sb.de/FB/LS/Witz/cisg.htm, and http://www.cisg-online.ch/.
\textsuperscript{153} www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain.
\textsuperscript{154} www.newyorkconvention1958.org.
\textsuperscript{155} www.maldb.org.
\textsuperscript{157} \textit{Most-Favoured-Nation Treatment in International Investment Law} (OECD 2004).
\textsuperscript{158} Some of the committee’s reports are published in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), \textit{Oxford Handbook of International Investment Law} (Oxford University Press  2008).
By contrast, for example, the ICSID Secretariat is active and largely well-respected, but has no authority regarding non-ICSID arbitrations. Similarly, although a robust academic debate persists on a variety of individual issues in international investment law, no advisory body exists that regularly issues opinions. Some treaty regimes do include commissions of the state parties that are empowered to make binding interpretations of treaty provisions;\(^{160}\) however, these tend to meet infrequently and, except arguably on a few discrete matters, have not had a significant impact on ISDS case law.\(^{161}\) In other words, although a great deal of authoritative guidance is available to counsel and arbitrators, nearly all of it is privately generated and most comes from individuals and small groups.

In addition, a number of resources are available that publicize and digest awards, many of them online. Some are academic initiatives that provide free access,\(^{162}\) while others (usually with more powerful search engines and more extensive digesting and collections of commentary) are commercial enterprises.\(^{163}\) In addition, ICSID’s own website\(^{164}\) and the *ICSID Reports* publish most ICSID awards, and the *ICSID Review—Foreign Investment Law Journal* publishes a large number of case comments.

Are these aids sufficient? Much may be said for simply “leaving well enough alone.” While the persistence of inconsistencies among ISDS tribunals demonstrates that no consensus has yet been reached on many issues, there so far have been relatively few published investment arbitration awards (at least compared with the volumes of published cases in national jurisdictions, even those with civil law systems). Divergent interpretations should therefore reduce over time in both number and degree, aided by case digests and academic commentary. This much has been claimed for uniform law instruments such as the CISG: “As more case law and commentary on the Convention develops, courts will apply the Convention with more regularity. . . . This will bring more predictability in international sales law.”\(^{165}\)

More importantly, it may be argued that interpretation is best served by a multitude of courts and tribunals assaying a multiplicity of approaches. Each decision serves as a data point for the adjudications that come after it, so that the body of knowledge gradually improves through a sort of guided trial and error, as beneficial interpretations are copied and harmful ones are identified and avoided.\(^{166}\) An overly centralized interpretive apparatus, such as an official

\(^{160}\) Such as the NAFTA Free Trade Commission. See NAFTA Chapter 11, art. 1131(2).

\(^{161}\) See, eg, Patrick Dumberry, “The meaning of the fair and equitable treatment standard under NAFTA article 1105 in light of general rules of treaty interpretation” (2013) 15(5) International Arbitration Law Review 12 (arguing that, although the Fair Trade Commission defined “international law” for the purposes of NAFTA Chapter 11 Art. 1105 as encompassing only the minimum standard of treatment under customary law, tribunals have applied a broader definition that includes other sources of international law).

\(^{162}\) Such as www.italaw.com.


\(^{164}\) https://icsid.worldbank.org/ICSID/Index.jsp.


commentary or advisory board, may therefore hinder improvement by stifling innovation and depriving courts and tribunals of data on the full range of possible interpretations. As Lookofsky argues with respect to the CISG, “we cannot fill the continuing need for healthy academic debate by the creation of yet another centralized (opinionative) CISG source.”

Nevertheless, the uniform law experience indicates that leaving the unruly garden of ISDS jurisprudence entirely untended would be a mistake. Collections of case law can lead the reader into error, as a line of cases can coalesce around an incorrect view, or at least a short-cited one, and an uncritical digest may do little to help arbitrators choose between inconsistent lines of cases. Both commentaries and advisory bodies have been more effective in promoting consistent and high-quality adjudication when they are issued or approved by a body that enjoys some kind of institutional legitimacy.

The greater impact of institutional guides to interpretation is related to both to the fact that the pronouncement is a group one and to the status of the particular institution. As Barker notes, treatises are “quintessentially individual (personal) statements. . . . There is a difference of order (not just degree) between a public statement about the law made by a single, distinguished expert and a statement that has received the formal imprimatur of a formal legal community.” Similarly, the founders of the American Law Institute recognized that it was critical to the success of the Restatements that they have a degree of authority “much greater” than that of treatises and other academic works, more “on a par with that accorded [to] the decisions of the courts”.

It therefore seems advisable for some institution to take a lead role in promulgating aids to interpretation. But which one? Kanetake and Nollkaemper found that the effect of an official imprimatur is stronger when the organization is associated with a treaty, as in human rights treaty monitoring bodies. The problem is that, in ISDS, there is no single treaty, and therefore no obvious institution with universal legitimacy. A substantial number of investor-state arbitrations are governed by the ICSID Rules, and ICSID procedures have an impact beyond their strict scope of jurisdiction, so ICSID might seem to be a prime candidate. The ICSID Secretariat already appears to have taken on an at least occasional role as informal enforcer of consistent decision-making.

167 Lookofsky (n 18) at 194.
168 Cf Kaufmann-Kohler (n 2) at 145 (“[T]here is a significant risk that simply waiting for consistency to emerge will not produce the results hoped for because certain fundamental disagreements will remain.”).
170 Report Proposing the Establishment of the American Law Institute (n 139) at 13.
171 Ibid at 29.
173 See Hirsch (n 68) at 29 (describing two occasions in which the ICSID Secretariat intervened to encourage tribunals to follow precedents and concluding that it acts as “as an informal agent that exerts some influence on ICSID adjudicators to conform to settled ICSID jurisprudence constante. On the role of the ICSID Secretariat more generally, see Schreuer et al. (n 46) at 37-42.
However, factors other than association with a treaty regime ought also to be taken into account. In general, interpretive aids are more likely to be relied upon when the institution issuing or endorsing them is perceived as impartial and politically independent. To give a negative example, the UN Human Rights Commission has been criticized for excessive politicization and the persuasive authority of its decisions has been rejected on that basis. In one case, the New Zealand Refugee Status Appeals Authority refused to follow a decision of the Human Rights Commission interpreting a provision of the Refugee Convention, observing that “the 52-state Commission is highly politicized, as witness the circumstances in which Cuba and China were successful in having the United States lose its seat in 2001.”\textsuperscript{174} More generally, “The fact that they [members of some treaty supervision bodies] are nominated and elected by states parties has an impact on their impartiality. Treaty bodies are often considered to be unrepresentative and lacking in real independence.”\textsuperscript{175} By contrast, courts have given the decisions of the International Labor Organization’s Committee of Experts “considerable weight” in view of the Committee’s independence and the qualifications of its experts.\textsuperscript{176}

It therefore makes sense to work through established institutions that possess the legitimacy that comes from the participation of a geographically and economically diverse group of states,\textsuperscript{177} but which are seen as primarily technocratic and not dominated by political representatives. In ISDS, it would also be advisable to avoid bodies associated with a specific treaty regime. Examples of suitable institutions might include UNCITRAL and the International Law Commission.

Smaller committees of experts, selected both for their expertise and for their ideological, ethnic, and geographic diversity tend not only to be seen as more neutral, but also to be small enough to deliberate effectively.\textsuperscript{178} Such a committee could also contain a mix of academic experts, practitioners, international civil servants, and diplomats. It is likely to be perceived as providing impartial and high-quality guidance, and association with a major international institution would provide legitimacy. A recent roundtable on supporting interpretation of the Refugee Convention recommended the establishment of a committee of experts under the auspices of the UNCHR.\textsuperscript{179}

\begin{itemize}
\item\textsuperscript{174} Mansouri-Rad \textit{v Department of Labour}, Appeal decision, Refugee Appeal no 74665/03, (2005) NZAR 60, ILDC 217 (NZ 2004) at para 78 (New Zealand, Refugee Status Appeals Authority, July 7, 2004).
\item\textsuperscript{175} Whiteman and Nielsen (n 115) at 363.
\item\textsuperscript{177} Thus, for example, not the OECD.
\item\textsuperscript{178} Bonell (n 125) at 242 (proposing the establishment of a committee of experts to support uniform interpretation of the CISG, to which smaller states from the same region or with similar interests could appoint a common representative).
\end{itemize}
The impartiality of such bodies might be compromised if members are appointed by directly states, but it may be politically difficult to avoid state nominations.\textsuperscript{180} Given the prestige membership in such a body would confer, and the potential to monetize that prestige in the form of arbitral appointments, competition for places may be fierce.\textsuperscript{181} Either decentralizing nominations to states or delegating appointments to a neutral figure such as the Secretary-General of UNCITRAL would help to ease such pressures, as would making terms on the committee relatively short. The institutional status of such a body, the transparency of its procedures, and the prestige and representativeness of its membership should help its opinions to stand out from the wide range of high-quality interpretive guidance already available to ISDS tribunals.

Such an advisory committee would have no judicial power, either to decide disputes itself or to take references on pending disputes in the manner of the European Court of Justice or the Inter-American Court of Human Rights. Instead, it would be charged solely with issuing guidance on contested matters of law. Promulgation of a global guide to international investment law might improve consistency of interpretation, but a truly comprehensive document cannot be written given the diversity in the provisions in different IIAs. It would be a document fixed in time; any guidance issued should be responsive to changing conditions and emerging trends. Therefore, some kind of comprehensive commentary would not, on its own, be sufficient to ensure consistency and may actually hinder the evolution international investment law.

Instead, it would be both more feasible and more useful for the committee to issue advisory opinions on individual legal issues. The committee could meet periodically, decide on topics either on its own motion or on the recommendation of other institutions or experts, and adopt opinions by consensus.\textsuperscript{182} Recognizing up-front that any opinions produced by the committee would be non-binding will help both to achieve buy-in and to make it easier to agree on the “best” interpretations.\textsuperscript{183}

While such opinions should have a prescriptive element—not merely collect existing case law—they should proceed in a piecemeal manner and not be too ambitious. Opinions should state their conclusions in a set of restatement-style propositions of law that can be easily understood by parties and easily applied by tribunals. These propositions should then be justified by reference to treaty text, case law, and commentary. Areas in which the opinions shift between the descriptive and the prescriptive should be clearly identified.\textsuperscript{184}

Opinions should either be limited to a specific treaty regime or should be conscious of differences in the text of different IIAs. To build its legitimacy and promote uptake of its

\textsuperscript{180} Ibid at 395.
\textsuperscript{181} This should at least save some costs by making unnecessary to pay the committee members beyond reimbursing their expenses.
\textsuperscript{182} The CISG Advisory Council follows such a procedure.
\textsuperscript{183} Cordero-Moss (n 7) at 143-144. See also R Goode, H Kronke, and E McKendrick, \textit{Transnational Commercial Law} 509, 528 et seq, explaining that these factors explain why good faith and fair dealing are given a central role in the UNIDROIT Principles but not in the CISG.
\textsuperscript{184} Restatement projects have been criticized for concealing such shifts, “unacceptably mixing ‘is’ with ‘ought’.” For a summary of this and other criticisms, see KD Adams, “Blaming the Mirror: The Restatements and the Common Law” (2007) 40 Indiana Law Review 205 at 208-241.
opinions by tribunals, the committee could begin with areas where the case law has already developed toward a degree of consensus and precision, such as the rules on expropriation, rather than the standard of fair and equitable treatment. In general, aids to uniform interpretation are more likely to be successful in increasing predictability if they do not get too far ahead of developments in the case law, and play a primarily supportive rather than creative role.

V. CONCLUSION

Just as adjudicators can benefit from the work of other adjudicators that have already considered the same issues, the ISDS community can benefit from the experience of the international uniform law community.

Doctrines developed through scholarly commentaries and case law in uniform law can be adapted for the ISDS context. The functional consistency standard, if adopted by tribunals, would refocus arbitrators’ attention on the core goals of international investment law and dispute resolution—to promote predictable and fair treatment of cross-border investments—while not binding them to an unachievable and ultimately destructive paradigm of absolute uniformity.

In addition, consistent and high-quality adjudication would benefit from adoption of a standard of persuasive precedent comparable to the precedential doctrines identified by uniform law scholars. In each case, arbitrators (aided by the parties’ submissions) should canvass the relevant case law. Prior decisions should be followed, unless the tribunal can explain why the prior decision is distinguishable or wrongly decided—and where possible, precedents should be distinguished rather than contradicted. Such a practice would not only promote better arbitral decision-making, but also promote the healthy evolution of international investment law generally. Such doctrines would be implemented most effectively by amendments to rules of procedure or IIAs or by pronouncements of the commissions of state parties. However, even if no rules were altered, tribunals could adopt doctrines of functional consistency and persuasive precedent on their own.

The international uniform law experience also points to ways in which tribunals can be supported in these endeavours. Non-binding aids to interpretation have proven effective in promoting consistent and high quality decision-making from the unruly and unpredictable mass of national courts that interpret international uniform law instruments. Whatever their form, interpretive aids are more effective when they associated with international institutions that are perceived as legitimate, and when they are written by committees that are perceived as expert, impartial, and responsive to real-world practicalities and changing conditions. Discrete advisory opinions tend to work better than generalized commentaries, especially when they are primarily descriptive but contain well-supported prescriptive aspects. Establishment of an official advisory committee for international investment law would undoubtedly be difficult, but it is far more realistic than an appellate court or global institution, and may actually be more effective in promoting functionally consistent and high quality adjudication.

185 See, eg, Cordero-Moss (n 7) at 130; Kaufmann-Kohler (n 26) at 372.