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Precedent and Dialogue in Investment Treaty Arbitration

Richard C. Chen*

Since the turn of the century, investment treaty arbitration (“ITA”) tribunals have begun citing past decisions with increasing frequency. They do so despite the absence of any formal doctrine of stare decisis and the presence of structural obstacles to the use of precedent in this context. Scholarship in this area has focused on explaining the rise of this de facto doctrine of precedent and evaluating the merits of the practice. Few have grappled with more practical questions about how precedent should operate in this unique sphere, but an examination of ITA decisions reveals that some order and discipline are needed if the practice is to continue.

This Article is the first to offer a detailed framework to guide ITA tribunals in the practice of precedent. It does so from the dual standpoints of applying precedent (how much deference is owed) and authoring precedent (how broadly or narrowly to write). The framework is designed to help tribunals at each stage balance the three key values of predictability, accuracy, and legitimacy that any system of precedent is expected to serve. That balancing should be conducted in light of the distinctive institutional features that make ITA different from common law systems. At a high level, the proposal is to replace the common law approach of stable, incremental decision making with a model of robust and contentious dialogue. In this dialogue, tribunals should view past decisions skeptically and, in writing their own decisions, seek not just to resolve the immediate dispute at hand but to advance the broader conversation of which each case forms one part.

INTRODUCTION

The use of precedent in investment treaty arbitration (“ITA”) presents a puzzle. The treaties themselves do not provide for a doctrine of stare decisis,¹ which is the idea that courts should “stand by things decided and not disturb settled points.”² Certain structural characteristics of the ITA regime cast further doubt on whether precedent can play a useful role in the process. In particular, there is the lack of continuity and hierarchy: each tribunal is constituted to resolve a single dispute, and there is no appellate mechanism to police decisions for correctness and coherence.³ Moreover, the substantive law that the tribunals are shaping through precedent is fragmented, coming

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1. See Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 *ARB. INT’L* 357, 368–69 (2007).

2. BRYAN A. GARNER, *GARNER’S DICTIONARY OF LEGAL USAGE* 841 (3d ed. 2011).

3. See Irene M. Ten Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration*, 51 *COLUM. J. TRANSNAT’L L.* 418, 426, 450–51 (2013).

not from a single multilateral treaty but instead from thousands of investment treaties that are similar in content but nonetheless formally distinct.⁴

Despite these formal and structural obstacles, investment tribunals began citing past awards and decisions⁵ as precedent in the late 1990s, right around the time that the number of arbitrations began to grow.⁶ Practitioners have noted that earlier arbitrations tended to focus on the language of the treaties because there were few past decisions to discuss.⁷ But as the number of arbitrations increased, it soon became routine for lawyers to cite prior arbitral decisions in support of their arguments and for tribunals to discuss them in their reasoning.⁸

For the past decade, scholarship in this area has grappled with two main questions: why this practice of citing precedent arose and whether it is a good thing. The primary explanation is that the treaty terms at issue are vague, so it is only natural that tribunals would take into account past efforts to interpret the same or similar provisions.⁹ As for assessments of the practice, most have been favorable, noting that use of precedent increases predictability and enhances the legitimacy of the system.¹⁰ Notably, even commentators who have expressed skepticism about these benefits seem to accept that the continued use of some form of precedent is likely inevitable.¹¹

This Article seeks to shift the conversation to a question that has received comparatively little attention: how precedent should operate in this unique sphere. If we accept that the practice of precedent is now fairly entrenched and almost certain to continue in some form, we should give more thought to what objectives precedent is serving and how tribunals can best achieve those objectives. In short, how can the practice of precedent be optimized?

In answering this question, this Article proposes breaking out the two components of the practice—applying precedent and authoring it—for separate analysis. Consider first how tribunals apply past decisions. There currently exists a range of views and practices regarding how much deference is

4. See *id.* at 425.

5. The term “award” is usually used to describe a final determination on the merits. Written determinations on preliminary matters, such as jurisdiction, are referred to as “decisions.” Since both awards and decisions could be cited as precedent, I will use the latter term with the understanding that it includes both preliminary and final determinations.

6. See Jeffery P. Commission, *Precedent in Investment Treaty Arbitration*, 24 J. INT’L ARB. 129, 149 (2007); see also Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 46–47 (2007) (documenting the increase in awards issued between 1990 and the first half of 2006).

7. See Lucy Reed, *The De Facto Precedent Regime in Investment Arbitration: A Case for Proactive Case Management*, 25 ICSID REV.—FOREIGN INV. L.J. 95, 97 (2010) (describing the author’s experience representing clients in early arbitrations, in which arguments were “focus[ed] directly on the relevant treaty language and underlying principles”).

8. See Commission, *supra* note 6, at 149.

9. See *infra* Section I.B.

10. See *infra* Section I.B.

11. See Cate, *supra* note 3, at 472.

owed.¹² Do tribunals have an obligation to promote consistency? Should they wait until a consistent line of cases has reached the same conclusion before deferring? Or should past decisions be considered as persuasive authority only? The practice of precedent aims to improve the predictability of the ITA system, yet the absence of any framework to govern how precedent is used makes that goal impossible to achieve.¹³

A less appreciated but equally important part of the practice of precedent concerns the writing of the decision. For the system to function effectively, tribunals need to be conscious of their roles in authoring precedent and not only in applying it.¹⁴ The question of how to approach the authoring task has received less attention, and views that have been expressed are relatively uniform: commentators and the tribunals themselves generally agree that disputes should be decided narrowly.¹⁵ But what tribunals actually do in practice is another story. Sometimes they confine themselves to the narrow facts of the case, but often they offer broader reasoning, beyond what is necessary to resolve the dispute at hand.¹⁶ Again, a more disciplined approach is needed.

This Article offers a detailed framework for addressing all these questions—at the application stage, how much deference tribunals should afford to past decisions, and at the authoring stage, how broadly or narrowly tribunals should write their decisions. Rather than proposing a single answer to these questions, I argue that tribunals should decide in each case which course will best promote the several values that a system of precedent is supposed to serve: predictability, accuracy, and legitimacy.¹⁷ The task therefore is to determine the optimal means for achieving those goals and how they should be balanced when they are in tension with each other.

An initial step in developing a useful framework is to recognize the distinctive institutional characteristics of ITA. Consider first how precedent works in the context of common law systems, where the practice originated.

12. See *infra* Section III.C.1.

13. See Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 *FORD. INT'L L.J.* 1014, 1046–47 (2006).

14. In prior work, along with two coauthors, I adopted a similar lens in analyzing the role of U.S. courts in authoring precedent. See Paul J. Watford, Richard C. Chen & Marco Basile, *Crafting Precedent*, 131 *HARV. L. REV.* 543, 544–45 (2017) (reviewing BRYAN GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* (2016)).

15. See, e.g., Karl-Heinz Böckstiegel, *Commercial and Investment Arbitration: How Different Are They Today?*, 28 *ARB. INT'L* 577, 588 (2012).

16. For example, as described in Sections IV.B and IV.C below, tribunals have often reasoned broadly about the meaning of the fair and equitable treatment provision and narrowly about the potential interaction between human rights and investment treaties.

17. The significance of these values was evident in the discussions of a Working Group of states that was recently convened by the United Nations Commission on International Trade Law to discuss potential ITA reforms. See U.N. Commission on International Trade Law, Working Group III, Possible Reform of Investor-State Dispute Settlement: Consistency and Related Matters, U.N. Doc. A/CN.9/WG.III/WP.150 (Aug. 28, 2018). Although not focused on the issue of precedent, one report following the most recent Working Group session underscored the fundamental importance of values like predictability, “correctness,” and legitimacy to the international investment law regime. *Id.* at ¶ 28.

The default position of common law courts is to resolve disputes narrowly and allow broader rules to take shape in an incremental process as each case adds to the one before it.¹⁸ That process manages to promote predictability because courts are bound by *stare decisis*. Thus, even if a modest decision leaves unresolved questions, one can at least be confident that later courts will strive for consistency and not lightly choose to reverse course entirely. Moreover, a common law system's court of last resort further enhances predictability by providing broader guidance when needed in the form of a general rule or governing framework. The presence of a high court is also key to preserving accuracy, not only in the short-term sense of reversing incorrect decisions but in the longer-term sense of having the authority to provide a course correction when a line of decisions proves to be misguided.

The institutional differences between common law courts and ITA tribunals mean that the latter cannot take the approach of the former and expect the same results to follow.¹⁹ Because ITA lacks *stare decisis* and a court of last resort, I argue that, in lieu of a piecemeal approach that prizes stability and continuity, precedent in the ITA context should function as a robust and contentious dialogue.²⁰

At the application stage, that means taking a skeptical view rather than deferring to past decisions. In the absence of a *stare decisis* norm, any individual decision to defer will necessarily be *ad hoc* and thus fail to promote any meaningful predictability. And if tribunals did develop a strong presumption of deference, that would trigger serious accuracy concerns because the first tribunal to decide an issue could set the law off in a flawed direction, with no high court available to reverse the tide. The proposed dialectic model strikes the right balance between predictability and accuracy by en-

18. JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 195–96 (2d ed. 2009).

19. Notably, these features are familiar to participants in and observers of the ITA system, but their implications for the practice of precedent are not yet well understood. For example, Commission correctly observes that “it is essential at this stage to examine the impact of [the emerging practice of ITA precedent] on the continued operation of such a system without a hierarchical structure or rule of binding precedent.” Commission, *supra* note 6, at 154. But later in that same article, he suggests that “investment treaty tribunals and those appearing before them as counsel are not always as faithful to traditional common law techniques of reasoning as could be desired.” *Id.* at 156. My contention is that distinctive features of the ITA system mean traditional common law approaches are not always appropriate.

20. Other commentators have suggested that ITA tribunals should develop the law through dialogue or a dialectic process, but they see this as an alternative to, rather than a way to conceptualize, a system of precedent. See, e.g., Julian Arato, *The Margin of Appreciation in International Investment Law*, 54 VA. J. INT'L L. 545, 571–72 (2014); Cate, *supra* note 3, at 451. For both Arato and Cate, the main point is that past decisions should be considered only insofar as their reasoning is persuasive. See Arato, *supra* note 20, at 574–75; Cate, *supra* note 3, at 467–68. As explained in the main text, this Article provides a more nuanced framework for applying past decisions as well as for authoring new precedents. There is also a more general literature studying how national courts and international tribunals are engaged in a transnational judicial dialogue about the content of international law or the meaning of shared constitutional norms. See, e.g., Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 492–97 (2005). Because my project is focused on the particular institutional features of ITA, the scholarship on judicial dialogue more generally has less relevance here.

couraging tribunals to actively debate an issue until a genuine consensus forms as to the best answer.

At the authoring stage, the dialectic model encourages tribunals to reason and write with an eye toward how their decisions fit into the larger dialogue. That may mean a willingness to reason and write more broadly, to test ideas that later tribunals can accept, reject, or modify. For the competition of ideas to be effective, tribunals cannot always produce fact-bound decisions that resolve only the narrow dispute at hand. Instead, they must engage with each other at a higher level of generality. In combination with a norm of skepticism toward past decisions, the use of broad reasoning facilitates the path toward genuine consensus and ultimately produces the authoritative guidance that, in a common law system, only a court of last resort could provide.

The precise approach a tribunal should take in any given dispute requires an individualized assessment of how best to advance the values of predictability, accuracy, and legitimacy, which may present tradeoffs in particular circumstances. For example, sensitivity to the concerns of accuracy and legitimacy may require tribunals to reason more modestly, allowing the issues to take shape over the course of a series of disputes before venturing any broader pronouncements. Likewise, once a genuine consensus has formed, predictability may trump accuracy, as tribunals should be less willing to disrupt settled expectations in the pursuit of a purportedly sounder solution. The framework developed in this Article is intended to help tribunals recognize where a given dispute fits into a larger dialogue and what implications that has for how they should approach their task.

This Article proceeds as follows. Part I provides a more detailed overview of the existing literature on precedent in ITA. It describes the evolution of the practice and how commentators have explained its rise. Part II describes three key values that any system of precedent is expected to serve—predictability, accuracy, and legitimacy—and explains what they mean in the ITA context specifically.

Part III turns to the question of how precedent should operate if the goal is to promote those key values. It begins by highlighting how ITA differs from common law systems and explaining how those distinctions should shape the approach taken by tribunals. At a high level, this means tribunals should approach their task as engagement in a dialogue instead of the stable, piecemeal decision making process used by common law courts. After explaining the concept of precedent as a dialectic process, Part III develops a more detailed framework to guide tribunals. I divide the framework into the two roles in which tribunals engage with precedent—application and creation—and suggest how tribunals can best promote the three key values as well as balance them when they are in tension.

Part IV illustrates my proposed approach with several examples. Sometimes tribunals did precisely what my framework would have recommended,

and other times they did not. But either way, there is little evidence that they proceeded as they did based on an adequate evaluation of how their analysis fit into a broader system of precedent. The goal of this Article is to supply the principled framework that tribunals presently lack.

Finally, although the focus of this Article is on how precedent can best promote dialogue among tribunals, it is worth remembering that the larger conversation involves states, investors, nongovernmental organizations, and other affected members of the public. As others have noted, international adjudicatory bodies have the capacity to generate useful public deliberation about the content of legal rights.²¹ Understanding how those dynamics play out in the ITA context will have to await further research, but as a general matter, the proposed steps for facilitating dialogue among tribunals should help advance the larger public conversation as well.

I. THE RISE OF PRECEDENT IN ITA

A. A Brief Overview

This Section provides a brief history of ITA—it has been chronicled extensively elsewhere²²—and an introduction to how precedent has been used in this setting. ITA was created to give foreign investors a neutral forum in which to challenge the conduct of host states. The most popular arbitral institution is the International Centre for Settlement of Investment Disputes (“ICSID”), which is part of the World Bank.²³ The ICSID Convention provides a framework for the conduct of proceedings,²⁴ and states that join it agree to recognize awards as “binding and final and not subject to review except under the narrow conditions provided by the Convention itself.”²⁵ The parties to a dispute must consent to ICSID’s jurisdiction, and for states that typically occurs when each party to a bilateral investment treaty (“BIT”) agrees in advance to arbitration for claims brought by investors from the other state.²⁶ The foreign investor, in turn, consents by filing a request for arbitration, thereby initiating the dispute.²⁷

21. See Shai Dothan, *International Courts Improve Public Deliberation*, 39 MICH. J. INT’L L. 217, 218–19 (2018).

22. See, e.g., Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORD. L. REV. 1521, 1536–45 (2005).

23. RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 238 (2d ed. 2012). Other widely used institutions include the International Chamber of Commerce and London Court of International Arbitration. *Id.* at 241.

24. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, opened for signature Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

25. DOLZER & SCHREUER, *supra* note 23, at 239.

26. *Id.* at 13, 238.

27. *Id.* at 258.

The ICSID Convention came into force in 1966, and the first dispute was filed in 1972.²⁸ But investor-state arbitration did not really take off until around the turn of the century.²⁹ To give an idea of the increase: “In 1995 there were four ICSID arbitrations pending and in summer 2012 about 150 cases were pending.”³⁰ As the number of cases increased dramatically, so too did the practice of citing past decisions rise significantly. One 2007 study on citation practice in ICSID shows that, until 1994, the number of ICSID precedents cited per ICSID decision was about two; between 1994 and 2002, the average number was between two and four; and between 2002 and 2006, the average number was about ten.³¹ When that study was conducted, there were 151 publicly available ICSID decisions.³² Today that number is closer to 650.³³ As the number of available decisions continues to grow, tribunals have more decisions to draw on or otherwise account for on any given issue. Thus, since the 2007 study, the rate of citation is likely to have at least held steady, if not increased even more.

Beyond this quantitative analysis, there is also the question of how precedents are actually being used. In domestic legal scholarship, the different possible uses of precedent are sometimes characterized as a sliding scale of deference.³⁴ At one end of the spectrum is binding precedent, which a court is obligated to apply without any discretion.³⁵ At the other end of the spectrum is persuasive authority, which a court will follow only to the extent its reasoning is convincing.³⁶ In between those two extremes are different degrees of deference. A modest form of deference would treat precedent as a tiebreaker, meaning that it will be followed when the competing arguments present a close case that could go either way. A more robust form of deference would mean that a precedent will be followed unless there are compelling reasons to depart from it. This is often how the high court in a common law system treats its own precedents.³⁷

In the ITA context, we know that one extreme—treating arbitral precedents as binding—is off the table. Most tribunals that have discussed their use of precedent seem to conclude that it is entitled to only persuasive authority or a fairly modest amount of deference.³⁸ I return to the question of

28. *Id.* at 239.

29. See Franck, *supra* note 6, at 46.

30. DOLZER & SCHREUER, *supra* note 23, at 239.

31. Commission, *supra* note 6, at 149–50.

32. *Id.* at 132.

33. International Centre for Settlement of Investment Disputes, Cases, Advanced Search, <https://perma.cc/55AG-4ELJ>.

34. See Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin’s Chain Novel: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1161–62 (2005); see also Zachary Douglas, *Can a Doctrine of Precedent Be Justified in Investment Treaty Arbitration?*, 25 ICSID REV.—FOREIGN INV. L.J. 104, 104 (2010) (using the term “sliding scale” in the ITA context).

35. Lindquist & Cross, *supra* note 34, at 1161.

36. *Id.* at 1162.

37. See BRYAN GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* 35 (2016).

38. See *infra* Section III.C.1.

how tribunals are applying precedents, as well as how they should be, in Section III.C.1 below. The next Section addresses how the scholarly community has explained the rise of precedent in ITA.

B. Existing Understandings of ITA Precedent

The starting point for understanding the status of ITA precedent is to underscore that there is no formal basis for it. Neither the substantive investment treaties nor the procedural rules in the ICSID Convention provide for *stare decisis*.³⁹ Indeed, some have read Article 53 of the ICSID Convention, which provides that arbitral awards “shall be binding on the parties,”⁴⁰ as precluding any doctrine of precedent, at least in the stricter sense of binding authority.⁴¹ Moreover, the ICSID Convention does not identify past arbitral awards as one of the enumerated valid sources of authority.⁴²

Even so, there is an argument that tribunals may properly treat past awards as a relevant consideration. The ICSID Convention directs tribunals to apply “rules of international law.”⁴³ Under the authoritative hierarchy of sources of international law provided in the Statute of the International Court of Justice (“ICJ”), “judicial decisions” do not have the force of law—that is reserved for treaties, custom, and general principles of law.⁴⁴ Further, the ICJ Statute provides that the ICJ’s own decisions have “no binding force except between the parties and in respect of that particular case.”⁴⁵ The Statute does, however, identify “judicial decisions,” along with scholarly writings, as “subsidiary means for the determination of rules of law.”⁴⁶ Moreover, the ICJ cites its own decisions and those of arbitral tribunals for precedential guidance in a manner that resembles how common law courts cite case law.⁴⁷ Thus, even if arbitral awards do not have formal status in the way that common law court decisions do, this concern has not prevented the

39. See Kaufmann-Kohler, *supra* note 1, at 368–69.

40. ICSID Convention, *supra* note 24, art. 53(1).

41. Commission, *supra* note 6, at 142 (citing CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 1082 (2001)). *But see* Kaufmann-Kohler, *supra* note 1, at 368 (criticizing this as an unconvincing “basis to deny the existence of any form of precedent in this field”).

42. The relevant provision states:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

ICSID Convention, *supra* note 24, art. 42(1).

43. *Id.*

44. Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055, 3 Bevans 1179.

45. *Id.* art. 59.

46. *Id.* art. 38(1).

47. See Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, in *INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE* 265, 266–68 (Colin Picker et al. eds., 2008).

ICJ from developing a system of precedent and probably should not pose an obstacle in the ITA context either.⁴⁸

Apart from these formal considerations, there are also practical reasons why precedent fits awkwardly in the structure of ITA. First, there is no institutional continuity. Each tribunal is created anew, with arbitrators selected by the parties for the sole purpose of resolving their specific dispute.⁴⁹ The arbitrators therefore lack the incentive to promote the coherent development of the law that a system with a more stable set of actors generally has.⁵⁰ Second, there is no hierarchy. That means not only that there is no appellate court to ensure uniformity by reversing wrong decisions, but also that there is no authority to say which view is correct in the first place.⁵¹ Third, the substantive law is fragmented, codified across thousands of treaties, most of them bilateral. While investment treaty provisions are often very similar, there is variation in the language, and there may be differences in the negotiation history that are relevant to the interpretation process.⁵² This complicates any effort to rely on precedent interpreting one treaty in a later dispute about a similarly worded provision in a separate treaty.⁵³

Despite these practical obstacles, the citation of past decisions now appears to be routine. Commentators offer a simple, common-sense explanation: the treaty provisions at issue are vague, so it is helpful to know how other tribunals have given them content.⁵⁴ Applying broad concepts like fair and equitable treatment might entail more discretion than tribunals feel comfortable exercising. The ability to point to earlier decisions narrows that discretion and allows tribunals to offer a more reasoned analysis.⁵⁵

48. See *id.*; J. Ramesh Weeramantry, *The Future Role of Past Awards in Investment Arbitration*, 25 ICSID REV.—FOREIGN INV. L.J. 111, 123 (2010).

49. See Cate, *supra* note 3, at 450.

50. See DOLZER & SCHREUER, *supra* note 23, at 28. This point should not be overstated, however. Although there is no standing court, parties frequently choose from a select group in making their appointments, so that “a relatively small college of elite arbitrators play an outsized role in the system, giving the field more coherence than it might otherwise have.” ALEC STONE SWEET & FLORIAN GRISEL, *THE EVOLUTION OF INTERNATIONAL ARBITRATION: JUDICIALIZATION, GOVERNANCE, LEGITIMACY* 72 (2017).

51. See Irene M. Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44 N.Y.U. J. INT’L L. & POL. 1109, 1110 (2012) (noting that appellate courts in domestic legal systems serve the two separate but related functions of “error correction and lawmaking”). ICSID decisions are subject to annulment by an ad hoc committee, but the available grounds are very narrow. See DOLZER & SCHREUER, *supra* note 23, at 301–04.

52. See Christoph Schreuer & Matthew Weiniger, *Conversations Across Cases—Is There a Doctrine of Precedent in Investment Arbitration?*, 5 TRANSNAT’L DISP. MGMT. 3, 6 (2008) (“[I]dentical or similar provisions of different treaties may not necessarily yield the same interpretative results once differences in the respective context, objects and purposes, subsequent practice of parties and *travaux préparatoires* have been taken into account.”).

53. There are many examples suggesting that tribunals do not pay close attention to subtle differences and often treat similar terms as identical. See, e.g., Section IV.A.

54. See Reed, *supra* note 7, at 96–97; Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT’L L.J. 391, 427 (2012).

55. See Douglas, *supra* note 34, at 106; Judith Gill Q.C., *Is There a Special Role for Precedent in Investment Arbitration?*, 25 ICSID REV.—FOREIGN INV. L.J. 87, 87 (2010).

Comparing ITA to other arbitration systems reveals similar insights. As Gabrielle Kaufmann-Kohler, a leading arbitrator, puts it, “the less developed the body of rules is, the more important the role of the dispute resolver will be with respect to the creation of rules.”⁵⁶ She points out that the need for precedent is greater in ITA than in commercial arbitration, where there is generally a well-developed body of domestic law to apply.⁵⁷ Mark Weidemaier similarly describes arbitral precedent as serving a “gap-filling function.”⁵⁸ In the context of foreign investment, “there is only a thin body of state-supplied law,” meaning content that is “supplied by public actors like courts and legislatures.”⁵⁹ Contrast that to, for example, the field of employment arbitration, where “courts remain active in interpreting the statutes that govern employment relationships, and they regularly produce the contract and tort law that underlies nonstatutory employment disputes.”⁶⁰ In such a setting, a system of arbitral precedent would seem not only unnecessary, but potentially improper because tribunals would be seen as usurping the role of courts, which have greater legitimacy to develop the law.⁶¹

Weidemaier provides a further explanation that serves as a bridge to Part II. The conditions described above probably do not make a system of arbitral precedent inevitable; the relevant actors still must be motivated to produce it, and preexisting norms may pose an obstacle.⁶² The actors in the ITA context were in fact motivated to use precedent to increase the predictability of the system and thereby promote its long-term legitimacy.⁶³ Part II elaborates on these and other values that the system of precedent is supposed to serve.

* * *

As the preceding discussion showed, the use of precedent in ITA appears to be entrenched. Despite formal and practical barriers, lawyers and arbitrators began citing precedent because they needed a way to ground the meaning of the vague provisions they were charged with interpreting. But in the absence of any guiding framework, the practice of precedent in ITA is undisciplined. The remainder of this Article develops such a framework to assist ITA tribunals in their task of applying and creating precedent.

56. Kaufmann-Kohler, *supra* note 1, at 375.

57. *See id.*

58. W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1928–29 (2010).

59. *Id.* at 1928.

60. *Id.* at 1948.

61. *See id.* at 1947–49.

62. That has been the case with securities arbitration, which Weidemaier describes as having resisted developing a practice of precedent despite sharing certain features with ITA, “because the norms in securities arbitration have disfavored reasoned awards.” *See id.* at 1955–57.

63. *See* Weidemaier, *supra* note 58, at 1944–47.

II. THE VALUES SERVED BY PRECEDENT

Apart from the general goal of facilitating more reasoned decision making, what other values is a system of precedent supposed to serve? In other regimes, courts use precedent with an eye toward predictability, accuracy, and legitimacy concerns.⁶⁴ Commentators in the ITA context have generally focused on these same objectives, though, as discussed below, their precise meaning must be adapted to the needs and characteristics of this particular regime.⁶⁵

Other values, such as efficiency and equality, are also sometimes cited as benefits of precedent in general and in the ITA setting in particular. Use of precedent increases efficiency in that it allows adjudicators to rely on past decisions and not have to address previously settled questions anew.⁶⁶ It promotes equality in that a fair system should treat like cases alike.⁶⁷ These values are apt insofar as they describe system-level benefits that would follow from the effective practice of precedent in ITA. But I bracket them for present purposes because they do not add anything to the operational questions on which this Article is focused. They are sufficiently incorporated in the other values—an efficient and fair system will also be predictable, accurate, and legitimate—that it would be redundant to address them separately.

The remainder of this Part defines the values of predictability, accuracy, and legitimacy and explains how tribunals may use precedent to promote them. It concludes with a discussion of how a minority view has criticized the practice of precedent in ITA.

A. *Predictability*

The value of predictability is perhaps best underscored by Justice Brandeis's observation that "in most matters it is more important that [the ques-

64. Commentators have identified a range of values served by precedent. The three I focus on, along with efficiency and equality, which I discuss briefly below, are fairly standard. For example, Deborah Hellman cites "protecting liberty, equality, stability, predictability, and legitimacy" as pertinent values. Deborah Hellman, *An Epistemic Defense of Precedent*, in *PRECEDENT IN THE UNITED STATES SUPREME COURT* 63, 63–64 (Christoph J. Peters ed., 2013). She then offers an "epistemic defense of precedential reasoning" that corresponds to what I mean by accuracy. *Id.* at 65. Jeremy Waldron offers a longer list: "importance of stability, respect for established expectations, decisional efficiency, the orderly development of the law, Burkean deference to ancestral wisdom, formal or comparative justice, fairness, community, integrity, the moral importance of treating like cases alike, and the political desirability of disciplining our judges and reducing any opportunity for judicial activism." Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 *MICH. L. REV.* 1, 3 (2012). At least some of these concepts overlap and could be consolidated into the five I have emphasized.

65. I bracket the question of precisely what should fall within the ITA system I am describing. It suffices for present purposes to say that many participants acknowledge their connection to a larger international investment community that cuts across individual investment treaties and arbitral institutions.

66. GARNER ET AL., *supra* note 37, at 10.

67. Cate, *supra* note 3, at 448.

tion] be settled than that it be settled right.”⁶⁸ Whether a given answer is correct or not, a settled rule allows people to plan their affairs with a better understanding of potential legal consequences.⁶⁹ A system that relies on precedent facilitates such planning by enabling people to better predict the outcomes of potential disputes with “reasonable confidence” and conduct themselves accordingly.⁷⁰ In this sense, predictability is often discussed in connection with protecting reliance.⁷¹ Departing from precedent is disfavored because it disrupts the “legitimate expectations of those who live under the law.”⁷²

Reliance concerns may be heightened in the context of investment treaties in particular. While predictability is desirable in any environment, it has been recognized as fundamental to investment treaties and their goal of promoting the flow of capital.⁷³ Unlike other actors in the general public, foreign investors may be present in a host state precisely because they have been promised a stable legal framework.⁷⁴ Although these assurances typically relate to a host state’s domestic legal environment, the same concerns would seem to apply to the interpretation of treaty commitments.⁷⁵ Foreign investors desire clarity regarding the scope of treaty protections just as they do regarding the content of domestic regulations, so that they can plan their affairs accordingly.

Given these concerns, it is not surprising that tribunals have justified their use of precedent based largely on predictability. As one tribunal put it, “cautious reliance on certain principles developed in a number of those cases, as persuasive authority, may advance the body of law, which in turn may serve predictability in the interest of both investors and host States.”⁷⁶

B. Accuracy

Accuracy in the context of adjudication must be defined with reference to the applicable law. In ITA, the investment treaty is the primary source of law. When a treaty speaks directly to an issue, there is no doubt what con-

68. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

69. See Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 597 (1987). A predictable system also promotes the rule of law by conveying that decisions are being decided according to neutral principles. I discuss this aspect of predictability in connection with legitimacy below.

70. *Id.* at 597 n.53 (distinguishing between predictability and certainty).

71. See Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459, 1465 (2013).

72. See *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment).

73. See Johanna Kalb, *Creating an ICSID Appellate Body*, 10 UCLA J. INT’L L. & FOREIGN AFF. 179, 197–98 (2005).

74. I discuss this view, and its limitations, in connection with the fair and equitable provision standard in Section IV.B below.

75. See Kalb, *supra* note 73, at 197.

76. *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, ¶ 293 (Oct. 2, 2006).

stitutes an accurate or correct answer: the parties' express intent must govern.⁷⁷

Often, however, it is impossible to say what the "right" answer is. As noted earlier, most bilateral investment treaties ("BITs") contain vague provisions susceptible to numerous interpretations.⁷⁸ In such circumstances, tribunals generally attempt to be faithful to the "object and purpose" of the treaty,⁷⁹ but in filling in gaps, they inevitably exercise some discretion to make law in the way that common law courts do.⁸⁰ Accuracy in that context means fashioning a workable rule that produces sensible results in later cases.⁸¹

The fact that there are rarely clear answers is key to understanding how precedent fosters accuracy in decision making. Adherence to precedent means drawing on the collective wisdom of earlier decision makers. When there is no objectively "right" answer but only better and worse solutions, the individual judge is likely to produce better results by following the collective wisdom rather than her own intuitions.⁸² Although the collective wisdom will turn out to be misguided from time to time, the content of the law as a whole is likely to be better in the long run when a system of precedent is in place.⁸³

That brings us to the first and most fundamental tradeoff that precedent presents. When precedent seems generally sound, predictability and accuracy point in the same direction. But when precedent proves to be misguided, it serves as an obstacle to accuracy, and the question becomes whether disruption is warranted. It may be, as Justice Brandeis believed, that the value of predictability trumps the value of accuracy in most circumstances, but implicit in his statement is that there are at least some matters

77. See Tony Cole, *The Boundaries of Most Favored Nation Treatment in International Investment Law*, 33 MICH. J. INT'L L. 537, 573–75 (2012). When there is a conflict between the text and apparent subjective intent, the answer is more complicated. See *id.* at 573–74. As Andrea Bjorklund notes, party intent is not actually a proper basis of interpretation under the Vienna Convention on the Law of Treaties, but it is nonetheless regularly consulted. Andrea K. Bjorklund, *The Enduring but Unwelcome Role of Party Intent in Treaty Interpretation*, 112 AJIL UNBOUND 44, 44 (2018). I bracket this debate and note only that, in referring hereinafter to state intent as a basis of interpretation, I leave open the question of whether that means subjective intent or only objective intent, as evidenced by the text and the object and purpose of the treaty.

78. See *supra* text accompanying notes 54–55.

79. See VIENNA CONVENTION ON THE LAW OF TREATIES, art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

80. See Yackee, *supra* note 54, at 413; see also Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 11 (1995) (describing how common law courts make law both in traditional common law cases and in filling gaps in constitutional and statutory provisions).

81. See Leo E. Strine, Jr., *The Inescapably Empirical Foundation of the Common Law of Corporations*, 27 DEL. J. CORP. L. 499, 517 (2002).

82. See GARNER ET AL., *supra* note 37, at 9–10; see also CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 3–23 (1999).

83. Hellman, *supra* note 64, at 65.

in which it is more important to be accurate.⁸⁴ To that dilemma I would add the following complication: should a tribunal's willingness to depart from precedent differ depending on whether the purported error is a misinterpretation of state intent or merely misguided from a practical perspective? I attempt to offer some guidance on these questions in Section III.C.1 below.

C. Legitimacy

The third value tribunals need to consider when engaging with precedent is legitimacy. A legitimate adjudicatory body is "one whose authority is perceived as justified."⁸⁵ Legitimacy may be evidenced by the willingness of parties to submit their disputes to a particular body and to comply with its rulings.⁸⁶ Since the long-term viability of ITA tribunals depends on how their constituencies perceive them, legitimacy may be the most important of the three considerations.⁸⁷

Commentators have identified a range of factors that go into determining the legitimacy of international adjudicatory bodies. Many of these factors do not relate to the practice of precedent and so will be set aside for present purposes.⁸⁸ Another factor—the quality of reasoning—is directly linked to precedent, in that reliance on precedent provides a basis for neutral, ordered decision making.⁸⁹ But apart from providing a reason in favor of using precedent, this aspect of legitimacy does not add anything to the operational framework being developed here.

Legitimacy is also often associated with the values of predictability and accuracy. More specifically, predictability and legitimacy are linked through the concept of the rule of law: a system that is predictable and produces coherent and consistent case law garners legitimacy because it bears the hallmarks of the rule of law, with outcomes being decided based upon neu-

84. Schauer, *supra* note 69, at 598.

85. Nienke Grossman, *Legitimacy and International Adjudicatory Bodies*, 41 GEO. WASH. INT'L L. REV. 107, 115 (2009).

86. *See id.* at 116–18.

87. *See* Cheng, *supra* note 13, at 1026 ("[B]ecause arbitration is a privately-sponsored system, its continued growth and existence depends on the global community believing that it is legitimate.").

88. For example, procedural fairness is often cited as a component of legitimacy, but that relates primarily to the conduct of proceedings and not the application or authoring of precedent. *See* Grossman, *supra* note 85, at 124.

89. *See* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 319 (1997) (describing how "[a]dherence to precedent, even when used only as authoritative guidepost and not as binding obligation," contributes to perceptions of quality and therefore legitimacy); Weidemaier, *supra* note 58, at 1946 (noting how engagement with precedent "signals that the decision resulted from a deliberative, systematic process, rather than from an ad hoc balancing of the equities in a particular case"); *cf.* Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law*, in 50 YEARS OF THE NEW YORK CONVENTION: ICAA CONGRESS SERIES No. 14, at 5, 51 (Albert Jan van den Berg ed., 2009) (criticizing the use of "I-know-it-when-I-see-it"-type of reasoning" by ITA tribunals).

tral principles.⁹⁰ Writing in the ITA context, Kaufmann-Kohler contends that predictability is an essential element of any system that aspires to the rule of law.⁹¹ She therefore concludes that even absent “a *legal* obligation to follow precedents . . . it seems well settled that [arbitrators] have a *moral* obligation to follow precedents so as to foster a normative environment that is predictable.”⁹²

At the same time, accuracy is also essential to legitimacy because flawed decisions, particularly as they accrue over time, can likewise undermine the rule of law.⁹³ That is because participants in the system care about the substantive content of the law and not only the process used to get there.⁹⁴ Thus, as tribunals decide whether to correct an established but flawed line of cases, broader considerations about legitimacy may strengthen the case for departing from precedent beyond what accuracy concerns alone would dictate.

To this point, legitimacy as a consideration merely adds a gloss on what we knew from the preceding two sections. But there is another dimension of the legitimacy factor, which could be described as a concern about the proper role of the tribunal. In other words, even if a decision strikes the appropriate balance between predictability and accuracy in applying past decisions and crafting new guidance for later tribunals, one could separately question whether that decision exceeded the proper scope of the tribunal’s authority based on state consent.⁹⁵ In particular, because tribunals have not been explicitly delegated the power to make law, there are plausible grounds on which to criticize decisions that defer to the reasoning of past cases or attempt to articulate broader principles beyond what was needed to decide the dispute at hand.

This is, to some extent, a legitimacy concern that any adjudicatory body must face, particularly in the early stages of its existence, as the scope of its authority is being refined.⁹⁶ But this concern is heightened in the ITA con-

90. See GARNER ET AL., *supra* note 37, at 10; see also Franck, *supra* note 22, at 1584 (describing the legitimacy of ITA as in part dependent on the extent to which it promotes predictability and the rule of law).

91. Kaufmann-Kohler, *supra* note 1, at 374 (citing LON L. FULLER, *THE MORALITY OF LAW* 38–39 (rev. ed. 1969)).

92. *Id.*

93. See Randy J. Kozel, *Settled versus Right: Constitutional Method and the Path of Precedent*, 91 *TEX. L. REV.* 1843, 1862 (2013) (noting that “[e]xcessive deference to flawed constitutional precedents can also threaten to create systemic concerns for the rule of law”).

94. See Cheng, *supra* note 13, at 1019; Grossman, *supra* note 85, at 115 (noting that an international court’s legitimacy depends in part on whether it is “interpreting and applying norms consistent with what states believe the law is or should be”).

95. See D. Brian King & Rahim Moloo, *International Arbitrators as Lawmakers*, 46 *N.Y.U. J. INT’L L. & POL.* 875, 889–90 (2014).

96. The International Criminal Court, for example, has from its inception faced questions about its legitimacy. See Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 *AM. J. INT’L L.* 510, 510–11 (2003); Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 *FORD. INT’L L.J.* 1400, 1435–38 (2009).

text not only because of the uncertainty surrounding the tribunals' lawmaking role, but also because of their status as privately appointed international arbitrators. In comparison to domestic courts, or even international courts with permanent members, ITA tribunals face more skepticism about their legitimacy to decide matters of public concern.⁹⁷ If that is true at the level of the individual case, the skepticism is likely to be that much higher when tribunals purport to develop the law of international investment more generally.⁹⁸

The foregoing concerns do not necessarily mean that ITA tribunals must shrink from their lawmaking role to avoid weakening their legitimacy. Rather, they should simply exercise caution and pay due attention to the context in which they are operating at a particular moment. Yuval Shany describes how international tribunals possess "legitimacy capital" that may vary over time based on reactions to their performance.⁹⁹ He suggests that as their capital increases, international tribunals may be willing to issue "bolder decisions."¹⁰⁰ Their ability to author such bold decisions may, in turn, further increase their legitimacy, resulting in a "virtuous cycle[]."¹⁰¹ In calibrating how to apply and author precedent, ITA tribunals may need to begin modestly, but Shany's argument suggests that there is room to increase their lawmaking role as their legitimacy capital rises.

D. Critiques

Several skeptics have pushed back on whether precedent has actually produced predictability and legitimacy and whether those are goals worth pursuing.¹⁰² But perhaps the strongest critique has come from Irene Ten Cate, who makes the claim that a system of precedent is affirmatively harmful "to the interests of parties to specific disputes and the investment community at large."¹⁰³ Her argument is, first of all, that goals like predictability and legitimacy have "diminished force" in the ITA context, such that any purported benefits of a system of precedent are overstated.¹⁰⁴ Further, a system that gives "weight to consistency" produces costs in the form of sacrifices to

97. See Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471, 475 (2009).

98. See Yackee, *supra* note 54, at 416–17.

99. Yuval Shany, *Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions*, in LEGITIMACY AND INTERNATIONAL COURTS 354, 360 (Nienke Grossman et al. eds., 2018).

100. *Id.* What Shany means by bold is that a tribunal may be more willing to tackle "deep-seated injustices caused by structural social problems." *Id.* But presumably the same logic would apply to a tribunal's greater willingness to issue a broadly reasoned decision.

101. *Id.*; see also Helfer & Slaughter, *supra* note 89, at 314–15 (describing how the European Court of Justice benefited from "incrementalism and awareness of political boundaries" in increasing its legitimacy over time).

102. See, e.g., Douglas, *supra* note 34, at 107–10.

103. Cate, *supra* note 3, at 422.

104. *Id.*

accuracy, sincerity, and transparency.¹⁰⁵ She therefore concludes that tribunals should not give any deference to earlier decisions, even when they form a consistent line of cases, though she accepts the use of precedent in the form of persuasive authority.¹⁰⁶

Cate's views and mine are not diametrically opposed in the sense that I do not make any blanket arguments about how tribunals should engage with precedent. But her arguments require a response because, if she is correct that predictability and legitimacy are entitled to minimal weight and accuracy is entitled to nearly controlling weight, then there would be little point in my effort to balance the three values in a more nuanced manner in Part III.

An initial point about accuracy can be made quickly. Cate's arguments about the importance of accuracy overlook the distinction I drew earlier regarding cases that have objectively right answers and those that do not.¹⁰⁷ When a case has an objectively right answer, most would probably agree that pursuing accuracy is paramount. But in most difficult cases, interpreting the treaty does not produce a right answer, and the challenge is to identify the best solution based on practical concerns. In those circumstances, precedent will often be an aid rather than an obstacle to accuracy.

My more significant critique relates to an implicit normative assumption underlying her cost-benefit analysis. In short, Cate argues that ITA is at bottom a dispute resolution system and nothing more. Arbitrators are not "taking part in a joint endeavor similar to the way judges do," but are more like appointed agents of the parties tasked with resolving a discrete dispute between them.¹⁰⁸ Alec Stone Sweet and Florian Grisel call this the "contractual model," which understands the arbitrators' authority as "issuing from an act of delegation to which the parties have freely consented."¹⁰⁹ That authority is "limited to the domain of activity governed by the contract,"

105. *Id.* at 422–23. The costs to accuracy have already been addressed above. As for sincerity and transparency, the basic point is that reliance on precedent may mask the true reasoning on which tribunals are basing their decisions. *See id.* at 460–65.

106. *Id.* at 477.

107. *See id.* at 458–59 (making several references to the "right" decision and "what the law requires").

108. Cate, *supra* note 3, at 459. A related objection, even assuming ITA should be understood as a coherent system, is that tribunals should not seek to advance system values directly. Rather, they, like any adjudicatory body, should focus solely on resolving disputes, and by doing so effectively they can hope to serve other useful "social functions" indirectly. David D. Caron, *Fifth Annual Charles N. Brower Lecture on International Dispute Resolution: The Multiple Functions of International Courts and the Singular Task of the Adjudicator*, 111 AM. SOC'Y INT'L L. PROC. 231, 234 (2017). Although that argument might have force in regard to established systems, others have shown the value of self-conscious efforts by newer bodies to improve their effectiveness more broadly. *See* Helfer & Slaughter, *supra* note 89, at 277 (describing the European Court of Justice and European Court of Human Rights as "partial architects of their own success"). Further, on the specific subject of whether and how to use precedent, the relative newness of ITA means that tribunals cannot avoid such meta-questions about how disputes should be decided. In other words, tribunals cannot focus solely on resolving disputes while the norms of what constitutes proper reasoning are still being worked out.

109. STONE SWEET & GRISEL, *supra* note 50, at 26.

and any law that is made in the act of interpretation “applies only to a discrete dispute involving a pre-existing contract.”¹¹⁰

The contractual model is, of course, one possible understanding of ITA, but Cate does not grapple with alternative conceptions of the arbitral role.¹¹¹ In particular, other scholars, including but not limited to Stone Sweet and Grisel, contend that ITA is moving, or has already moved, toward a broader understanding of the arbitral role. Under the “judicial model,” arbitrators owe a duty “not only to the parties in dispute, but to the arbitral system and the transnational community they serve.”¹¹² In practice, this duty requires that tribunals look not only to resolve the immediate dispute before them, but also to develop procedures and practices with the broader goal of “enhancing the effectiveness and autonomy of the arbitral order as a legal system in itself.”¹¹³ Unlike their counterparts in the contractual model, tribunals in the judicial model are delegated some prospective lawmaking authority.¹¹⁴

Stone Sweet and Grisel conclude that ITA falls within the judicial model, and a range of other observers as well as experienced arbitrators have expressed concordant views.¹¹⁵ The very fact that arbitrators and counsel are citing precedent with increasing frequency is a strong indication that participants in ITA understand themselves to be part of a larger enterprise. Moreover, the states themselves have arguably acquiesced to a lawmaking role for arbitrators. Despite murmurs of broader discontent, there has not been any widespread denunciation either of ITA in its evolved form or of the substantive international investment rules that the ITA system helped to

110. *Id.*

111. In arguing that legitimacy is not worth dwelling on, Cate says “[i]t is not impossible to try to develop investment law into something that more closely resembles a ‘system,’ but this approach is in tension with the dynamic and fragmented nature of the field.” Cate, *supra* note 3, at 456. Cate’s argument overlooks the growing convergence that other commentators have observed and advocated for. See STEPHAN W. SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* 364–69 (2009) (arguing that international investment law, despite being codified across thousands of individual BITS, functions in practice like a multilateral system). Indeed, the practice of precedent is one effort to establish a more coherent system. Thus, Cate’s argument has a circular quality: she rejects legitimacy as a rationale for adopting a doctrine of precedent because there is no “system” that is in need of legitimacy, but she ignores that one of the goals of such a doctrine is to help establish that very system.

112. STONE SWEET & GRISEL, *supra* note 50, at 28.

113. *Id.*

114. *See id.* at 219.

115. *See id.* at 219–20; DOLORES BENTOLILA, *ARBITRATORS AS LAWMAKERS* 134–36, 151 (2017); *Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL Arb., Award, ¶ 6 (June 8, 2009) (“A case-specific mandate is not license to ignore systemic implications. To the contrary, it arguably makes it all the more important that each tribunal renders its case-specific decision with sensitivity to the position of future tribunals and an awareness of other systemic implications.”). Stone Sweet and Grisel describe a third model, the “pluralist-constitutional model,” that looks beyond “the internal development of international arbitration as a legal system in its own right” to “how the arbitral order interacts with other legal regimes, externally as it were, in processes of transnational governance.” STONE SWEET & GRISEL, *supra* note 50, at 30. They see evidence that ITA is evolving toward that next phase. *Id.* at 74–75. In any event, their argument that ITA has evolved beyond the pure contractual model, if correct, would suffice as a rebuttal to Cate’s analysis.

produce. Quite the opposite: states have tinkered at the margins, adding language here and there to clarify their intentions, and in doing so seem to endorse the regime's fundamental premises.¹¹⁶ To be sure, individual states have withdrawn from ICSID or repudiated their BITs,¹¹⁷ but that again only serves to highlight the apparent staying power of the regime as a whole.¹¹⁸

None of this is to suggest that the judicial model could not be upended if states chose to pursue more radical revisions.¹¹⁹ Moreover, I do not want to overstate the consensus that the judicial model is appropriate. As I discussed in the preceding Section, tribunals may face pushback on legitimacy grounds if they pursue their lawmaking role too aggressively.

But the key point for immediate purposes is that, to the extent that ITA tribunals have evolved or are evolving toward the judicial model, Cate's calculations would not hold. Values like predictability and legitimacy take on increased importance, and accuracy, while always a significant consideration, is not an automatic trump card. Part III outlines how these values should be balanced at the ground level in the ongoing practice of precedent.

III. OPTIMIZING THE PRACTICE OF PRECEDENT

How should tribunals engage with precedent to best serve predictability, accuracy, and legitimacy? Section III.A begins by describing how precedent operates in common law systems and how such systems balance predictability and accuracy using an incremental approach. Section III.B then explains why those same practices do not translate well to the ITA context in light of differences in institutional characteristics and suggests how a dialectic process could better achieve those two objectives. In these two sections, I do not focus on legitimacy as a distinct consideration. That is because, in seeking to stay within the legitimate bounds of their authority, ITA tribunals face the same basic challenge as common law courts, so legitimacy has less bearing on the problem of translating practices.

116. See STONE SWEET & GRISEL, *supra* note 50, at 233–34 (noting that “when states have considered departures from the standard template for BITs, the more radical proposals have been removed or diluted,” and “only marginal adjustments” are actually made); Wolfgang Alschner, *The Impact of Investment Arbitration on Investment Treaty Design: Myth Versus Reality*, 42 YALE J. INT'L L. 1, 4 (2017) (conducting an empirical study of how states react to arbitral jurisprudence and finding that states “fine-tune existing treaty commitments in light of legal developments, investing in the gradual adjustment of the field rather than its reinvention”).

117. STONE SWEET & GRISEL, *supra* note 50, at 77–78.

118. Stone Sweet and Grisel studied new BITs signed between 2002 and 2015 and found “no support for the view that the regime has generated ‘backlash’ in any systemic sense.” *Id.* at 212. Instead, they found, “(a) states continue to negotiate and sign investment treaties; (b) the mix of treaty protections on offer has remained remarkably stable; and (c) what states have mostly done is to consolidate the system in line with how arbitrators have, in fact, developed it in their awards on liability.” *Id.*

119. See *id.* at 236 (noting that “if even a handful of powerful states converged on preferences to remake the regime in some fundamental way, they would very likely succeed”).

After Section III.B describes the dialectic process at a high level, Section III.C develops a more detailed framework to guide tribunals at the two stages in which they engage with precedent: at the back end, when applying decisions, and the front end, when authoring them.

A. *The Common Law Approach*

Most readers will be familiar with the basic features of common law reasoning, so the focus here will be on how those features promote predictability and accuracy. Common law reasoning is characterized by incremental and stable decision making. Principles are refined over the course of a series of cases, as new fact patterns and experience help to clarify the appropriate contours.¹²⁰ Courts tend to decide disputes narrowly to preserve flexibility, rather than locking themselves into overly broad pronouncements.¹²¹ Under the doctrine of stare decisis, lower courts are bound by the decisions of higher courts in the same jurisdiction, and higher courts that have the authority to overrule their own past decisions do so only in rare circumstances.¹²² Further, even when there is no binding authority on point, courts try to extend the law in a coherent fashion. And when a previously articulated rule leads to a problematic result in a new case, courts will often try to distinguish rather than overrule it. This approach preserves a sense of stability even as the original rule has evolved.¹²³

Benjamin Cardozo described the piecemeal process as follows:

The implications of a decision may in the beginning be equivocal. New cases by commentary and exposition extract the essence. At last there emerges a rule or principle which becomes a datum, a point of departure, from which new lines will be run, from which new courses will be measured. Sometimes the rule or principle is found to have been formulated too narrowly or too broadly, and has to be reframed.¹²⁴

The common law approach strikes a delicate balance between predictability and accuracy, and these values are dependent on the doctrine of stare

120. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 23 (1921) (noting that the common law “method is inductive, and it draws its generalizations from particulars”).

121. See Raz, *supra* note 18, at 196.

122. See GARNER ET AL., *supra* note 37, at 27, 35.

123. See *id.* at 99 (“To distinguish, then, a court will usually articulate a new condition, justified on its own terms, one that preserves the former rule while separating it from the current case. The old decision is retained (unlike in the process of overruling) but separated from (and so deemed not to control) the current case.”); see also *id.* at 97–102 (describing the choice between distinguishing and overruling a precedent).

124. CARDOZO, *supra* note 120, at 48; see also MUNROE SMITH, *JURISPRUDENCE* 21 (1909), cited in CARDOZO, *supra* note 120, at 23 (“The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered.”).

decisus and the presence of a high court to serve as final arbiter.¹²⁵ Of course, the outcomes of individual cases are never completely certain even in the most mature legal systems.¹²⁶ A predictable system is simply one in which it is possible to identify a substantial body of settled law and to know that settled issues will not be lightly reopened. Further, even when novel questions arise in such a system, the range of potential answers is circumscribed because courts will attempt to develop the law in a coherent manner rather than veering off in unforeseen directions. Stare decisis is an essential component in this system because it disciplines courts to adhere to earlier decisions and depart only rarely and gradually. Likewise, the presence of a high court helps to enforce that discipline as well as to resolve inconsistencies or clarify the law when a pool of narrow decisions has become muddled, and some broader synthesis is needed.

Those same characteristics are key to promoting accuracy as well. As noted earlier, precedent fosters accuracy by requiring judges to adhere to the collective wisdom rather than straying off on their own. In that sense, stare decisis likely improves the quality of decision making in the long run, even as it precludes individual judges from pursuing their version of the best answer in any particular case.¹²⁷ Common law systems also depend on their hierarchical court structure to promote accuracy. Appellate courts are available to correct mistaken decisions, and lower courts, knowing they are subject to review, will tend to apply the law faithfully. Moreover, the presence of a court of last resort also promotes accuracy at a deeper level by providing a safeguard when a more fundamental course correction is needed. The incremental process is designed to keep courts modest, but over time a series of even minor misguided choices or simple path dependence may bring the law to an untenable position.¹²⁸ In such scenarios, a high court with the power to speak authoritatively is needed to shift the law onto a better path.

125. The paradigm described here is the hierarchical structure of a single jurisdiction, such as an individual U.S. state. Of course, in the larger U.S. legal system, each state sits on the same horizontal plane as the others and has the final say on its own law. Because decisions of a state's high court are binding within the state but not on others, the interaction between states functions much like the dialogue I propose here, in which different approaches may be tested and debated. See Shirley S. Abrahamson, *The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1146 (1985) (studying criminal procedure decisions in the early twentieth century and finding "a dynamic vertical and horizontal federalism, that is, a continuing exchange of legal thought between the Supreme Court and state courts, and a dialogue among the various states' courts"); see also *Heitman v. State*, 815 S.W.2d 681, 686 (Tex. Crim. App. 1991) (en banc) ("State courts have the opportunity to experiment with constitutional rights and lay potential guidelines for future constitutional decisions of not only state courts but the Supreme Court as well."). Similar exchanges may take place among federal circuit courts and district courts on issues not yet decided by the Supreme Court. See Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 54 (1994).

126. See Schauer, *supra* note 69, at 597 n.53 (distinguishing between predictability and certainty).

127. See GARNER ET AL., *supra* note 37, at 9–10; SUNSTEIN, *supra* note 82, at 3–23.

128. For an example of "a line of cases in which a rule was extended incrementally until it was tacitly transformed in its application," see GARNER ET AL., *supra* note 37, at 93–96.

B. *Shifting to a Dialectic Model*

Tribunals and commentators often assume that they should approach precedent in ITA from the same standpoint as common law courts do.¹²⁹ But the absence of stare decisis and a hierarchical structure in ITA fundamentally changes the challenge facing arbitral tribunals. In the absence of stare decisis, no individual decision is entitled to be treated with any respect, let alone as binding authority. Likewise, in the absence of hierarchy, there is no final arbiter to resolve inconsistent decisions and bind later tribunals to an authoritative interpretation. In such a setting, any individual tribunal's choice to defer to an earlier decision will be necessarily ad hoc, making any sense of predictability impossible to achieve.

The inevitable inconsistency in such a system also detracts from accuracy insofar as there is no coherent set of past decisions embodying a collective wisdom for tribunals to draw on. Moreover, any effort to address these concerns by creating a strong norm of deference would create a separate risk to decision making accuracy. That is because too much weight would be placed on the decision of the first tribunal to encounter an issue. If there is no high court with the authority to reverse course, the risk of allowing a bad decision to become entrenched is too great. Thus, if precedent is to serve the values of predictability and accuracy effectively in the ITA context, tribunals cannot simply import the practices and assumptions of common law courts wholesale.

I argue that, in lieu of the incrementalism and stability prized by common law systems, ITA tribunals should conceive of their roles as participants in a contentious dialogue about the meaning of investment treaty provisions. That means, at the application stage, being actively skeptical of prior decisions to avoid the risk of a premature consensus that will be difficult to undo in the absence of a high court.¹³⁰ And at the authoring stage, it means considering how a case fits into the broader discussion and being willing, in

129. Frédéric Sourgens makes the most direct argument in favor of an analogy to the common law. He contends that, like common law courts, ITA tribunals develop the rules of international investment law through an inductive process, refining the meaning of treaty provisions as new cases present themselves for resolution. See Frédéric G. Sourgens, *Law's Laboratory: Developing International Law on Investment Protection as Common Law*, 34 NW. J. INT'L L. & BUS. 181, 224–31 (2014). Sourgens's primary objective is to offer a new theoretical explanation for the status of arbitral decisions that avoids "the structural and normative problems encountered by the currently predominant theories of international investment law." *Id.* at 187. He is not as focused, as this Article is, on the ground-level practice of precedent, and what he does say is largely consistent with points I make here. For example, he recognizes that it would not be sensible to import any doctrine of binding precedent into ITA because it lacks a hierarchical structure. See *id.* at 240.

130. For example, the tribunal in *SGS v. Philippines* critically examined a prior decision regarding the interpretation of an umbrella clause (in short, whether a contractual breach can be elevated into a treaty violation) and reached the opposite conclusion even after acknowledging the value of consistency in ITA jurisprudence. See *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 97, 113–29 (Jan. 29, 2004). The tribunal further noted that "there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals." *Id.* ¶ 97.

the right circumstances, to offer more general reasoning to advance the dialogue.¹³¹

This dialectic process better serves the goals of predictability and accuracy within the institutional limits of ITA. First, it ensures that general rules are actually being produced. In a system with no high court, there is a risk that a rigid insistence on incrementalism will produce a large pool of fact-bound decisions.¹³² Individual tribunals should recognize that the responsibility falls on them to offer a broader synthesis or articulation when the time is ripe, and while no one tribunal's statement will be authoritative, it can at least serve to move the conversation forward.

Second, a dialectic process expedites the building of consensus. Because no one tribunal can speak authoritatively on an issue, any sense of predictability depends upon a critical mass of tribunals converging on an answer.¹³³ This consensus might eventually emerge even in a world of incrementalism, but the process would be much less efficient if tribunals always gave only the narrowest reasons for their decisions. If consensus is the goal, each tribunal should take a broader perspective on the issues before it and be prepared to actively debate potential solutions rather than passively waiting for an answer to reveal itself.

Third, the proposed model provides a safeguard against errors. If tribunals reflexively defer to earlier decisions, the danger is that any apparent consensus would be artificial, with arbitrators converging not around the best answers but around the first ones given.¹³⁴ If instead each tribunal views earlier decisions skeptically, and consensus develops following a robust debate among independent minds, the resulting answer is likely to be better as a result of that process.

Finally, the proposed model promotes accuracy in a different sense, by inviting a response from states when they disagree with the understanding that tribunals have converged upon. As noted earlier, the ultimate touchstone of accuracy in ITA is the intent of the contracting states. Others have observed that renegotiating BITs is a costly process and does not happen very often.¹³⁵ Moreover, there is a high degree of path dependence in inter-

131. For example, the tribunal in *Urbaser v. Argentina* helpfully addressed the broader question of how human rights should interact with investment treaty obligations, despite concluding that the host state's reliance on human rights was misplaced in this case. See *Urbaser SA v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, ¶¶ 1200–04, 1208 (Dec. 8, 2016). I discuss *Urbaser* further in Section IV.C below.

132. See Watford et al., *supra* note 14, at 578 (describing an example of an area in which the case law was "extensive yet disconnected" until the New York high court synthesized the cases into a more general rule).

133. As discussed in Section IV.B below, tribunals have converged on a common understanding of certain aspects of the fair and equitable treatment standard. See Kaufmann-Kohler, *supra* note 1, at 372–73.

134. See Andrea J. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN. ST. L. REV. 1269, 1295 (2009) ("Assigning too great a role to any one decision could lead to the establishment of norms that might soon be viewed as undesirable.").

135. See Cheng, *supra* note 13, at 1022.

national investment law, as new BITs tend to recycle the provisions of earlier ones.¹³⁶ States do undertake major revisions from time to time, but the point is that they are likely to do so only when there is a clear and important departure from their preferred course.¹³⁷ A contentious dialogue that produces a settled understanding gives states a clear answer that they can evaluate and respond to if needed. By contrast, a series of incremental decisions may never produce a settled answer, or at least it will take much longer to get to the same place.

The preceding discussion is not meant to suggest that deference to earlier decisions is never appropriate or that broad pronouncements are always proper. The point rather is that stability and incrementalism should not be treated reflexively as the norm the way that common law systems treat them. The next two sections provide more nuanced guidance on when applying tribunals should defer to past decisions and when authoring tribunals should reason broadly, taking into account the values of predictability, accuracy, and legitimacy.

C. *Implementing the Dialectic Model*

This Section develops a more detailed framework for implementing the proposed dialectic model. I divide the discussion according to the two distinct roles in which ITA tribunals engage with precedent: applying decisions and authoring them.

1. *Applying Precedent*

There is an active debate about the proper approach to applying precedents and in particular how much, if any, deference to afford them. As previously noted, the concept of formally binding precedent is off the table, and it is difficult to find anyone arguing for a strong degree of deference. Nor has anyone gone to the opposite extreme and suggested that past decisions should be entirely ignored even for their persuasive value. That leaves three main approaches that are part of the ongoing debate.

First, some commentators and arbitrators believe a modest amount of deference to past decisions is warranted. In practice, that means there is a thumb on the scale in favor of following the earlier decision or decisions, such that there needs to be a good reason to depart. One study of the legal reasoning of ICSID tribunals found that “[i]t was quite common for tribunals to use case law as a means to establish a presumption in favour of one result, and thus for placing a burden of proof on one of the parties.”¹³⁸

136. See Alschner, *supra* note 116, at 51.

137. For example, in response to arbitral decisions that were perceived as constraining their regulatory flexibility, states began including more expansive exception provisions. See Richard C. Chen, *A Contractual Approach to Investor-State Regulatory Disputes*, 40 YALE J. INT’L L. 295, 321–22 (2015).

138. Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals—An Empirical Analysis*, 19 EUR. J. INT’L L. 301, 336–37 (2008).

The logic of the dialectic model proposed here would reject this first option. As noted earlier, in the absence of a formal doctrine of *stare decisis*, no one tribunal can promote predictability by deferring to past decisions because there is no guarantee or legitimate expectation that future tribunals will follow the same course. Nor can this problem be resolved by developing a stronger norm of deference. If the expectation were that tribunals would defer, even modestly, to the first solution that was adopted, the risk of entrenching error would become too great. And in contrast to a common law system, there would be no high court with the authority to provide a course correction if the initial approach proved to be flawed.

A second approach would reject deference of any sort, but would still allow consideration of past decisions as persuasive authority. This is the view, summarized earlier, taken by Irene Ten Cate.¹³⁹ In short, Cate believes the costs of consistency outweigh the benefits and thus contends that past decisions should be consulted for their persuasive value alone. Some tribunals have adopted this approach.¹⁴⁰ The problem with this position is that it gives too little weight to the value of predictability. At a certain point, once a genuine consensus has formed, investors and states will begin to rely on the prevailing view, and subsequent tribunals should take those expectations into account before casting the consensus aside in pursuit of a better answer.

A third approach seeks a middle ground by affording deference only once a particular rule or principle has been established in a consistent line of cases. Andrea Bjorklund has suggested such an approach might be appropriate by analogy to the French civil law model of *jurisprudence constante*. Under this view, doctrine is developed “through the accretion of a consistent line of cases, rather than the establishment of a rule by an individual case.”¹⁴¹ She argues that this approach strikes an appropriate balance by maximizing the potential for past decisions to “creat[e] predictable and widely accepted principles of investment law, while minimising any potential harm that might ensue from such a system of de facto precedent.”¹⁴²

The *jurisprudence constante* approach and the dialectic model proposed here share the same basic philosophical orientation. Apart from agreeing on the point that deference should not precede genuine consensus, advocates of the *jurisprudence constante* approach also value the competition of ideas. As one arbitrator has put it in supporting this view, “Arbitral jurisprudence can be compared to a competitive market: various solutions to arising interpretative

139. See *supra* Section II.D.

140. See, e.g., *AES Corp. v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, ¶ 30 (Apr. 26, 2005) (“Each tribunal remains sovereign and may retain . . . a different solution for resolving the same problem; but decisions . . . dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order to compare its own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solution.”).

141. Bjorklund, *supra* note 47, at 273.

142. *Id.* at 270.

challenges compete for attention and acceptance; there is experimentation going on. The most persuasive solutions will generate a momentum that leads to '*jurisprudence constante*.'

¹⁴³

The remaining task is to translate this general conception into operational guidance. The actual practices of civil law systems with respect to *jurisprudence constante* vary in their particulars,¹⁴⁴ and those who have proposed its incorporation into the ITA setting have not specified how it should work, particularly with respect to how much flexibility remains to depart from an established view.¹⁴⁵ The framework I propose seeks to calibrate deference based on a balancing of predictability, accuracy, and legitimacy concerns.

A good first step for tribunals is to take into account the stage of doctrinal development in the area they are addressing. When confronting relatively novel questions, tribunals should be especially skeptical of past decisions, to the point of proactively seeking out competing ideas. Even as tribunals appear to be embracing the general idea of deferring only to consistent lines of cases,¹⁴⁶ there is a risk that they will be too quick to latch onto an apparent consensus in practice.

Consider the following influential statement from a tribunal led by Kauffman-Kohler:

The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors toward certainty of the rule of law.¹⁴⁷

The statement indicates that deference is warranted only when a solution has been "established in a series of consistent cases." But it also emphasizes a broader duty to "contribute to the harmonious development of investment

143. Thomas W. Wälde, *The Present State of Research Carried out by the English Speaking Section of the Centre for Studies and Research*, in *NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW* 63 (Philippe Kahn & Thomas W. Wälde eds., 2006).

144. See Mary Garvey Algero, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation*, 65 *LA. L. REV.* 775, 787–92 (2005) (surveying practices in France, Italy, and Spain).

145. Bjorklund, for example, defends the normative appeal of the *jurisprudence constante* model but does not say what a tribunal should do with a consistent line of cases, beyond that they must be taken into account. See Bjorklund, *supra* note 47, at 272–80.

146. See Weeramantry, *supra* note 48, at 117 n.21 (collecting statements from tribunals suggesting deference to consistent lines of cases).

147. *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶ 67 (Mar. 21, 2007) (footnote omitted).

law.” The risk is that embracing this broader responsibility will lead tribunals to seek consistency and defer prematurely before a genuine consensus exists.¹⁴⁸ Both Bjorklund and Tai-Heng Cheng describe the informal pressures that arbitrators face to discuss precedent, in particular because doing so may enhance their reputation.¹⁴⁹ A similar reputational concern suggests that arbitrators may tend to conform rather than depart from past reasoning when they feel they can plausibly do so, because they open themselves up for more criticism by forging a new path on their own. Thus, during the early phases of doctrinal development, my proposal would emphasize the importance of more active skepticism and robust debate as a safeguard against premature deference.

Once the cases have converged on a common view in a particular area following a robust debate, subsequent tribunals can fairly presume that the consensus view is correct, and deference should be the norm. The question then becomes whether and when a later tribunal’s accuracy concerns should override the value of predictability. An initial point to reiterate here is that there are two senses of accuracy, and the answer to the posed question depends on which sense is at issue. When there is a strong case to be made that past decisions have incorrectly interpreted the contracting states’ intent, there is a more compelling argument that the tribunal should choose the objectively right answer even at the cost of predictability. Even if one believes, as I have argued, that tribunals have additional obligations to the broader system, their primary obligation is still to resolve disputes based on faithful interpretations of the law. So when tools of interpretation reveal that the contracting states’ intent is contrary to the consensus view, tribunals should follow their primary obligation.¹⁵⁰

Legitimacy concerns reinforce that conclusion. As noted earlier, tribunals do not have explicit authority to develop the law of international investment.¹⁵¹ At most, they have some implied authority to do so based on the states’ continued use of vague treaty language and continued willingness to

148. Sourgens cites two examples in which tribunals appeared to rely on one or two past decisions “without considering whether [those decisions have been] broadly accepted.” Sourgens, *supra* note 129, at 241; *see also id.* at 241 n.384 (citing *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, ¶ 123–28 (May 11, 2005); *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, ¶ 50, 55 (May 8, 2009)). It is difficult to say with certainty whether those particular tribunals deferred to the cited decisions or merely invoked them to confirm their own conclusions. But it seems fair to say as a general matter that, unless a norm encouraging active skepticism develops, tribunals will sometimes defer because it is the easier path.

149. *See* Bjorklund, *supra* note 47, at 276–77; Cheng, *supra* note 13, at 1046.

150. If the BIT at issue were entered into after the consensus view took hold, and the relevant language remained unchanged, the tribunal could reasonably infer that the states intended to codify the prevailing understanding. A more difficult question, which I bracket for present purposes, is whether tribunals should take post-ratification conduct into account. For example, should a tribunal consider the fact that a state has signed new BITs with the same operative language after a consensus view took hold in interpreting an agreement by that same state entered into before the consensus was reached?

151. *See supra* notes 94–98 and accompanying text.

have their disputes resolved in arbitration.¹⁵² But at the present moment, the idea of deferring to the interpretations of past tribunals when the treaty is best understood to mean something else may trigger the objection that the tribunals are exceeding their proper role.

The calculation may change, however, when the tribunal's concern is simply that prior cases have adopted a misguided solution. The first point to remember is that one tribunal's view may not in fact be clearly better than the collective wisdom reflected in past decisions. And even if it is, predictability concerns could trump. When there is no clear state intent, tribunals need not be as concerned that by deferring to past decisions they are flouting their primary obligation to apply the law correctly or otherwise harming their own legitimacy. In that scenario, because there is no correct way to fulfill their primary obligation, tribunals should feel freer to fulfill their systemic obligations to further the coherent development of the law.

Tribunals facing this dilemma could draw on the considerations that common law high courts use when deciding whether to depart from *stare decisis*. Typically they look for some justification beyond that the earlier case was wrongly decided.¹⁵³ Relevant considerations include whether the rule at issue is "unworkable," whether the original decisions were "badly reasoned," the strength of the "reliance interests at stake," and the lessons of intervening experience.¹⁵⁴ These factors, while highly discretionary in nature, at least give tribunals a framework under which to analyze whether departing from an unsound but established principle is warranted.

The primary focus of this Section has been on the question of deference to past decisions, but the dialectic model has another, separate implication for how tribunals should apply precedent. Return for a moment to the early stage of doctrinal development, before any consensus has formed. Tribunals do not face the binary choice of following or rejecting earlier decisions. The third alternative, as is familiar to common law lawyers, is to distinguish the precedent.¹⁵⁵ Common law courts may be reluctant to overrule precedent when there is a plausible way to distinguish it instead because the latter path preserves a sense of stability.¹⁵⁶ ITA tribunals often do the same,¹⁵⁷ perhaps not with the explicit goal of preserving stability, but rather because it is the easier path. If the present case has features that distinguish it from

152. See Stephan W. Schill, *System-Building in Investment Treaty Arbitration and Lawmaking*, 12 GERMAN L.J. 1083, 1101–03 (2011).

153. See GARNER ET AL., *supra* note 37, at 42.

154. *Id.* at 41–42.

155. *Id.* at 97 ("If the new case is dissimilar to the pending cases in ways that seem important, the court will 'distinguish' it and reach a result different from what the precedent would otherwise suggest or even dictate.").

156. *Id.* at 99.

157. See KATHARINA DIEL-GLIGOR, TOWARDS CONSISTENCY IN INTERNATIONAL INVESTMENT JURISPRUDENCE: A PRELIMINARY RULING SYSTEM FOR ICSID ARBITRATION 194–95 & n.823 (2017) (collecting examples).

the cited precedent, the tribunal need not grapple directly with the earlier tribunal's reasoning and can simply declare it to be inapposite.¹⁵⁸

The dialectic model reveals costs to this practice that provide a reason for caution. First, by distinguishing a prior decision rather than engaging directly with its reasoning, a tribunal misses the opportunity to more substantially advance the dialogue. If the tribunal agrees with the past decision's reasoning, it should say so explicitly and explain why.¹⁵⁹ And if there are flaws in the earlier decision's reasoning, it is better for the long-term clarity and predictability of the law if those flaws are exposed so that the case can be more swiftly discarded.¹⁶⁰

Second, depending on precisely what language is used, distinguishing an earlier decision may be seen as an implicit endorsement of its reasoning. If tribunals work within the boundaries set by an earlier decision even as they reach a different outcome, that decision's reasoning may become entrenched even though subsequent tribunals would not have endorsed it if they had forced themselves to engage directly. Put another way, the act of distinguishing could be itself a form of deference.¹⁶¹ In a common law system, it may be a benefit that "the discipline of distinguishing imposes some limits on the second court's creative capacity."¹⁶² But in the ITA context, just as deference to a single decision should be avoided because of the risks of error it creates, so should tribunals avoid using the option of distinguishing as a way to avoid rejecting reasoning with which they disagree.

2. *Authoring Precedent*

In contrast to the question of how much deference to afford past decisions, there has been relatively little debate about how tribunals should approach the writing of decisions. The expressly stated views are relatively uniform: most assume that cases should be analyzed, and decisions written,

158. See, e.g., *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, ¶ 260 (Sept. 5, 2008) (deciding not to "enter[] into an evaluation of" cited precedents because "there are significant factual and contextual differences with the present case").

159. Some forms of distinguishing are actually intended to do just that. A court may distinguish a precedent because it believes that a deeper understanding of the case's true rationale requires a different outcome in the present dispute. See GARNER ET AL., *supra* note 37, at 101 (drawing a distinction between distinguishing as a way of "limiting" unwise precedent and distinguishing as a way of "clarify[ing] the intended scope" of a precedent). That is not problematic so long as any endorsement of the earlier reasoning is intentional. The more problematic distinguishing I refer to above involves efforts to avoid overruling or otherwise confronting the reasoning of a past decision.

160. To be clear, as suggested in the previous footnote, the act of distinguishing past cases could be valuable in advancing the dialogue, insofar as it helps to clarify the boundaries of the rule at issue. The point here is that tribunals should first engage the question of whether that rule is in fact the right one.

161. As noted above, I have been assuming for this part of the discussion that there is no consensus view. Once a genuine consensus has formed, then a later tribunal's decision to distinguish the earlier cases is less problematic because it does not inhibit an ongoing dialogue or create the risk of entrenching bad reasoning. The act of distinguishing can actually advance the dialogue in the sense described in the preceding footnote.

162. GARNER ET AL., *supra* note 37, at 98.

on narrow grounds. In practice, however, tribunals regularly offer reasoning that is broader than what is needed to resolve the dispute at hand. As in the prior Section, I provide a framework for approaching this issue rather than a blanket answer. But it is worth emphasizing upfront that a distinguishing feature of the proposed model is that it justifies the use of broader reasoning under appropriate circumstances.

Some of those who take the conventional view that ITA disputes should always be decided narrowly rely on an analogy to the common law. For example, Joel Dahlquist draws on common law traditions in arguing that tribunals should avoid dicta in their reasoning.¹⁶³ In a common law system, only the holding of a case formally binds future courts.¹⁶⁴ Dahlquist acknowledges that this distinction should be “theoretically irrelevant” in the ITA context because there is no such thing as binding precedent.¹⁶⁵ He nonetheless concludes, drawing practical lessons from the common law experience, that later tribunals should distinguish between holding and dictum in applying past decisions and that authoring tribunals should avoid engaging in dicta to reduce the risk of confusion.¹⁶⁶

Others make the same types of assumptions from a different starting point—not the merits of common law reasoning, but rather their conception of the arbitral role.¹⁶⁷ For example, Karl-Heinz Böckstiegel, a leading arbitrator, describes his view of the role of tribunals as follows:

[W]e should be very much aware that arbitral tribunals receive their authority and mandate from the parties and institutions which appoint them for the case at hand. And that mandate is to decide on the relief sought, and to consider all factual and legal issues relevant for that decision, no less, but also no more.¹⁶⁸

163. See Joel Dahlquist, *Beside the Point—On Obiter Dicta in Investment Treaty Arbitration*, 32 *ARB. INT’L* 629, 630, 639 (2016).

164. See GARNER ET AL., *supra* note 37, at 44.

165. Dahlquist, *supra* note 163, at 630. Zachary Douglas offers a helpful elaboration on this point:

What is interesting is the growing tendency for arbitral tribunals to undertake a meticulous examination of whether statements in prior awards are properly characterized as part of the *ratio decidendi* or merely as *obiter dictum*. This is a little puzzling because it is a technique that has developed in common law systems precisely to mitigate the effects of a strong doctrine of precedent. It gives a judge room to maneuver in determining whether or not the past decision is formally binding upon the judge. If the doctrine of precedent in investment treaty arbitration is much weaker, then what is the point of characterizing statements in prior awards as part of the *ratio* or as mere *obiter*?

Douglas, *supra* note 34, at 107.

166. Dahlquist, *supra* note 163, at 630, 639.

167. Dahlquist himself makes both points. Apart from drawing on common law analogies, he also writes, “When drafting an award, an arbitral tribunal is only obligated towards the parties who put it in place.” *Id.* at 640.

168. Böckstiegel, *supra* note 15, at 588. Böckstiegel goes on to express a hope that his “awards are persuasive enough to convince later tribunals to go on a similar path,” but any such effect should come from necessary reasoning and not from dicta for which the tribunal “had no mandate.” *Id.*

W. Michael Reisman, another well-known arbitrator, has similarly written that ITA tribunals should view their mandate as “case-specific,” rather than concerning themselves with “systemic implications.”¹⁶⁹

The primary defense of the use of broader reasoning offered in this Section is based on a functional argument for how best to balance predictability and accuracy. But these formal concerns about arbitral authority warrant a more direct response. In short, and as noted above in Section II.D, the judicial model better reflects how ITA participants now understand the process than does the contractual model. This does not mean that parties believe that dispute resolution is *secondary* to law development, only that they reasonably expect tribunals to be attentive to systemic concerns.¹⁷⁰ Indeed, both states and investors have said as much¹⁷¹ and actively encouraged tribunals to serve a lawmaking function by extensively citing past arbitral decisions and treating them as having some normative force beyond their persuasive value.¹⁷² Thus, if the parties themselves want and expect tribunals to reason with systemic implications in mind, then objections based on the arbitrators’ formal mandate lose their force.

The weakening of those formal objections opens the door to rethinking the practical effectiveness of incremental decision making. Notably, even those commentators who have endorsed the broader understanding of the arbitral role have not taken the further step I propose here of changing how individual arbitrations should be approached. My proposal is that tribunals begin with a very different mindset. If the ultimate goal of a dialectic process is to produce guidance in the form of clear, generally applicable rules, overly narrow reasoning is an obstacle to that process. Rather than approaching their task solely as answering the isolated question posed by the two disputing parties, tribunals should appreciate that their decision is contributing to a larger dialogue and tailor their reasoning to best advance that discussion.

The dialectic model suggests, contrary to the conventional wisdom, that it will sometimes be proper for tribunals to reason more broadly than is strictly necessary to decide the case at hand. Consider, for example, a case in

169. W. Michael Reisman, “Case-Specific Mandates” Versus “Systemic Implications”: How Should Investment Tribunals Decide?, 29 *ARB. INT’L* 131, 132 (2013). Reisman acknowledges limited exceptions to this principle, allowing, for example, for the “thoughtful consideration of previous awards that are on-point.” *Id.* Presumably this means allowing for past decisions to serve as persuasive authority but nothing more.

170. See King & Moloo, *supra* note 95, at 890.

171. As noted earlier, a current Working Group of states discussing potential ITA reforms highlighted the states’ interest in systemic values like predictability, accuracy, and legitimacy. See U.N. Comm’n on Int’l Trade Law, *supra* note 17, at ¶ 28 (“[P]redictability and correctness were said to be values that support the rule of law, enhance confidence in the stability of the investment environment, further bring legitimacy to the regime, and contribute to the development of investment law.”). Further, state delegations that had consulted with their respective constituencies reported that “predictability was important to investors as well, in that lack of predictability could constitute a risk factor for investors and so inhibit investment.” *Id.*

172. Schill, *supra* note 152, at 1106–07.

which the complainant claims that the host state's behavior violated provision X. It may be obvious to the tribunal that provision X has not been violated. But at the same time, it would be useful to the participants in the ITA community for a clearer understanding of provision X to develop. In the right circumstances—if, at a minimum, the parties have argued the matter and the tribunal has studied it and formed a view—the tribunal should consider articulating that view for the benefit of later tribunals and the broader international investment community.

A willingness to reason more broadly also has implications for the level of generality at which the tribunal analyzes the facts. For example, assume that there is a settled understanding of provision X, but that understanding is pitched at an abstract level. In that instance, the tribunal may face a choice between applying that general standard to a narrow version of the facts before it and moving up a level of generality to place those facts into a broader category. If the latter option is available, going that route helps more to advance the dialogue about the concrete meaning of provision X.¹⁷³

A further implication of the dialectic model is that tribunals should not see the use of dicta as inherently problematic. As Zachary Douglas notes, “Reasoning that might be characterized as *obiter* can be far more important for the subsequent development of a coherent international law of investment than the reasoning deployed to justify the narrowly defined *ratio* of the case.”¹⁷⁴ This is not to suggest that tribunals should go off on wholly unrelated tangents or make uninformed assertions, but neither should they hold back a useful explanation merely because it is not strictly necessary to the outcome. For example, in concluding that the facts at hand do not constitute a violation of provision X, a tribunal might explain how other facts would have changed the result as a way to shed light on the provision's meaning.¹⁷⁵

The foregoing discussion is not meant to suggest that tribunals should necessarily jump straight to the highest level of generality in every case. But again, neither should they always confine themselves to the narrowest possible rationale. To promote predictability, individual tribunals must assume the responsibility of articulating broader principles that would ordinarily fall to courts of last resort in common law systems. They should not think solely about the case at hand and wait passively for general guidance to reveal itself. Rather, they should see each case as an opportunity to contribute toward developing that broader guidance, whether that means proposing

173. The scenario described in this paragraph is similar to what has occurred with the fair and equitable treatment standard. As described in Section IV.B below, the standard has been defined at an abstract level, but individual cases are resolved narrowly, and more categorical reasoning is needed to provide broader guidance about the provision's meaning.

174. Douglas, *supra* note 34, at 107.

175. Common law courts sometimes draw a distinction between *obiter dicta* and *judicial dicta*. The former consist of stray remarks, while the latter consist of technically superfluous but considered statements. See GARNER ET AL., *supra* note 37, at 62. There is never any justification for the former, but the latter may be appropriate in the right circumstances.

a way to synthesize a group of decisions that came before or just offering up a piece of a puzzle that a later tribunal will complete.

Calibrating the proper scope of reasoning for a given case depends not just on predictability, but accuracy and legitimacy considerations as well. A few words on what those two values mean in the present context are in order.

Accuracy at the authoring stage means not the correctness of the result in the case at hand, but the soundness of the guidance provided to future tribunals. An initial observation to make here is that the costs of error are diminished precisely because no reasoning will be binding on later tribunals. In the absence of *stare decisis*, tribunals need not be concerned with the risk that common law courts face of compelling future courts to reach bad results or otherwise constraining their ability to adjust to unforeseen circumstances. Thus, ITA tribunals should have more freedom to experiment with broader-reaching ideas that may prove to be influential, but can be readily discarded if further experience demonstrates that they are misguided.

Nonetheless, for a dialogue to be effective in facilitating consensus and producing sound guidance, tribunals must offer informed and considered ideas. Thus, accuracy concerns may in some circumstances require tribunals to moderate the level of breadth at which they might otherwise have pitched their decisions.

As for legitimacy, the main consideration tribunals must take into account is whether their broad reasoning will be perceived as going beyond their proper role. The parties, which pay for the costs of arbitration proceedings, may object to the use of their private dispute as a platform for the development of law. The wider international investment community may similarly frown upon any trend toward broader reasoning and eventually push back by altering the dispute resolution terms of investment treaties or opting out of the use of arbitration. On the other hand, as noted earlier, views on legitimacy are not static and appear to be evolving toward acceptance of ITA tribunals playing a lawmaking role and functioning as a broader system. In any event, tribunals should take into account both the circumstances of a particular case and the then-prevailing perceptions of ITA tribunals when deciding how legitimacy concerns should affect their approach.¹⁷⁶

176. It could be argued that tribunals should consider legitimacy in determining not only the scope of their reasoning but also the content of their decisions. In particular, since ITA's survival as a regime ultimately depends on state consent, tribunals may feel some pressure to decide cases in a manner that states would approve of. See Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179, 198 (2010). Such concerns may indeed be responsible for a perceived shift in the orientation of arbitrators since earlier ITA decisions faced a backlash for being too generous to investors. See Frédéric G. Sourgens, *Keep the Faith: Investment Protection Following the Denunciation of International Investment Agreements*, 11 SANTA CLARA J. INT'L L. 335, 358–59 (2013). I bracket the question of whether such a shift was appropriate, except to note that it is difficult to separate legitimacy and accuracy in this context. Because states are drafting the treaties at issue, tribunals may believe states' views are entitled to some weight in the interpretation process and may not merely be acting to avoid backlash.

How then should tribunals balance predictability, accuracy, and legitimacy concerns in the context of a particular case? As in the preceding Section, focusing on the stage of doctrinal development is a helpful place to start. When there are few other cases addressing a particular issue, tribunals may need to proceed modestly, not because they would be expected to defer to earlier decisions, but because there would be limited information about the different factual contexts in which the issue at hand may arise. As additional cases accumulate, later tribunals can attempt to fashion a general rule that properly takes into account the range of circumstances that can be expected to arise.¹⁷⁷

In developing the meaning of a provision, tribunals may also find it prudent to build upward in stages rather than leaping to the highest level of generality and then filling in the details below. As I show in Section IV.B below, tribunals faced with as yet undefined treaty terms have sometimes attempted to start off by articulating a comprehensive understanding of their meaning. This is, of course, the exact opposite of what convention demands, but the temptation to do so is understandable given that they are writing on blank slates, and the international investment community may have expressed a desire for general guidance. The danger, even assuming that later tribunals refrain from deferring prematurely to the proposed view, is that the debate gets off and running on misguided premises. Tribunals may want instead to move upward in generality more gradually. They can build consensus around categories of cases before moving toward a more comprehensive definition. Such an approach reduces concerns about accuracy and legitimacy because it bases general guidance on accumulated wisdom rather than a single tribunal's perspective.

In assessing whether the stage of doctrinal development counsels modesty, tribunals should also consider whether the issue is one on which further information is needed. For example, tribunals may feel comfortable issuing broad guidance on pure questions of law because further information from future cases will not influence their view.¹⁷⁸ By contrast, when interpreting provisions that are intended to function as fact-intensive standards, it may be necessary to proceed more gradually. Relatedly, tribunals should take into account the quality and thoroughness of the briefing they have received. It would not typically make sense to attempt to fashion a general rule when the parties have not adequately addressed the issue from that perspective.

Apart from their own comfort level in reasoning broadly, tribunals should also consider whether the issue at hand is one on which states and investors are in particular need of guidance. Not every question has an equal effect on the ability of investors to plan their business affairs and of states to set their

177. Sourgens makes a similar point about the primary value of past decisions. They are useful because they "set the scope of legally relevant facts that must be taken into account in interpreting an [international investment agreement]." Sourgens, *supra* note 129, at 236.

178. For an example, see *infra* Section IV.A.

regulatory agenda. Matters of substance are generally where predictability is most needed, because investors and states may make different decisions depending on how the scope of their protections and liabilities, respectively, are defined. Conversely, clarity surrounding matters of procedure or remedy might be less urgent because they influence planning less directly.

Finally, as noted already, tribunals can factor in the amount of legitimacy capital that the ITA system in general holds, apart from the circumstances of any given case. To the extent that states, investors, and the broader community grow more comfortable with tribunals playing a lawmaking role, they can be increasingly willing to write decisions that do just that.

IV. ILLUSTRATING THE DIALECTIC MODEL

In developing the framework proposed in Part III, I have necessarily relied on abstractions and stylized examples. To provide a more concrete understanding of how the framework would work in practice, this final Part walks through three extended, real-world examples and explains where the dialectic model would have counseled a different approach. The first Section addresses the interpretation of most-favored-nation (“MFN”) clauses and shows how tribunals converged prematurely around a conventional wisdom that is now being belatedly questioned. The second Section addresses the interpretation of fair and equitable treatment (“FET”) provisions and shows how tribunals again converged prematurely, this time helped along by unduly broad statements of principle by tribunals that would have benefited from more factual information. The third Section addresses the question of whether human rights have any bearing on investment treaty obligations and shows how tribunals have largely avoided the issue, thereby preventing a dialogue that is needed to clarify how these two areas interact.

A. *Most-Favored-Nation Clauses*

The general idea of an MFN clause is that two countries agree that “each will treat the other as well as it treats any other country that is given preferential treatment.”¹⁷⁹ In the context of investment treaties, the conventional wisdom has been that MFN clauses permit the importation of substantive rights. In other words, foreign investors may use an MFN clause between their home state and the host state to import a more favorable provision from a different investment treaty.¹⁸⁰ The alternative view, recently adopted by the tribunal in *İçkale v. Turkmenistan*¹⁸¹ and elaborated on by Simon Batifort and J. Benton Heath, is that MFN clauses should be limited to reme-

179. *Most-Favored-Nation Clause*, BLACK’S LAW DICTIONARY (10th ed. 2014).

180. See Simon Batifort & J. Benton Heath, *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, 111 AM. J. INT’L L. 873, 881 (2018).

181. *İçkale İnşaat Ltd. Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, ¶ 328 (Mar. 8, 2016).

dying discrimination that favors investors from one foreign country over investors from another foreign country.¹⁸² My aim is not to decide whether the importation view or the discrimination view is correct, but rather to explore how the precedential dialogue could have been conducted more effectively by the tribunals involved and to suggest where tribunals should go from here.

Batifort and Heath helpfully document the chronology of how tribunals converged upon the importation view. The process began in 2000, when the tribunal in *Maffezini v. Spain* established a dichotomy between procedural and substantive provisions.¹⁸³ Over the next few years, tribunals took competing views on whether an MFN clause permits the importation of more favorable dispute resolution provisions, but tribunals on both sides simply assumed as their starting point that the importation of substantive standards would be uncontroversial.¹⁸⁴ This presumption, asserted repeatedly in dicta, played a role in cementing the conventional wisdom as tribunals actually confronting the issue reached the same conclusion.

The first published ITA decision permitting the importation of substantive provisions came in *MTD v. Chile*,¹⁸⁵ and between 2004 and 2009 several other tribunals reached the same conclusion.¹⁸⁶ They generally came to the same answer independently, but they used a fairly perfunctory analysis to do so.¹⁸⁷ As of 2009, the earlier decisions were considered to reflect conventional wisdom, and later tribunals cited them accordingly.¹⁸⁸ Others relied on the entrenched *Maffezini* procedure/substance distinction to simply declare that MFN clauses clearly permitted the adoption of the latter.¹⁸⁹

The *İçkale* tribunal was the first to provide an alternative view, and only after the conventional wisdom had coalesced. In adopting the discrimination view for the MFN clause at issue, the tribunal focused on the treaty language, which stated: “Each Party shall accord to these investments, once established, treatment no less favourable than that accorded in similar situa-

182. Batifort & Heath, *supra* note 180, at 880–81.

183. See *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, ¶ 41 (Jan. 25, 2000).

184. Batifort & Heath, *supra* note 180, at 887–89.

185. *MTD Equity Sdn. Bhd v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, ¶ 113 (May 25, 2004).

186. Batifort & Heath, *supra* note 180, at 890–97.

187. See, e.g., *MTD*, ICSID Case No. ARB/01/7, Award, at ¶ 104 (addressing the issue in a single paragraph that appeared to confuse MFN and fair and equitable treatment); *ATA Constr., Indus. and Trading Co. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, ¶ 125 n.16 (May 18, 2010) (resolving the issue in a single-sentence footnote).

188. See, e.g., *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, ¶ 158 (Aug. 27, 2009) (citing the *MTD* decision in support of its conclusion); *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, ¶ 541 (Dec. 15, 2014) (noting that “a number of contemporary arbitral decisions” had also allowed the use of MFN clauses “to import fair and equitable treatment”).

189. See, e.g., *White Indus. Aust. Ltd. v. Republic of India*, UNCITRAL, Final Award, ¶¶ 11.2.3–4 (Nov. 30, 2011); *EDF Int’l S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, ¶¶ 935–36 (June 11, 2012).

tions to investments of its investors or to investors of any third country, whichever is the most favourable.”¹⁹⁰ The tribunal explained that the phrase “similar situations” meant that claimants had to show that another investor from a different country was treated more favorably, not merely that some other treaty provided for a more favorable legal right.¹⁹¹ Batifort and Heath endorse the reasoning as an example of effective “bottom-up” interpretation that is appropriately sensitive to specific treaty language.¹⁹²

Without having to take a position on the merits of the debate,¹⁹³ it seems fair to assert that the arguments now being raised against the conventional wisdom would ideally have been identified earlier in the process. It is difficult to say how much work in these later decisions was being done by precedent as opposed to the tribunals’ independent reasoning. But it is at least telling that the independent analysis was generally quite abbreviated, lacking a serious consideration of counterarguments.¹⁹⁴ Notably, the language carefully scrutinized by the tribunal in *İçkale* was not unique; tribunals adopting the importation view had previously considered MFN provisions including the “similar situations” language.¹⁹⁵

For Batifort and Heath, the broader theoretical concern that their account reveals is that tribunals have taken a top-down approach to treaty interpretation.¹⁹⁶ In other words, tribunals relied on “presumptions as to the nature or essence of MFN clauses in general” rather than conducting a “careful analysis of the text of specific clauses” in each individual treaty.¹⁹⁷ For purposes of this Article, the fact that tribunals used a top-down approach underscores a different point: that differences in treaty language are easily overlooked in the pursuit of consensus. Of course, particularly since several tribunals reached the same conclusion independently, it may be that tribunals con-

190. *İçkale İnşaat Ltd. Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, ¶ 326 (Mar. 8, 2016) (citing Agreement Concerning the Reciprocal Promotion and Protection of Investments, Turk.-Turkm., art. II, ¶ 2, May 2, 1992).

191. *Id.* ¶ 329.

192. Batifort & Heath, *supra* note 180, at 899.

193. For a critique of the *İçkale* tribunal’s reasoning, see Stephan W. Schill, *MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath*, 111 AM. J. INT’L L. 914, 929–33 (2018). In addition to commissioning the Schill response, the *American Journal of International Law* hosted a symposium on the Batifort and Heath article in its online forum. See Donald McRae, *Introduction to the Symposium on Simon Batifort & J. Benton Heath*, “The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization,” 112 AJIL UNBOUND 38 (2018) (summarizing the debate and the views of four symposium contributors).

194. Of course, the length of the written decision does not necessarily reflect the extent of the analysis actually conducted. Some courts are known for writing short opinions that do not explain their reasoning. See André Tunc, *Methodology of the Civil Law in France*, 50 TUL. L. REV. 459, 467 (1976) (describing the example of the French Court of Cassation). But the norm in ITA is for tribunals to provide a more robust explanation of their reasoning, so it stands out when some aspect of a decision seems truncated. See Fauchald, *supra* note 138, at 308. And under the dialectic model, such an abbreviated analysis is problematic because effective dialogue depends on tribunals offering thorough reasoning.

195. See, e.g., *Bayindir İnşaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, ¶ 386 (Aug. 27, 2009).

196. See Batifort & Heath, *supra* note 180, at 874.

197. *Id.*

verged quickly not only because they were deferring to precedent, but also because the past cases confirmed their own intuitions. After all, as Batifort and Heath acknowledge, the fact that MFN clauses had been used for importation in other contexts explains why tribunals may have had preconceived notions of what such clauses should mean in investment treaties.¹⁹⁸ Even so, the dialectic model proposed here emphasizes the importance of active skepticism precisely to ferret out misconceptions before they congeal. And although it is impossible to say whether closer examination would have led the tribunals to a different conclusion, the troubling point is precisely that no such in-depth analysis took place.

In addition to questioning whether the later tribunals deferred too readily to precedent, it is also fair to ask whether the earlier tribunals bear responsibility for making pronouncements that stunted the debate.¹⁹⁹ An initial observation on this point is that the meaning of an MFN provision is a pure legal question. Thus, it is one that tribunals should feel comfortable answering based on treaty text and structure, without having to wait for future cases to clarify the range of possible factual circumstances. However, at least those tribunals that pronounced on the question of importing substantive provisions in cases involving the importation of procedural rights can fairly be criticized for overstepping. The dialectic model accepts the value of informed judicial dicta for the sake of providing guidance,²⁰⁰ but the tribunals in this circumstance appeared to be making stray assertions without analysis, which had the effect of helping to cement a conventional wisdom before certainty was warranted.

Given the existence of an apparent consensus, the remaining question is whether tribunals should feel free, as the *İçkale* tribunal did, to reverse course if they are persuaded by the argument. This is where the nature of the purported inaccuracy becomes important. Although the choice between the two views comes with serious policy consequences,²⁰¹ the reasoning in *İçkale*, bolstered by Batifort and Heath, is based on interpretation. They present at the very least a plausible case that MFN provisions using the “similar situations” language are best understood as protecting against discrimination

198. See *id.* at 886; see also Schill, *supra* note 193, at 922 (arguing for the importation view based on “general international law rules on the interpretation of MFN clauses”).

199. One might say that so long as tribunals do not improperly defer at the application stage, it does not matter what authoring tribunals do. While that is true to a point, the dialogue as a whole will be better if authoring tribunals refrain from making broad pronouncements that are not fully informed.

200. On the difference between judicial dicta and obiter dicta, see *supra* note 175.

201. On the one hand, the importation view promotes the multilateralization of international investment law, which may be desirable from the standpoint of uniformity and economic interdependence. See Schill, *supra* note 193, at 934. On the other hand, the “‘combinations and permutations’ of investment protections resulting from MFN importation” may make it harder for states “to predict their scope of potential liability.” Batifort & Heath, *supra* note 180, at 875. Further, “expansive applications of MFN could undermine efforts . . . to ‘rebalance’ investment agreements” because any changes made to new treaties will be rendered moot by the ability to import the provisions of older ones. *Id.*

only. The weakness of the reasoning in the decisions that helped establish the conventional wisdom is also a justification for reopening the debate.²⁰²

Under the dialectic model, when a tribunal's disagreement is based on interpretation rather than policy, concerns about predictability are given less weight. Legitimacy concerns also weigh in favor of respecting the best understanding of the states' intent over deferring to arbitral precedent. Thus, if future tribunals are persuaded that *İçkale*'s interpretation is objectively more accurate, they would be free under the dialectic model to disregard the existing consensus and adopt the discrimination view.

B. *Fair and Equitable Treatment*

The FET provision is the most important investment treaty standard. It is the most commonly invoked standard and the one most likely to form the basis of a finding of liability.²⁰³ There is general consensus that the provision was intended to be a catch-all, offering flexibility for claimants to challenge host state conduct that might not fit neatly into another more specific provision.²⁰⁴ FET has been invoked to address a variety of concerns, such as denial of due process, coercion, harassment, and lack of transparency.²⁰⁵ This Section explores the evolution of the FET standard, showing how in this area, tribunals did not shy away from offering broad guidance. But consensus around the broad concepts may have formed prematurely, and given the fact-intensive nature of the issue, a more gradual approach may have been warranted.

The origins of the FET standard date back to the treaties of friendship, commerce, and navigation entered into during the 1950s.²⁰⁶ In the decades that followed, the provision was widely adopted in bilateral investment treaties as well as in multilateral economic treaties that covered investment issues.²⁰⁷ We pick up the story in the 1990s, when FET emerged as a key focal point in investment disputes.

Debates over the meaning of fair and equitable treatment were robust in one sense. Parties and commentators vigorously disputed, and tribunals carefully examined, the question of whether FET should be treated as an autonomous treaty standard or as a mere codification of the international

202. In his response to the Batifort and Heath article, Stephan Schill, while disagreeing that the larger group of MFN clauses needs to be reevaluated, does agree that some of the relevant decisions were poorly reasoned. See Schill, *supra* note 193, at 916 (“[T]he reasoning of many arbitral tribunals, in particular in earlier cases, is weak and unsatisfying, and therefore constitutes a brittle basis for constructing a *jurisprudence constante* on the issue in question.”).

203. U.N. Conference on Trade and Development, *Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II*, U.N. Doc. A/UNCTAD/DIAE/IA/2011/5, at 1 (2012).

204. See DOLZER & SCHREUER, *supra* note 23, at 132.

205. See *id.* at 145.

206. See *id.* at 130–31.

207. See Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. WORLD INV. & TRADE 357, 358–59 (2005).

minimum standard in customary international law.²⁰⁸ Most tribunals now take the former view.²⁰⁹

While the debate just described has been ongoing, tribunals that took the view that the standard was autonomous also endeavored to work out the scope of protection it offered. In 2003, the tribunal in *Tecmed v. Mexico* set forth what would become the leading statement of the meaning of FET:

The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.²¹⁰

The actual dispute in *Tecmed* concerned the host state's refusal to renew an operating permit, which purportedly frustrated the claimant's "justified expectation of the continuity and duration of the investment made."²¹¹ The tribunal concluded that Mexico had violated its FET guarantee by acting in "contradictory and ambiguous" ways, thereby leaving the claimant unable to plan its business activities.²¹²

The best interpretation of the tribunal's holding is that it concerned a failure of transparency, making other aspects of its definition dicta.²¹³ But based on that more comprehensive definition of FET, the case came to stand for the further proposition that host states are required to provide stability and protect investors' legitimate expectations, and that a failure to do so may result in liability even in the absence of bad faith.²¹⁴ Later tribunals, in *CMS v. Argentina* and *Occidental v. Ecuador*, for example, relied on *Tecmed* for this proposition and solidified this conception of FET by finding that it was

208. See DOLZER & SCHREUER, *supra* note 23, at 134–39.

209. See *id.* at 137. Another possibility still being actively debated is whether the meaning of customary international law has evolved to track the interpretation of the treaty standard. See *id.* at 138–39; see also Marcela Klein Bronfman, *Fair and Equitable Treatment: An Evolving Standard*, 10 MAX PLANCK Y.B. U.N. L. 609, 670–72 (2006).

210. *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 154 (May 29, 2003).

211. *Id.* at ¶ 41.

212. *Id.* at ¶ 172.

213. See DOLZER & SCHREUER, *supra* note 23, at 151 (describing the *Tecmed* holding in a section on transparency); Josef Ostránský, *An Exercise in Equivocation: A Critique of Legitimate Expectations as a General Principle of Law Under the Fair and Equitable Treatment Standard*, in GENERAL PRINCIPLES OF LAW AND INTERNATIONAL INVESTMENT ARBITRATION 344, 371 (Andrea Gattini et al. eds., 2018) (noting that the legitimate expectations principle announced in *Tecmed* was not actually applied to the facts of the case).

214. See DOLZER & SCHREUER, *supra* note 23, at 145–49 (summarizing this aspect of FET and drawing on *Tecmed*, among other decisions). This conception of FET predated *Tecmed*, see *id.* at 145–46, but *Tecmed* appears to have been the most influential statement of that viewpoint, perhaps because it consciously "assumed the broader task" of setting forth "the full reach of the FET standard," see Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 SANTA CLARA J. INT'L L. 7, 14 (2013).

violated based on inconsistency alone.²¹⁵ A consensus appears to have been formed around this view.²¹⁶

Yet commentators have shown flaws in *Tecmed's* thin reasoning as well as serious policy concerns that follow from its interpretation. Both of those issues create doubts about the accuracy of *Tecmed's* definition and, in turn, the quality of the dialogue that followed.

First as to *Tecmed's* reasoning, the tribunal purported to ground its definition in the “good faith principle established by international law.”²¹⁷ But it is not clear why a requirement that host states act in good faith should subject them to potential liability even for regulatory changes undertaken without bad faith.²¹⁸ Later tribunals pointed to the purpose of investment treaties, sometimes noting preambular language about stability, to support their interpretation.²¹⁹ But even that does not make clear that host states should be liable for inconsistency in the absence of bad faith. At a minimum, it seems difficult to deny that the legitimate expectations principle is an “arbitrary innovation” rather than something that obviously follows from the FET concept.²²⁰

From a policy standpoint, the willingness of tribunals to find liability even in the absence of bad faith has led to backlash among states and harsh criticism by commentators. When concerns about the excesses of the international investment law regime are described, the focus is typically on cases involving good-faith regulatory changes.²²¹ Few would disagree that protecting investors from abusive or exploitative host state conduct is a laudable goal. The claims challenging efforts to regulate in the public interest, which *Tecmed* opened the door to, are the ones creating concerns about regulatory chill and infringements on host state sovereignty.²²² These concerns

215. See DOLZER & SCHREUER, *supra* note 23, at 146–47 (summarizing *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award (May 12, 2005), and *Occidental Petroleum Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (July 1, 2004)).

216. See Dolzer, *supra* note 214, at 18–19 (describing the “consolidat[ion]” of this position beginning with *Tecmed* in 2003 and finishing in 2011 with *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (Oct. 27, 2011)).

217. *Tecmed*, ICSID Case No. ARB(AF)/00/2, Award, at ¶ 154.

218. Michele Potestà, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28 ICSID REV. 88, 92 (2013).

219. *CMS*, ICSID Case No. ARB/01/8, Award, at ¶ 274.

220. U.N. Conference on Trade and Development, *Fair and Equitable Treatment*, *supra* note 203, at 9; see also Potestà, *supra* note 218, at 90–91 (describing how the principle was established in a series of cases featuring minimal analysis).

221. See, e.g., Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775, 782 (2008) (“Public interest regulations are promulgated by elected officials to protect the welfare of the state's citizens and nationals. Thus, interference with these regulations by unelected and unappointed arbitrators is not consistent with basic principles of democracy.” (citation omitted)).

222. See Jason Haynes, *The Evolving Nature of the Fair and Equitable Treatment (FET) Standard: Challenging Its Increasing Pervasiveness in Light of Developing Countries' Concerns—The Case for Regulatory Rebalancing*, 14 J. WORLD INV. & TRADE 114, 133–34 (2013).

are evidence that the principles set forth in *Tecmed* are not just suspect as a matter of legal reasoning but unsound as a matter of policy.

Of course, the relevant question for present purposes is not whether *Tecmed*'s interpretation of FET is correct. Rather, it is whether the tribunals settled too quickly on that understanding. As in the preceding Section, it is impossible to know just how much the tribunals relied on *Tecmed* as authority, as opposed to citing it merely to bolster conclusions they would have reached independently. But it is again telling that their analyses were relatively brief apart from their citation to precedent.

In *MTD v. Chile*, for example, the tribunal's independent analysis consisted of a single paragraph. Examining the plain meaning of the words "fair" and "equitable" and the object and purpose of the treaty did not yield much insight, only the unremarkable conclusion that "fair and equitable treatment should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment."²²³ The court then quoted the comprehensive definition set forth in *Tecmed* before concluding, without further explanation, "this is the standard that the Tribunal will apply to the facts of this case."²²⁴

Thin reasoning of that sort suggests that *Tecmed* became the "most often cited [award] in arbitral jurisprudence"²²⁵ not because it was especially persuasive, but because it was the most comprehensive statement to date and bore the hallmarks of an authoritative interpretation. Given that the doctrine was still in the early stage of development, the dialectic model would have counseled not only against such premature deference, but in favor of more active skepticism. Instead of a robust dialogue, the legitimate expectations principle came about as the result of apparent inertia. As one commentator summarized it: the early tribunals identified the legitimate expectations principle without any concrete authority, "[l]ater cases picked up on their pronouncements[,] and suddenly we are faced with 'established jurisprudence on [legitimate expectations].'"²²⁶

Moreover, to the extent tribunals did question the reasoning of *Tecmed* and its progeny, it was only to note that the stability requirement should not be interpreted to literally freeze the host state's regulatory framework at the time of investment.²²⁷ The investor's legitimate expectations would need to be assessed "in light of the objective circumstances prevailing in the host state."²²⁸ Later tribunals were able to distinguish their facts from *CMS* and

223. *MTD Equity Sdn. Bhd. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, ¶ 113 (May 25, 2004).

224. *Id.* at ¶¶ 114–15; see also Bronfman, *supra* note 209, at 640 (describing the reference to the *Tecmed* definition as "decisive" in the *MTD* tribunal's analysis).

225. Dolzer, *supra* note 214, at 14.

226. Ostřanský, *supra* note 213, at 349.

227. See DOLZER & SCHREUER, *supra* note 23, at 148–49.

228. Joshua Paine, *On Investment Law and Questions of Change*, 19 J. WORLD INV. & TRADE 173, 189 (2018).

Occidental on these and other grounds, but in doing so helped to reinforce the basic principle that instability in the absence of bad faith is at least potentially sufficient to trigger liability.²²⁹

It is also worth asking, from the standpoints of both accuracy and legitimacy, whether *Tecmed* acted prematurely in purporting to set forth a comprehensive definition.²³⁰ Given the vague meaning of FET, it is understandable that tribunals would want to provide clarity and guidance to the investment community, and indeed one of my main suggestions above is that tribunals should consider this to be part of their role. But FET is, as tribunals have recognized, a fact-intensive standard.²³¹ As such, there would have been good reason to proceed more gradually in developing a comprehensive definition. *Tecmed* could have provided a building block by just recognizing transparency as a component of FET, while leaving it to later tribunals to move up a further level of generality. Later tribunals could then have made the assessment of whether inconsistency in the absence of bad faith should suffice to trigger liability with the benefit of information drawn from subsequent disputes. Whatever answer they settled on not only would have been better informed, but also would have raised fewer legitimacy objections following the use of a collective decision making process.²³²

Despite a less-than-ideal process and continued criticism by commentators and states, the debate on this aspect of FET appears to be settled among tribunals. The question, then, is whether any tribunals taking a different view should be willing to depart from the principle established in a consistent line of cases. In this regard, it is significant that any disagreement would likely be based on policy concerns rather than evidence of the correct interpretation of the treaty language.²³³ While the original reasoning adopting the stability principle may have been weak in itself, the open-ended nature of the FET provision makes it difficult to refute that interpretation decisively. Thus, to the extent their disagreement is on policy grounds, tribunals should avoid departing from precedent because doing so likely creates more harm from the standpoint of predictability than benefit in greater accuracy. In particular, the importance of FET as a source of investor protec-

229. See, e.g., *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, ¶¶ 257–60 & n.389 (Sept. 5, 2008) (distinguishing *CMS* because the investor in this case had not received “specific guarantees” of stability, but still acknowledging stability as a relevant consideration).

230. The same caveat I made in the preceding Section applies here. One might say that the applying tribunals bear more responsibility for over-relying on *Tecmed*'s reasoning, but it nonetheless seems fair to ask authoring tribunals to self-regulate for the sake of improving the process overall.

231. See, e.g., *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, ¶ 118 (Oct. 11, 2002) (noting that “[a] judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case”).

232. See Ostřanský, *supra* note 213, at 373 (citing *Tecmed* as an example of “how easily controversial and unprincipled legal solutions can come to hold sway in the area of investment arbitration”).

233. This point does not necessarily apply to new treaties in which states may have attempted to scale back the scope of FET protections. See Paine, *supra* note 228, at 190–91. In those instances, tribunals could of course read the FET provision more narrowly, based on the specific language in the treaty.

tion—both in terms of its prominence and substantive breadth—means that reliance concerns have particular force.

Recent trends suggest that tribunals have been trying to find a middle ground. They respect the established line of cases by recognizing that stability and the protection of legitimate expectations are part of the FET guarantee. But they mitigate the effects of that interpretation by ensuring a degree of latitude for states to make regulatory changes, either by interpreting legitimate expectations more narrowly or by relying on other doctrines like proportionality and margin of appreciation.²³⁴ These solutions may raise problems of their own,²³⁵ but from the standpoint of the practice of precedent, they represent an arguably fair balance of the relevant considerations. A degree of predictability is preserved by not disrupting an established line of cases, while the concerns of accuracy are addressed by adapting the rule at issue to mitigate its problematic effects.

A final concern remains regarding how the law of fair and equitable treatment is to be developed from this point on. Despite some consensus around the broad meaning of fair and equitable treatment and the components that go into it, it remains as difficult as ever to know what conduct will actually trigger liability.²³⁶ The broad principles standing alone are indeterminate and need to be given meaning through their application to concrete facts. But the actual approach often taken by tribunals (which may not conceive of themselves as precedent setters) fails at this task. Benedict Kingsbury and Stephan Schill, writing about deficiencies in arbitral decisions more generally, describe the problem as “‘I-know-it-when-I-see-it’-type of reasoning,” in which the tribunals offer “an extensive summary of the facts of the case at hand . . . followed by [an] abrupt determination with little intelligible legal reasoning.”²³⁷

In other words, despite including some broad statements of principles, tribunals are producing the sorts of narrow, fact-bound decisions that prevent effective dialogue and make predictability unattainable. Later tribunals cannot draw any precedential guidance from such decisions because they do not know exactly which facts mattered and why.²³⁸ A minimal first step for tribunals to take in order to facilitate more effective analogical reasoning is to emphasize which facts are determinative and explain their legal significance. But to achieve predictability in the long run, tribunals must also reason more categorically. That means moving up a level of generality, placing the very specific facts at issue into categories of conduct so that, over

234. See *id.* at 191–95; see also Chen, *supra* note 137, at 308–13. This is not unlike how common law courts try to adapt rather than overturn the principles established in past cases. The key difference is that, under the dialectic model, ITA tribunals should not prioritize stability until a consensus has formed.

235. See Chen, *supra* note 137, at 308–13.

236. See, e.g., Haynes, *supra* note 222, at 119–21.

237. See Kingsbury & Schill, *supra* note 89, at 51. This problem is not unique to arbitral tribunals. See Watford et al., *supra* note 14, at 573 (describing the same concern for U.S. courts).

238. See Watford et al., *supra* note 14, at 570–71.

time, the investment community can develop a “working sense” of how various common fact scenarios are likely to be resolved.²³⁹

C. *The Intersection of Human Rights and Investment Treaty Obligations*

Human rights and investment treaty obligations intersect in two main ways. One is when investors draw on human rights principles and analogies in support of their claims.²⁴⁰ Another is when host states use human rights obligations as a defense against an investment treaty claim.²⁴¹ This Section focuses on the latter intersection and argues that tribunals have been too hesitant to articulate any general framework for addressing this problem, which is likely to arise with increasing frequency.

The issue has arisen most prominently in cases involving the right to water. In the typical case, a foreign investor that privately owns the water supply brings investment treaty claims after the host state terminates concessions or freezes tariffs “in order to secure adequate access to water at affordable prices.”²⁴² The host state in turn argues that this action was necessary to comply with its obligation to promote the right to water, as codified in the International Covenant on Economic, Social and Cultural Rights, among other conventions.²⁴³ The question facing tribunals, therefore, is whether and to what extent human rights obligations can serve as a defense to investment treaty liability.

At least a couple of tribunals have supplied an answer and thereby contributed one viewpoint to the dialogue. Their answer is simply to say that human rights obligations are no defense to investment treaty liability, because the host state faces no conflict: if a certain action is necessary to fulfill human rights, the host state may do it and pay the investor appropriate compensation.²⁴⁴ Again, the merits of that position are not our immediate concern. More relevant for present purposes is how several other tribunals have ducked the issue. Some have done so by simply never addressing the arguments despite including them in their summary of the host state’s position.²⁴⁵ Others have gone so far as to acknowledge that human rights obliga-

239. GARNER ET AL., *supra* note 37, at 81.

240. See Vivian Kube & Ernst-Ulrich Petersmann, *Human Rights Law in International Investment Arbitration*, 11 ASIAN J. WTO & INT’L HEALTH L. & POL’Y. 65, 72 (2016).

241. See *id.*

242. *Id.* at 81.

243. *Id.*

244. See, e.g., *Suez, Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 262 (July 30, 2010) (“Argentina is subject to both international obligations, *i.e.* human rights *and* treaty obligation, and must respect both of them equally. Under the circumstances of the case, Argentina’s human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive. Thus, as discussed above, Argentina could have respected both types of obligations.”).

245. See, e.g., *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, ¶ 434 (July 24, 2008) (“Water and sanitation services are vitally important, and the Republic has more than a right to protect such services in case of a crisis: it has a moral and perhaps even a legal obligation to do so.”); see also *id.* at ¶ 387 (summarizing the human rights arguments made in

tions could be relevant, but decided that the issue was unnecessary to resolve in the particular circumstances of the case.²⁴⁶

The recent decision in *Urbaser SA v. Argentine Republic*²⁴⁷ may mark a turning point. There the tribunal acknowledged the host state's defense that it was obligated "to guarantee the continuation of the basic water supply to millions of Argentines."²⁴⁸ It explained that "[t]he protection of this universal basic human right constitutes the framework within which Claimants should frame their expectations."²⁴⁹ Although the tribunal found the host state liable for lack of transparency,²⁵⁰ its decision to consider human rights arguments that it could have avoided, and to suggest where they fit into the larger analysis, served as a valuable contribution to the dialogue.

Without implying that any particular tribunal prior to *Urbaser* erred by avoiding the issue, I do suggest that this is an area in which a broader dialogue would be fruitful. First, the need for predictability on this issue is compelling. The intersection between human rights and investment treaty obligations is likely to arise with increasing frequency. As foreign investor claims increasingly involve challenges to good-faith regulatory changes, host states are likely to justify them as necessary to fulfill human rights obligations. Commentators have pointed out that recently challenged tobacco regulations, for example, could have been defended as necessary to promote public health.²⁵¹ If not raised by the host states, human rights concerns are likely to come in via *amicus curiae* submissions, which tribunals are increasingly willing to consider.²⁵² States, investors, and the broader public alike would benefit from more guidance on whether this defense is viable and what its requirements are.²⁵³

amicus curiae submissions). After acknowledging the argument, the tribunal did not address it in its analysis. See *id.* at ¶¶ 451–521.

246. The best example of this comes from outside the right-to-water context. In *Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL Arb., Award (June 8, 2009), certain mining regulations were justified in part based on the need to protect the human rights of indigenous populations. See Susan L. Karamanian, *The Place of Human Rights in Investor-State Arbitration*, 17 LEWIS & CLARK L. REV. 423, 428–29 (2013). The tribunal acknowledged the arguments, but decided they were unnecessary to address because it was ruling in favor of the state on other grounds. *Glamis Gold*, NAFTA/UNCITRAL Arb., Award, at ¶ 8. The tribunal went on to criticize the tendency of tribunals to "ma[k]e statements not required by the case before" them. *Id.*

247. *Urbaser SA v. Argentine Republic*, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016).

248. *Id.* at ¶ 624.

249. *Id.*

250. *Id.* at ¶ 845. The *Urbaser* case is also significant for being the first to accept jurisdiction over a human rights counterclaim. For an analysis of this aspect of the case, see Edward Guntrip, *Urbaser v. Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?*, EJIL: Talk, <https://perma.cc/47UK-WG8T> (Feb. 10, 2017).

251. See Kube & Petersmann, *supra* note 240, at 85–86.

252. See *id.* at 87–91.

253. Nor is the human rights regime the only one with which investment treaties may intersect. See STONE SWEET & GRISEL, *supra* note 50, at 75 (noting potential linkages with trade and environmental protection). Developing the law here could pave the way to greater clarity in those other areas as well.

Relatedly, the fact that human rights concerns are at stake makes the importance of providing guidance that much greater. Clarity surrounding the scope of substantive rights is always important to investors, for the sake of business planning, and to host states, for the sake of planning their regulatory agenda. But when a regulatory issue involves human rights concerns, it will often be even more urgent for host states to know whether investment treaty liability is a risk so that they can plan accordingly.²⁵⁴

Second, from the standpoint of accuracy concerns, this is not an area in which further factual development is needed before some progress can be made. In particular, the threshold question of whether human rights obligations should have any bearing on investment treaty liability is a pure legal one that tribunals can begin debating immediately. If the answer to that threshold question is yes, tribunals also need to work out the legal mechanism by which human rights concerns should enter the analysis—as a defense based on necessity or an exception provision,²⁵⁵ as a lens through which to interpret the investor’s legitimate expectations,²⁵⁶ or some other possibility not yet proposed. Further factual development would undoubtedly be useful before standards are developed to address questions such as the weight human rights concerns should be afforded and what showing the host state must make.²⁵⁷ But the point is that tribunals can make progress on the less fact-intensive questions in the meantime.

CONCLUSION

The practice of precedent in ITA is here to stay, but if it is going to produce the values that proponents expect, a more principled approach is needed. This Article supplies the missing framework. It begins by outlining three key values served by precedent, and then explains why achieving them in the distinctive ITA context requires a different model from the common law approach of stable, incremental decision making. The proposed alternative is a model of dialogue, in which tribunals actively question past decisions and write their own decisions with an eye toward advancing the broader debate. The ultimate goal is convergence on a common view that can then serve as authoritative guidance, and the dialectic model facilitates

254. See Kube & Petersmann, *supra* note 240, at 68 (describing the regulatory chill concern in the context of human rights).

255. See Barnali Choudhury, *Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements*, 49 COLUM. J. TRANSNAT’L L. 670, 674–75 (2011).

256. See *Urbaser SA v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, ¶ 624 (Dec. 8, 2016); see also Yannick Radi, *Realizing Human Rights in Investment Treaty Arbitration: A Perspective from Within the International Investment Law Toolbox*, 37 N.C. J. INT’L L. & COM. REG. 1107, 1170–71 (2011) (discussing how human rights concerns should be incorporated into the analysis of legitimate expectations and proportionality).

257. Commentators have begun proposing frameworks for these questions as well. See, e.g., Karamanian, *supra* note 246, at 435–36 (identifying four principles based on, for example, the source of the human right at issue).

such convergence through a process that properly balances predictability, accuracy, and legitimacy.

The proposed framework leaves a fair amount of discretion for tribunals to decide how those values should be weighed in individual cases and thus does not necessarily yield determinate answers. But to the extent it fosters a more disciplined approach to precedent, it would still represent an improvement over current, ad hoc practices. Moreover, even if tribunals do not follow the proposed framework in all of its details, my more modest hope is that the Article encourages them to think about precedent more systematically, applying past decisions and authoring new ones with an appreciation for the larger dialogue in which they are participating.