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Abstract

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Orderliness and Coherence in International Investment Law and Arbitration: An Analysis Through the Lens of State of Necessity

Giovanni ZARRA*

The article addresses the need for orderliness and coherence in international investment law. It does so by reference to Argentina's various claims to necessity in CMS, LG&E, Continental Casualty Co., Enron and Sempra. After having analysed the various doctrinal positions regarding orderliness of international investment law and the need for coherence in this area of international law (both from the perspective of the consistency among investment awards and from the perspective of the integration of other areas of international law within investment disputes), the work reaches the conclusion that arbitrators should endorse an approach according to which, on the one hand, they should not ignore what is done by other tribunals (we can talk of investment arbitration as a network needing internal coherence) and, on the other hand, they should always take into consideration values protected by other areas of international law and general international law (in which investment arbitration is fully integrated).

No man is an island entire of itself; every man is a piece of the continent, a part of the main.
'MEDITATION XVII', *Devotions upon Emergent Occasions*, John Donne

1 INTRODUCTION, ANALYSIS OF THE GOALS AND SCOPE

Since 2011, International Centre for the Settlement of Investment Disputes (ICSID) has registered more than thirty cases per year[1] (with peaks of fifty cases

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[1] According to Andrea Giardina, *L'arbitrato internazionale in materia di investimenti: impetuosi sviluppi e qualche problema*, in *I Rapporti economici internazionali e l'evoluzione del loro regime giuridico* 319, 320 (R. Luzzatto & N. Boschiero eds, Editoriale Scientifica 2008), this is due to the emergence of the concept of 'arbitration without privity', according to which an investor may take advantage of an arbitration clause contained in a bilateral investment treaty (BIT) and commence an arbitration against the host state even in the absence of an ad hoc contractual commitment to arbitrate between the investor and the host state. This concept was coined by Jan Paulsson, *Arbitration Without Privity*, 10 ICSID Rev. 232, 233 (1995).

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in 2012 and fifty-two in 2015) compared with one to two per year at the beginning of its activity.[2] This 'baby boom'[3] in investment treaty arbitration has attracted increasing public interest, given the subject matter of the disputes and the sometimes extraordinary amounts claimed,[4] and criticism,[5] because it is seen by many as a system which is required to account for but instead ignores the interests of states and favours those of the corporate claimants.[6]

The legitimacy of investment arbitration has been put into question[7] because allegedly it no longer offers a 'perception of acceptability'[8] for states. It is clear that, regardless of whether this perception of bias is true,[9] the lack of trust *ex ante* towards this method of dispute settlement on the part of the stakeholders[10] generates the risk that the same method of dispute settlement is abandoned by whoever feels to be prejudiced by it.[11]

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2 Eloise Obadia, *ICSID, Investment Treaties and Arbitration: Current and Emerging Issues*, in *Investment Treaties and Arbitration, ASA Special Series No 19* 67, 68 (G. Kaufmann-Kohler & B. Stucki eds, ASA 2002), talked about ICSID as a 'sleeping beauty' at the beginning of its activity.

3 Stanimir Alexandrov, *The 'Baby Boom' of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals*, 6 J. World Inv. & Trade 387 (2006).

4 Loukas Mistelis, *Confidentiality and Third Party Participation*, 21 Arb. Int'l 211 (2005).

5 Gus Van Harten, *Investment Treaty Arbitration and Public Law* 152 (OUP 2007). *See also* Muthucumaraswamy Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration*, in *Appeal Mechanisms in International Investment Disputes* 42 and 73–74 (K. P. Sauvant ed., OUP 2008).

6 Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of New Public Law Approach*, 52 Va. J. Int'l L. 57, 72 (2011). *See also* in general terms, David D. Caron, *Investor State Arbitration: Strategic and Tactical Perspectives on Legitimacy*, 32 Suffolk Transnat'l L. Rev. 513 (2008). *See also* George Kahale III, *Is Investor-State Arbitration Broken?*, 9 TDM 1 (2012), explaining that, even if several statistical studies have been carried out in order to demonstrate that this bias does not actually exist, 'it is highly questionable whether any statistical analysis could even answer the question posed in [the title] of this article … It is my personal experience and that of many of my colleagues, not statistics, that leads me to say what is needed'. *See also* by the same author, *A Problem in Investor/State Arbitration*, 6 TDM 1 (2009).

7 Susan Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 Fordham L. Rev. 1521 (2005). *See also* Gus Van Harten et al., *Public Statement on the International Investment Regime – 31 August 2010* (2010), http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-Aug.-2010/ (accessed 25 Apr. 2016). *See* finally, Rossella Sabia & Cesare Trecroci, *Ascesa e declino dell'Investor-State Arbitration fra contrasto alla corruzione internazionale, regolazione dei mercati e Free Trade Agreements multilaterali*, 26 Rivista dell'arbitrato 165 (2016).

8 This expression has been used by Tullio Treves, *Aspects of Legitimacy of Decisions of International Courts and Tribunals*, in *Legitimacy in International Law* 169 (R. Wolfrum & V. Röben eds, Springer 2008).

9 This could be denied by looking at the practice of ICSID tribunals in 2016, which has demonstrated that state interests are duly taken into account in investment arbitration. *See* Giovanni Zarra, *The Centrality of State Interests in Recent ICSID Practice*, forthcoming in Italian Y.B. Int'l L. 2016 (2017).

10 *See* Joost L. M. Gribnau, *Legitimacy of the Judiciary*, 6 Elec. J. Comp. L. 25, 42–44 (2002).

11 This situation is similar to what happened with diplomatic protection: while diplomatic protection was the commonly accepted way of resolving disputes related to foreign investments for the greater part of the twentieth century, it then became obsolete due to the mistrust of investors, which perceived it as too state-oriented. *See* Benedetto Conforti, *Diritto Internazionale* 246–248 (Editoriale Scientifica 2015). Now the risk is the opposite: states are considering avoiding investment arbitration because it is perceived as too investor-oriented.

The perception of bias in investment arbitration is demonstrated, inter alia, by two factors. The first is that several states are terminating (or considering terminating) their bilateral investment treaties (BITs) and denouncing (or considering denouncing) the ICSID Convention.[12] The second is the recently approved text of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union, which, if (and when) it enters into force, will replace the traditional mechanism of ad hoc arbitral tribunals issuing non-appealable decisions (set forth in almost all currently existing BITs) with a fixed tribunal of fifteen members and an appellate tribunal to be previously appointed by the CETA Joint Committee.[13]

More in detail, four main criticisms have been made against investment arbitration.[14] First, it has been stated that it is not an accountable method for solving public disputes, since it does not provide a mechanism of control (e.g. an appeal mechanism) of what has been done by international arbitrators.[15] Secondly, investment arbitration has being criticized for being (still) managed as a private form of dispute settlement.[16] Thirdly, arbitrators have been accused of a lack of independence and of regularly favouring investors.[17] Fourthly, it has been said that investment arbitration lacks coherence and that it produces unpredictable awards by deciding, without a legal rationale, similar cases in very different ways.[18]

It is arguable that the first three such criticisms have been adequately addressed by the case law and scholarly writings and currently do not need further analysis.[19]

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[12] Julius Cosmas, *Legitimacy Crisis in Investor – State Arbitration System: A Critique on the Suggested Solutions and the Proposal on the Way Forward*, 11 Int'l J. Sci. & Res. Publ'ns 1 (2014).

[13] *See* CETA, Arts 8.27 and 8.28. The text of the Treaty is available at http://trade.ec.europa.eu/doclib/docs/2014/Sept./tradoc_152806.pdf (accessed 16 Apr. 2016). It could be replied that there are, however, various reasons that might prompt a state to denounce their BITs (and ICSID) and/or stimulate new dispute resolution mechanisms; e.g. an improved negotiating position vis-à-vis the counterparty compared to when the Treaties were signed; a move towards (and incentive for) more regional investment blocs; the belief that the protection is no longer necessary to attract investments; national (populist) policies. In the opinion of this author, nevertheless, all these reasons express a dissatisfaction towards the current method of dispute settlement.

[14] Van Harten, *supra* n. 5, at 152–184.

[15] *Ibid.*, at 153–159.

[16] *Ibid.*, at 159–164.

[17] *Ibid.*, at 167–175. *See also* Thomas Hale, *Between Interests and Law* 11 (CUP 2015), according to whom dispute settlement institutions have almost never run against the interests of dominant economic groups but, nevertheless, 'within the boundaries imposed by material interests, legal ideas and the communities of experts that promote them have often been the most proximate drivers of institutional variation'.

[18] Van Harten, *supra* n. 5, at 164–167. Additionally, and in strict relation with the problem of incoherence, it has also been stated that investment arbitration 'is far from offer[ing] finality' due to the fact that requests for annulment are too frequent. *See* Gloria M. Alvarez, *The ICSID Procedure: Mind the Gap*, 10 Revist@ *e-Mercatoria* 163, 187 (2011).

[19] *See* for all, Gloria Maria Alvarez et al., *A Response to the Criticisms Against ISDS by EFILA*, 33 J. Int'l Arb. 1 (2016); Daniel S. Meyers, *In Defense of the International Treaty Arbitration System*, 31 Hous. J. Int'l L. 47 (2008); Jorge E. Vinuales, *Investor Diligence in Investment Arbitration: An Overview of Sources and Arguments* (2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2787613 (accessed 6 June 2016).

Hence, this article focuses on the fourth of them. The importance of the subject of coherence[20] is illustrated, inter alia,[21] by the outcome of the necessity defence, which has been pleaded in many of the disputes brought against Argentina arising out of the 2001 economic crisis. Despite the almost identical circumstances in which that defence has arisen, it has been treated by different tribunals in very different (and, some might say, irreconcilable) ways.

Furthermore, the lack of coherence emerged also from the perspective of integration, within international investment law, of values which are protected by other fields of public international law (such as human rights and the protection of the environment), which often are in contrast with the protection of investors, and which have been taken into consideration only occasionally and unpredictably by investment arbitrators.[22]

In light of the above, the problem of coherence will be analysed from two perspectives: first, within international investment law (for practical reasons we will refer, in this regard, to *internal coherence*); and, secondly, in the relationship with general international law (that we will call *external coherence*). This research cannot be separated from an analysis of the orderliness of international investment law: it is indeed evident that the more investment arbitration is perceived as a system of law, the more coherence is required from decision-makers.

Starting from the assumption that *a perfect and universally accepted method of dispute settlement does not exist*,[23] this article shares the view of those who say that investment arbitration has proved itself to be an efficient method of dispute settlement and, therefore, tries to address the issue of coherence by applying the

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[20] *See* Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 Arb. Int'l 357, 373 et seq.; Patrick Juillard, *Variation in the Substantive Provisions and Interpretation of International Investment Agreements*, in *Appeals Mechanisms in International Investment Disputes* 90–93, *supra* n. 5. The importance of the issue of coherence is also recognized in Art. 2 of the Tokyo Resolution by the Institut de Droit International, Eighteen Commission, Rapporteur Andrea Giardina, *Legal Aspects of Recourse to Arbitration by an Investor Against the Authorities of the Host State Under Inter-State Treaties*, 29 ICSID Rev. 701, 702 (2014).

[21] There are, of course, other egregious examples of this problem, the most well-known being the case CME v. Czech Republic, UNCITRAL, Award, 14 Mar. 2003, which arose from the same facts giving rise to a previous award (Lauder v. Czech Republic, UNCITRAL, Award, 3 Sept. 2001) and reached opposite results. On this dispute and the problems related to it see Giovanni Zarra, Parallel Proceedings in International Arbitration (Giappichelli – Eleven 2017).

[22] *See* on the subject, inter alia, Saverio Di Benedetto, *International Investment Law and the Environment* (Elgar 2013); Jose E. Alvarez, *'Beware Boundary Crossings' – A Critical Appraisal of Public Law Approaches to International Investment Law*, 17 J. World Inv. & Trade 171 (2016); Giuseppe Puma, *Human Rights and Investment Law: Attempts at Harmonization Through a Difficult Dialogue Between Arbitrators and Human Rights Tribunals*, in *Judicial Dialogue in the International Legal Order* 193 (M. Arcari & L. Balmond eds, Editoriale Scientifica 2014); Roberta Greco, *The Impact of the Human Right to Water on Investment Disputes*, 109 Rivista di diritto internazionale 444 (2015).

[23] *See* Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 Chi. J. Int'l L. 471, 479 (2009).

already existing legal tools[24] and by centralizing the role of arbitrators as the main actors responsible for ensuring the functioning of investment arbitration. For the sake of clarity, it is important to note that with the word 'coherence' we do not mean coincidence of outcomes of the various decisions. Arbitration is (and shall remain) a method of dispute settlement based on ad hoc tribunals constituted on the basis of the needs of the parties in a specific case and free to apply the proper law of the case without suffering interference from the work of other tribunals. What we mean when we say that international investment law is to be applied coherently is that *tribunals cannot decide a case simply ignoring what other tribunals have done and cannot avoid taking into account the framework in which they operate.*[25] Every dispute is a single story, but all decisions must be justified and justifiable in light of the pre-existing legal framework, by ensuring 'a certain degree of connection and engagement' with such framework.[26] Only in this way can the legitimacy of investment arbitration be ensured.[27]

Section 2 of this article will start by very briefly analysing the Argentinian cases and their application of the doctrine of state of necessity. We will then try to understand whether coherence is actually required in international investment law. We will first of all (section 3) discuss the three *extreme* doctrinal positions regarding the alleged orderliness of international investment law: starting from those who state that there is no system in international investment law and therefore it is not required that tribunals be coherent with each other (section 3.1), we will then analyse the position of those who consider international investment law as an 'autopoietic' self-referential system (i.e. a system capable of reproducing and maintaining itself without need of external interferences), within which it is required that all tribunals grant consistency of outcomes (section 3.2); and will finally turn to the position of scholars who say that standards enshrined in international investment law are today part of customary international law (section 3.3). Section 4 will then consider the *more balanced* approach of those who say that international investment law is an area of law fully integrated within public international law, in which coherence must be ensured both by referring to other investment tribunals and other rules and decisions of public international

[24] The idea to apply 'system-internal approaches' is also fostered by Schill, *supra* n. 1, at 57, 61 (2011).

[25] In this regard, *see also* Art. 2 of the Tokyo Resolution by the Institut de Droit International, *supra* n. 20, according to which '[c]onsistency of solutions in investment arbitration contributes to legal certainty for all actors involved', but '[t]he quest for consistency *does not require the mechanical application of prior practice without regard to the particular circumstances of the case or the need for the interpretation and development of the law*' (emphasis added). As stated by Philippa Webb, *Factors Influencing Fragmentation and Convergence in International Courts*, in *A Farewell to Fragmentation* 146, 151 (M. Andenas & E. Bjorge eds, CUP 2016), '[c]onvergence does not equate to uniformity; as long as disparities in treatment of the same or similar legal issues are explained and justified, the end result can still be convergence'.

[26] Sergio Puig, *The Merging of International Trade and Investment Law*, 33 Berkeley J. Int'l L. 1, 50 (2015).

[27] *See* Eduardo Savarese, *La nozione di giurisdizione nel sistema ICSID* 227 (Editoriale Scientifica 2012).

law. In light of this conclusion, section 5 will highlight the central role of arbitrators in ensuring coherence (both from the internal point of view and from the external one).

2 ICSID DECISIONS ON THE ARGENTINIAN CRISIS AND INCOHERENT APPLICATION OF THE NECESSITY DEFENCE

As is very well known, at the beginning of the present century Argentina faced a serious economic crisis that led to the issuance of the so-called 'Emergency Law' of 6 January 2002. Such law disconnected the value of the Argentinian peso from the value of the US dollar and resulted in the deprivation of the economic value of the interests of foreign investors, who had commenced economic activities in Argentina on the basis of the connection that Argentinian law operated between those two currencies.[28] Many damaged investors, as a consequence, started ICSID proceedings against Argentina under the relevant BIT or state contract. In this article, we will take into consideration only some of the several proceedings started against Argentina, namely *CMS v. Argentina*,[29] *LG&E v. Argentina*,[30] *Continental Casualty Co. v. Argentina*,[31] *Enron v. Argentina*[32] and *Sempra v. Argentina*,[33] all started on the basis of the arbitration clause contained in the BIT entered into between the United States and Argentina in the 1990s.

Such BIT, in Article XI, contained a provision stating:

[28] For a detailed factual analysis of the circumstances which lead to the economic crisis in Argentina and of the measures adopted by the government, *see* Mara Valenti, *Lo stato di necessità nei procedimenti arbitrali ICSID contro l'Argentina: due soluzioni contrapposte*, 102 Rivista di diritto internazionale 114 (2008). In general terms, for an analysis of state of necessity in international investment law *see* Marie Christine Hoelck Thjoernelund, *State of Necessity as an Exemption from State Responsibility for Investments*, 13 Max Planck UNYB 423 (2009).

[29] *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005. The decision was then subject to (unsuccessful) annulment proceedings; *see* Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, 25 Sept. 2007. On this decision *see* Massimo F. Orzan, *Il caso CMS Gas Transmission Company e lo stato di necessità economica nel diritto internazionale*, 20 Diritto del commercio internazionale 251 (2007).

[30] *LG&E Energy Corp., LG&E Capital Corp., LG&E Int'l Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 Oct. 2006. For a comment to this case *see* Stephen W. Schill, *International Investment Law and Host State's Power to Handle Economic Crises: Comment on the ICSID Decision in LG&E v. Argentina*, 24 J. Int'l Arb. 265 (2007).

[31] *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 Sept. 2008. Also, this decision was then subject to (unsuccessful) annulment proceedings; *see* Decision on the Application for Partial Annulment of Continental Casualty Co. and the Application for Partial Annulment of the Argentine Republic, 16 Sept. 2011.

[32] *Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic* (also known as *Enron Creditors Recovery Corp. & Ponderosa Assets, L.P. v. Argentine Republic*), ICSID Case No. ARB/01/3, Award, 22 May 2007 and Decision on the Application for Annulment of the Argentine Republic, 30 July 2010.

[33] *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 Sept. 2007 and Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010.

> This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interest.

On the basis of this provision, and of Article 25 of International Law Commission (ILC) Articles on State Responsibility, that set out the conditions in the presence of which it is possible for a state to invoke state of necessity in international law,[34] and which, in accordance with the opinion of the vast majority of scholars,[35] was considered (both by Argentina and by the tribunals involved in the abovementioned disputes) an expression of customary international law, in all the aforementioned disputes Argentina claimed that the measures it adopted following the economic crisis were dictated by a state of necessity which precluded wrongfulness and exempted the host state from the payment of an indemnity.

Curiously, the tribunals (and the ad hoc committees) reached very different conclusions on the issue of necessity. Furthermore, and most importantly, some of them completely failed to mention the conclusion reached by the others, notwithstanding the circumstance that the factual framework at the basis of the disputes was almost identical (e.g. the *LG&E* tribunal departed from the results reached by the *CMS* tribunal fifteen months earlier without even mentioning the *CMS* award).[36]

In brief, it is possible to sum up the various decisions as follows. The *CMS, LG&E*, *Enron* and *Sempra* tribunals agreed that it was possible to invoke necessity in situations of economic crisis, and that Article XI of the BIT should be applied jointly with Article 25 of the ILC Articles (which the tribunals impliedly equated to customary international law). However, they disagreed on whether the requirements set forth by Article 25 were met. The *CMS, Enron* and *Sempra* tribunals argued that the threshold posed by Article 25 was not met and Argentina was not in a position to make recourse to necessity. To the contrary, the *LG&E* tribunal

[34] '1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity.' For a complete analysis of the legal framework and the debate surrounding this article *see* Robert Sloane, *On the Use and Abuse of Necessity in the Law of State Responsibility*, 106 Am. J. Int'l L. 447 (2012); Pietro Pustorino, *Lo stato di necessità alla luce della prassi recente*, 103 Rivista di diritto internazionale 411 (2009); Giancarlo Scalese, *La rilevanza delle scusanti nella teoria dell'illecito internazionale* (Editoriale Scientifica 2008).

[35] *See* e.g. (and also for the case law and authors there cited), Di Benedetto, *supra* n. 22, at 168–172.

[36] *See* August Reinisch, *Necessity in International Investment Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases?*, 8 J. World Inv. & Trade 191 (2007).

found that Argentina was facing a state of necessity from 1 December 2001 to 26 April 2003. According to the latter tribunal, Argentina was exempted from the obligation to pay an indemnity to the investor for the period during which it was facing the state of necessity.[37] The *CMS* ad hoc committee, in turn, while refusing to annul the award due to a strict interpretation of Article 52 of the ICSID Convention,[38] found (*obiter*) that the tribunal was completely erroneous in equating Article XI of the BIT and Article 25 of the ILC Articles. A similar legal path was followed by the *Sempra* ad hoc committee, which, without strictly applying Article 52 of the ICSID Convention, annulled the Tribunal's award. To the contrary, the *Enron* ad hoc committee held that the tribunal was entitled to equate Article XI of the BIT and customary international law, but argued that it failed in correctly applying the customary defence; for this reason, the committee annulled the award.[39] Finally, applying a completely different line of reasoning, the *Continental Casualty Co.* tribunal, first of all, accepted the *CMS* ad hoc committee's conclusion that Article XI of the BIT is autonomous from customary international law, and, without giving any further particular explanation, at paragraph 192 stated that:

> [s]ince the text of Art. XI derives from the parallel model clause of the U.S. FCN treaties and these treaties in turn reflect the formulation of Art. XX of GATT 1947, the Tribunal finds it more appropriate to refer to the GATT and WTO case law, which has extensively dealt with the concept and requirements of necessity … rather than to refer to the requirement of necessity under customary international law.

The tribunal, therefore, found that Argentina was indeed facing a state of necessity according to the WTO approach and dismissed all except one of the investor's claims.[40]

As foreseeable, very different (and irreconcilable) opinions on the outcome of the above cases can be found also in scholarship related to the above decisions.[41]

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[37] For a detailed comparison of the two cases *see Ibid.*, at 197–214.

[38] On the different possible interpretations of Art. 52 of the ICSID Convention *see* Irmgard Marboe, *ICSID Annulment Decisions: Three Generations Revisited*, in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* 200 (C. Binder, U. Kriebaum, A. Reinisch & S. Wittich eds, OUP 2009).

[39] *See* for a comment on the *CMS, Sempra* and *Enron* ad hoc committee's decisions, Promod Nair & Claudia Ludwig, *ICSID Annulment Awards: The Fourth Generation?* (2011), http://www.lexology.com/library/detail.aspx?g=7218cb56-7a64-426f-8cc0-8475303444e6 (accessed 18 Apr. 2016).

[40] For a brief analysis of the case, *see* Jose E. Alvarez & Tegan Brink, *Revisiting the Necessity Defence*, in *Yearbook on International Investment Law & Policy 2010–2011* 315, 320–325 (K. P. Sauvant ed., OUP 2012). For a comparison of the necessity defense in international investment law and WTO law, *see* Andrew D. Mitchell & Caroline Henckels, *Variations on a Theme: Comparing the Concept of 'Necessity' in International Investment Law and WTO Law*, 14 Chi. J. Int'l L. 93 (2013).

[41] In this regard, note, inter alia, Valenti, *supra* n. 28, at 121–125, who found that the *CMS* and *LG&E* tribunals failed to apply the customary rules on treaty interpretation; Alvarez & Brink, *supra* n. 40, at

This article is not the place to discuss the relevance of state of necessity in those disputes. There is extensive and detailed literature on this subject.[42] What is important to highlight here is that the legal framework resulting from the above decisions is exactly what should be avoided in order to safeguard the legitimacy of international investment law. If coherence is a key element for the legitimacy of a certain system of justice, the decisions regarding the necessity defence in the Argentinian cases are a step forward towards mistrust for investment arbitration: not only did they reach irreconcilable conclusions, but often they completely disregarded each other. The above concerns are illustrated by what is stated by an Italian scholar, who said:

> this contradiction of outcomes is regrettable and lead us to question whether ICSID is an adequate mechanism for the settlement of disputes. Situations such as the ones just discussed … do not support the credibility of the system and – from a theoretical point of view – the development of international law.[43]

3 EXTREME DOCTRINAL APPROACHES TO ORDERLINESS OF INTERNATIONAL INVESTMENT LAW AND NEED FOR COHERENCE

3.1 International investment law as a patchwork of treaties and tribunals

As one commentator has stated, at a first glance:

> the image which best synthesizes [international investment law and arbitration] is that of a patchwork, given its fragmentation into a multiplicity of autonomous legal instruments and, by the same token, the settlement of investment disputes by independent investment tribunals. This patchwork provides [the] notion of fragmentation in the international law on foreign investments, and if taken to its extreme consequences, *would even prevent scholars from construing international investment law in a unitary manner*.[44]

325–358, who made an extensive critique of the *Continental Casualty Co.* award and who strongly disagree with Alec Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier*, 4 L. & Ethics Hum. Rts. 47, 68–69 (2010). For a critic of the *CMS, Sempra* and *Enron* awards *see* William W. Burke-White & Andreas Von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures provisions in Bilateral Investment Treaties*, 48 Va. J. Int'l L. 307 (2008).

[42] *See* for more recent works (other than the abovementioned contributions), Elizabeth A. Martinez, *Understanding the Debate Over Necessity: Unanswered Questions and Future Implications of Annulments in the Argentine Cases*, 23 Duke J. Comp. & Int'l L. 149 (2012); Cynthia C. Galvez, *'Necessity', Investor Rights, and State Sovereignty for NAFTA Investment Arbitration*, 46 Cornell Int'l L.J. 143 (2013); Kelley Chubb, *The 'State of Necessity' Defense: A Burden, Not a Blessing to the International Investment Arbitration System*, 14 Cardozo J. Conflict Res. 531 (2013).

[43] Valenti, *supra* n. 28, at 135 (author's translation).

[44] Emphasis added. Di Benedetto, *supra* n. 22, at 22 (who, however, has criticized this approach). Similarly, it has been stated that 'international investment law … is not a "system" in the sense in

Such a description seems to perfectly suit the reality if one thinks of the more than 3,000 BITs in force and of the ad hoc nature of all investment tribunals, constituted for solving a single dispute.[45] Indeed, if one just thinks that decisions usually are made by ad hoc panels established for the express purpose of the dispute at hand,[46] each tribunal needs to carry out its work within the strict limits of the factual framework of the case and of the wording of the underlying treaty.[47] As stated by in *AES*, in principle 'each tribunal is sovereign, and may retain … a different solution for resolving the same problem'.[48]

In a framework like this there would be no need for coherence. This idea would be welcomed by scholars who think that the task of arbitrators is to do justice in the single case and that tribunals should not care about ensuring the predictability of their decisions[49]: arbitrators should do justice[50] and not follow

which most national legal regimes are. Substantively, there is no comprehensive multilateral investment treaty to which sovereigns can accede. Almost all investment treaties are negotiated between two sovereigns, and at present there are over three thousand bilateral investment treaties … The decentralized nature of the dispute resolution of choice, arbitration, also contributes to the picture of fragmentation'. *See* Irene M Ten Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration*, 51 Colum. J. Transnat'l L. 418, 425 (2013). The 'patchwork' nature of BITs has been also sustained by Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 Nw. J. Int'l L. & Bus. 327, 372–375 (1993), who stated that, notwithstanding the existence of certain principles common to all BITs, 'a close analysis of the various BITs … has revealed that there is not sufficient consistency in the terms of the investment treaties to find in them support for any definite principle of customary international law'.

45 *See* Anna Joubin-Bret, *The Governing Diversity and Inconsistency in the IIA System*, in *Appeals Mechanisms in International Investment Law* 137–139, *supra* n. 5.

46 Sornarajah, *supra* n. 5, at 41. *See also* Vid Prislan, *Non-investment obligations in Investment Treaty Arbitration: Towards a Greater Role for States?*, in *Investment Law Within International Law: Integrationist Perspectives* 450, 455 (Freya Baetens ed., CUP 2013), who underlined the risk of applying the ad hoc, private and *inter partes* model of dispute settlement of international commercial arbitration in investment arbitration, which, by nature, involves different (public) policy considerations. *See* on the different backgrounds required for arbitrators in commercial and investment arbitration, Karl-Heinz Böckstiegel, *Commercial and Investment Arbitration: How Different Are They Today? The Lalive Lecture 2012*, 28 Arb. Int'l 577, 582 (2012).

47 Joubin-Bret, *supra* n. 45, at 139. In this regard, what has been written by Webb, *supra* n. 25, at 149, is very significant, according to which '[a]rbitral tribunals usually exist only for the purposes of the specific dispute; the tribunal disbands once the case is over and the award rendered. The registries, arbitrators, and applicable rules vary from case to case. There is inconsistent publication of pleadings and reporting of awards, which hinders the accumulation of a body of jurisprudence that may be referred to by parties and arbitrators. *All these factors contribute to a sense of deciding in a vacuum rather than as part of an international legal system*' (emphasis added). However, the same author, at 149, acknowledges that also ad hoc tribunals could begin to have a perspective and long-term view by adopting reasoning apt to being adopted also in future cases.

48 *AES Corp. v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 Apr. 2005, para. 30. However, it should be noted that, notwithstanding this statement, the *AES* tribunal applied a different approach, quite favourable to arbitral precedent.

49 *See* Thomas Schultz, *Against Consistency in Investment Arbitration*, King's College London Dickinson Poon School of Law Legal Studies Research Paper Series, paper no. 2013-3 (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2318358 (accessed 24 Apr. 2016). *See also* Ten Cate, *supra* n. 44, at 420.

50 Ten Cate, *supra* n. 44, at 422.

precedents that might not reflect their best interpretation of the law. There is no systemic reason to believe that any one tribunal has greater expertise than others and therefore it would be unjustified to show deference to what has been done by other arbitrators.[51] Moreover, inconsistency is allegedly valuable because 'it keeps the investment arbitration community vigilant' and 'contributes to the development and refinement of substantive and procedural standards'.[52]

Hence, the reasoning of the *LG&E* tribunal, which had reached its conclusions while simply ignoring the already issued *CME* award, would be fully justifiable.[53]

This approach is not convincing. First of all, as it will be shown below, it does not reflect the attitude of the vast majority of tribunals and the quite unanimous opinion of the scholarship, both recognizing a certain degree of coherence in international investment law and awards.[54] Indeed, as stated by Reinisch when referring to the *LG&E* award, 'it is hardly understandable that a tribunal deciding such an important issue disregarded the findings of a previous tribunal'.[55] Secondly, and most importantly, this approach damages the legitimacy of international investment law,[56] by enhancing a perception of inequality of the parties in different disputes (who could perceive to have been unjustifiably and, above all, without an explanation treated differently notwithstanding the equality of circumstances) and by undermining the credibility of tribunals, which could seem completely detached from the legal framework in which they operate.[57]

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[51] *Ibid.*, at 443.

[52] *Ibid.*, at 471. This approach seems to be shared also by Sir Christopher Greenwood, *Unity and diversity in international law*, in *A Farewell to Fragmentation, supra* n. 25, at 37, 53 when he says that every BIT has its own meaning and 'it is quite wrong to treat the language of BITs simply as "boilerplate" texts which must necessarily be given a single, unified meaning'.

[53] *See* Judith Gill Q.C., *Is There a Special Role for Precedent in Investment Arbitration?*, 25 ICSID Rev. 87, 88 (2010), who, even if admitting a certain degree of persuasiveness of previous awards, has stated that '[a]n arbitral award will be valid even if it contains no references to any previous cases'. In this regard, it can be noted that it is undoubtedly true that the award will be valid. It is, however, doubtful if such an award will be legitimate.

[54] *See* s. 4 *infra*. In this regard, it is sufficient to quote some words from August Reinisch, *The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise f a More Effective System? Some Reflections from the Perspective of Investment Arbitration*, in, *International Law Between Universalism and Fragmentation, Festschrift in Honour of Gerhard Hafner* 107, 123 (I. Buffard et al. eds, Brill 2008), according to whom '[i]n an almost schizophrenic fashion, international courts and tribunals regularly first reject any *stare decisis* and then follow their own and others' precedents'.

[55] Reinisch, *supra* n. 54, at 118.

[56] *Ibid.*, at 119. In this regard, it could be said that the only element providing for the legitimacy of investment arbitration is the respect of party autonomy (as expressed in the BIT). However, this position seems very simplistic and does not represent the reality.

[57] *See* in this regard, Frédéric G. Sourgens, *Law's Laboratory: Developing International Law on Investment Protection as Common Law*, 34 Nw. J. Int'l L. & Bus. 181, 186 (2014), according to whom: 'Although each decision is not binding, it would be impossible for tribunals to exercise their function without recourse to jurisprudence. Jurisprudence sets the parameters of relevant record facts (as opposed to irrelevant ones) on the basis of which the legal determination of the case must proceed.' In general

3.2 International investment law as an autonomous and autopoietic system

A second approach to international investment law and arbitration, opposite to the just described idea of patchwork, regards investment treaty arbitration:

> as part of an *autopoietic, self-referential, and normatively closed system of law* that overarches the myriad number of bilateral investment treaty relations, unites them under common principles governing international investment relations, and contributes to providing a legal framework for the functioning of the global economic system.[58]

This idea, according to its proposers, is based on two main assumptions. First of all, the existence of an autonomous regime for investment would be confirmed by the considerable use of precedents made by international investment tribunals.[59] Secondly, the idea of international investment law as an autopoietic system is supported by the strong convergence in the application of the standards of treatment encapsulated in almost all BITs, the vague formulation of which has given a central role to decision-makers who, through the operation of precedent, have developed standards which are autonomous from specific BITs and have their own life.[60]

In this regard, it has been highlighted that the idea of a self-referential and normatively closed system immediately leads us to think of international investment law and arbitration as a self-contained regime, completely detached from the surrounding framework of public international law.[61] According to the International Law Commission, the concept of a self-contained regime 'is used to refer to interrelated wholes of primary and secondary rules, sometimes also referred to as "systems" or "subsystems" of rules that cover some particular problem differently from the way it would be covered under general international law'.[62] The concept of a self-contained regime means that every system evolves so

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terms *see also* Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. Int'l L. & Pol. 697, 699 (1999).

58 Emphasis added. Stephan W. Schill, *The Multilateralization of International Investment Law* 280–281 (CUP 2014). A similar approach has been proposed by Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 Harv. Int'l L.J. 427 (2010). Louis T. Wells, *The Emerging Global Regime for Investment: A Response*, 52 Harv. Int'l L.J. – Online 42 (2010) has also sustained this opinion.

59 Stephan W. Schill, *System-Building in Investment Treaty Arbitration and Lawmaking*, 12 Ger. L.J. 1083, 1096 and 1103 (2011). Salacuse, *supra* n. 58, at 461 and 467.

60 Schill, *supra* n. 59, at 1086 and 1092.

61 Di Benedetto, *supra* n. 22, at 43–44.

62 International Law Commission, Fifty-eighth session, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission Finalized by Marti Koskenniemi*, 68 (2006). There are plenty of works on fragmentation in general international law. It is obviously impossible to give an account of all of them in this article and, for this reason, the author will limit himself and will mainly cite works related in some way to international investment law. The concept of fragmentation, however, must be distinguished from regionalism, on which *see* Paolo Fois, *Sulle pretese novità del regionalismo internazionale contemporaneo*, 106 Rivista di diritto internazionale 5 (2012).

as to perpetuate itself and ensure its survival (autopoiesis).[63] The whole picture of international law would, thus, result in the sum of the various self-contained regimes that compose it; scholars talk, in this regard, of 'fragmentation' of international law.[64]

According to this approach, investment arbitral tribunals should apply a very strong idea of internal coherence and ensure, save for rare exceptions, consistency of outcomes among awards within the regime.[65] In the opinion of the present author, this approach is clearly expressed in the *Saipem v. Bangladesh* award, where it is said that an investment tribunal, 'subject to compelling contrary grounds, has *a duty* to adopt solutions established in a series of consistent cases'.[66] External coherence, however, is not a real concern for the proposers of this approach.

By applying this theory to the abovementioned Argentinian cases, the hypothetical result would most likely have been that the decisions of the tribunals should have been based only on the interpretation of Article XI of the United States-Argentina BIT. As a consequence, first of all, reference to other regimes (such as WTO law) would not have been welcome; thus the *Continental Casualty Co.* award would not have been an acceptable and legitimate one. Secondly, it is highly probable that also reference to customary international law would not have been well-received by the supporters of international investment law as a self-contained regime.

However, the concept of self-contained regimes has been strongly criticized by scholars, both in general terms and in particular as applied to international investment law.

Generally speaking, it has been said that fragmentation is an illusion,[67] and a misnomer,[68] because all the alleged regimes are founded on international law norms and general international law is always called to fill-in *lacunae* of the various systems.[69] It has even been said that '[i]t is doubtful whether such isolation is even

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63 Anthony J. Colangelo, *A Systems Theory of Fragmentation and Harmonization* (2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=27544021, (accessed 31 May 2016).

64 A very recent paper on the subject is Harlan G. Cohen, *Fragmentation*, Dean Rusk International Law Center, Research Paper Series, Paper 2016-12 (2016), http://ssrn.com/abstract=27857192 (accessed 31 May 2016).

65 In the words of Stephan W. Schill, *The Multilateralization of International Investment Law: The Emergence of a Multilateral System of Investment Protection on the Basis of Bilateral Treaties*, SIEL Online Proceedings Working Paper No. 18/08 (2008) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1151817&%3Brec=1&%3Bsrc21 (accessed 31 May 2016), 'precedent has become both quantitatively as well as qualitatively the premier determinant for the outcome of investor-State disputes'.

66 Emphasis added. *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction, 21 Mar. 2007, para. 67.

67 Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. Int'l L. & Pol. 791, 796 (1999).

68 International Law Commission, *supra* n. 62, at 100.

69 Benedetto Conforti, *Il ruolo del giudice nel diritto internazionale*, 1 Eur. J. Legal Stud. 1, 2 (2007).

possible: a regime can receive (or fail to receive) legally binding force ("validity") only by reference to (valid and binding) rules and principles *outside* it'.[70]

More in detail, in the opinion of this author there are certain specific issues that lead us not to consider international investment law as an autonomous and self-referential system. It is necessary, first of all, to highlight that (as the Argentinian cases on state of necessity demonstrate) the consistency of outcomes proposed by the regime proposers has still not been reached in international investment law. Secondly, as it will be seen below,[71] investment tribunals very often refer to general international law and other fields of international law.[72] A third (and final) reason is that, in the case of regime failures (i.e. in the case where the remedies set forth in the self-contained regime fail in their goals), the recourse to general international law is the only available solution. A clear example of this is Article 27(1) of the ICSID Convention, according to which, if an ICSID award is not complied with, diplomatic protection (i.e. the customary remedy for the protection of foreign investments) becomes applicable again.[73]

In light of the above, it is possible to conclude that, even if it is undeniable that international investment law has developed a certain degree of specificity and coherence, it is not possible to consider it as a self-contained regime.[74]

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70 Emphasis in original. International Law Commission, *supra* n. 62, at 100. A similar statement can be found in Eirik Bjorge, *The Convergence of the Methods of Treaty Interpretation: Different Regimes, Different Methods of Interpretation?*, in *A Farewell to Fragmentation, supra* n. 25, at 498, 533. A different criticism can be found in Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 Stan. L. Rev. 595 (2007). These authors have stated that fragmentation is a sword used by powerful states in order to preserve their dominance. Ignaz Seidl-Hohenveldern, *International Economic Law* 1 (Kluwer 1999), has ironically stated that fragmentation is only 'a plea to increase the number of academic posts in the field of international law'.

71 *See* s. 4 *infra*.

72 *See* in this regard, Fulvio Maria Palombino, *Il trattamento giusto ed equo degli investimenti stranieri* 23–60 (Il Mulino 2012; an English version of the book, *Fair and Equitable Treatment and the Fabric Of General Principles*, Asser – Springer 2017, is fortchoming), who, by examining the various doctrinal positions in relation to the nature of the FET standard, has impliedly demonstrated that all these positions are somehow related to general international law; *see also* Di Benedetto, *supra* n. 22, at 54–71.

73 In light of the above, it is not possible to share the opinion of Lorenzo Gradoni, *Regime failure nel diritto internazionale* 337–342 (CEDAM 2009), according to whom every situation of failure is generally dealt with within the single self-contained regime. The author, who does not consider international investment law in his book, at 337 further seems to say that there are no rules in (the entirety of) international law dealing with a situation of regime failure. In light of what stated is stated above (concerning Art. 27 of the ICSID Convention) this statement does not seem convincing.

74 This position is also shared by Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, in *International Economic Law: The State and Future of the Discipline* 265, 270 (C. B. Picker, I. D. Bunn & D. W. Arner eds, Hart 2008), who stated that 'it is perhaps overreaching to suggest there is a "system" of investment treaty arbitration at all'.

3.3 International investment law standards as part of customary international law

The third doctrinal approach to international investment law, authoritatively sustained by Lowenfeld[75] and Schwebel,[76] whose reasoning has been strongly supported and developed by Alvarez,[77] does not consider international investment law as a regime or a system but instead holds that BIT standards have today reached 'the level of customary law effective even for non-signatories'.[78] This thesis disregards the discussion on orderliness in international investment law because, by framing international investment law (or at least part of it) within customary international law, it does not need to consider whether a regime that constitutes *lex specialis* with regard to the rest of international law exists. This idea is mainly based on the fact that standards set forth in BITs (allegedly) usually reflect pre-existing general international law.[79] Moreover, they are largely and equally used in almost all existing BITs (*diuturnitas*)[80] and are today accepted, at least by way of acquiescence, by almost all states which wish to attract foreign investments (*opinio juris sive necessitatis*).[81]

According to this approach, internal coherence within international investment law has reached such a high level that today it is possible to talk about international investment law as customary, while external coherence is obviously to be ensured on the basis of the fact that international investment law is fully involved in the larger framework of general international law.[82]

Looking at the Argentinian cases, the application of this approach would have meant that the determination of state of necessity with reference to both Article XI of the BIT and Article 25 of the ILC Articles would have been fully legitimate. It is also arguable that, by way of contextual and systemic interpretation on the basis of Article 31 of the 1969 Vienna Convention on the Law of Treaties,[83] arbitrators would have been entitled to refer to WTO law in order to determine if a state of

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75 Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 Colum. J. Transnat'l L. 123 (2003).

76 Stephen M. Schwebel, *The Influence of Bilateral Investment Treaties on Customary International Law*, 2 TDM 1 (2005).

77 José E. Alvarez, *A BIT on Custom*, 42 N.Y.U. J. Int'l L. & Pol. 17 (2009).

78 Lowenfeld, *supra* n. 75, at 129.

79 Alvarez, *supra* n. 77, at 31 and 41.

80 *Ibid.*, at 49–51. This approach has been strongly criticized by Kishoiyian, *supra* n. 44, at 372.

81 Alvarez, *supra* n. 77, at 57–60.

82 *Ibid.*, at 71–77.

83 Such a rule sets forth the main criteria for interpreting an international treaty. According to para. (1) of Art. 31, providing, inter alia, for contextual interpretation '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context* and in the light of its object and purpose' (emphasis added). Systemic interpretation is, in turn, set forth by Art. 31(3)(c), according to which '[t]here shall be taken into account, together with the context: … (c) Any relevant rules of international law applicable in the relations between the parties'.

necessity occurred (following the interpretative path of the *Continental Casualty Co.* tribunal).[84]

However, it is to be noted that this approach does not seem acceptable from the theoretical point of view. Indeed, as stated by Prof. Palombino,[85] there are two main criticisms that can be addressed to those who equate BIT standards (and in particular the fair and equitable treatment (FET)) to customary international law. First of all, there are no indications in the text of treaties and in the case law that seem to suggest this conclusion.[86] Contrariwise, as stated by the International Law Association (ILA) Committee on the Formation of Customary (General) International Law, 'there is no presumption that a succession of similar treaty provisions gives rise to a new customary rule with the same content'.[87] Secondly, and more importantly, the element of the *opinio juris*, essential in order to prove a custom,[88] is lacking: it is insufficient to generally refer to the interest of states to improve investments or, even worse, to assume that the *opinio juris* exists because states acquiesced to the application of BIT standards.[89] On the contrary, the case law shows that respondent states always try to contest the content of these standards as developed in the earlier case law, which is often perceived as pro-investors.[90] For these reasons, this approach does not seem the

84 Alvarez, *supra* n. 77, at 65.

85 Palombino, *supra* n. 72, at 35–38.

86 The author finds support in the conclusions of *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 11 Oct. 2002, paras 116, 117 and 125, where, in order to deny the possibility that the FET corresponds to the customary international minimum standard of treatment, it is said that 'it is unconvincing to confine the meaning of "fair and equitable treatment" of foreign investments to what those terms – had they been current at the time – might have meant in the 1920s when applied to the physical security of an alien'. Indeed, in the recent case *Bilcon of Delaware et al. v. Government of Canada*, NAFTA (UNCITRAL) PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 Mar. 2015, para. 440, the tribunal expressly stated that 'there is no consensus yet on a formulation that best suits the modern evolution of the standard'.

87 International Law Association, Report of the Sixty-Ninth Conference (London, 2000) 712 (2000). The same ILA Report further stated at 759: 'some have argued that provisions of bilateral investment protection treaties … are declaratory of, or have come to constitute, customary law. But … there seems to be no special reason to assume that this is the case, unless it can be shown that these provisions demonstrate a widespread acceptance of the rules set out in these treaties outside the treaty framework' (emphasis in original).

88 Conforti, *supra* n. 11, at 37.

89 *See* in this regard, *United Parcel Service of America, Inc. v. Canada*, NAFTA/UNCITRAL, Award on Jurisdiction, 22 Nov. 2002, para. 97. Campbell McLachlan QC, *Investment Treaties and General International Law*, 57 ICLQ 361, 393–394 (2008), has expressed the idea that the promulgation of Model BITs could, however, constitute a step forward towards the inclusion of these standards within customary international law. However, this author does not seem to draw any conclusions in this regard, 'given the paucity of any State practice outside the treaties' reach'.

90 This is particularly true when respondent states try to argue that a violation of BIT standards does not take place when other essential values are at stake and this would justify the states' power to regulate, even if to the detriment of foreign investors. The debate that takes place every time that human rights are at stake in investment arbitration demonstrates that the content of BIT standards is far from being settled. *See* in this regard, Tamar Meshel, *Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond*, 6 J. Int'l Disp. Settlement 277 (2015); Pierre Thielbörger, *The Human Right to Water Versus Investor Rights: Double-Dilemma or Pseudo-Conflict?*, in *Human Rights in International Investment*

most suitable to describe how orderliness and coherence work in international investment law.

4 REQUIREMENTS OF INTERNAL AND EXTERNAL COHERENCE IN INTERNATIONAL INVESTMENT LAW

The present section will try to finally assess the orderliness and coherence of international investment law both from the internal and from the external point of view. The analysis will not only be based on doctrinal approaches, but also on what arbitral tribunals have said in this regard.

4.1 Internal coherence

From the internal point of view, the existence of a certain degree of orderliness and coherence in international investment law is, first of all, demonstrated by the adoption by arbitral tribunals of the so-called 'taking into account approach' with regard to the issue of arbitral precedent in international investment law.[91] According to this approach, arbitral tribunals have a 'functional duty' to consider previous decisions on the same matter, even if they are not bound by the decisions of previous tribunals. Such a duty is different from the 'moral obligation to follow precedent' to which Prof. Kaufmann-Kohler referred in her 2006 Freshfield Lecture.[92] She emphasized the need to *follow* precedents for creating consistency. It is the present author's opinion that, even if this is, of course, desirable, previous cases need not necessarily be *followed*, but it is

Law and Arbitration 487 (P. M. Dupuy, E. U. Petersmann & F. Francioni eds, OUP 2009); Fabrizio Marrella, *On the Changing Structure of International Investment Law: The Human Right to Water and ICSID Arbitration*, 12 Int'l Community L. Rev. 335 (2010). The tension between the investors' rights and the states' power to regulate is reflected by the adoption, in the abovementioned recently approved text of the CETA, of a provision (Art. 1.9) which expressly recognizes the freedom of states to regulate matters related to water, as well as of a provision that provides for a closed list of situations that may amount to FET violations (Art. 8.10). *See* Nathalie Bernasconi-Osterwalder, *Giving Arbitrators Carte Blanche – Fair and Equitable Treatment in Investment Treaties*, in *Alternative Visions of the International Law on Foreign Investments – Essays in Honour of Muthucumaraswamy Sornarajah* 324, 344–345 (C. Lim ed., CUP 2016).

[91] Such an approach has been proposed and is strongly supported by Palombino, *supra* n. 72, at 177–192. The author has perfectly demonstrated that the taking into account approach is the most applied standard in the whole framework of international law. This is also perfectly demonstrated by the recent ICJ Decision on *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, 3 Feb. 2015, in which the ICJ, at para. 125 'recalls that, in its Judgment of 26 February 2007 in the *Bosnia and Herzegovina v. Serbia and Montenegro* case, it considered certain issues similar to those before it in the present case. It will *take into account* that Judgment to the extent necessary for its legal reasoning here. This will not, however, preclude it, where necessary, from elaborating upon this jurisprudence, in light of the arguments of the Parties in the present case' (emphasis added).

[92] Kaufmann-Kohler, *supra* n. 20, at 374.

important that they are *taken into account* in awards in order to ensuring the legitimacy of decisions. Prof. Kaufmann-Kohler's focus seems to be on consistency of outcomes, while the present article's effort is to highlight the need for a coherent legal framework.[93]

The rationale behind this approach is that arbitral tribunals have, on the one side, the moral task to meet the expectations of the parties generated on the basis of previous awards (such a duty being based also on the arbitrators' need to issue a decision that is justifiable and therefore can be rationally accepted by the parties),[94] and, on the other side, a legal duty to issue the most correct award for the case at hand. Arbitrators, as it will be explained in section 5 below, must balance those duties.[95] The taking into account approach is perfectly represented by the *El Paso v. Argentina* award, in which the tribunal stated that:

> ICSID arbitral Tribunals are established ad hoc … It is nonetheless a reasonable assumption that international arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by other arbitration organs.[96]

The case law clearly shows that this approach is the one which best represents a *balance* among the various decisions of arbitral tribunals on the issue of precedent.[97] Indeed, this position is confirmed by the fact that the taking into account approach has been adopted by the drafters of the CETA as a solution to the problem of coherence in the case of parallel arbitration proceedings which can have a 'significant impact' on each other.[98]

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93 It is the present author's opinion that, however, consistency of outcomes should necessarily be ensured in cases of parallel proceedings (such as the *CME* and *Lauder* cases, on which *see supra* n. 21). *See* in this regard, Zarra, *supra* n. 21, at 37 et seq.

94 Kaufmann-Kohler, *supra* n. 20, 374. It has been demonstrated, in this regard, that precedent has a social function. *See* Moshe Hirsch, *The Sociology of International Investment Law*, The Hebrew University of Jerusalem Research Paper No. 13-13 (2013), ssrn.com/sol3/papers.cfm?abstract_id=232232820 (accessed 2 May 2016). With the same vein *see also* W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 Wm. & Mary L. Rev. 1895, 1900 (2010).

95 In the words of Joost Pauwelyn, *At the Edge of Chaos?*, 29 ICSID Rev. 372, 376 (2014), what arbitrators have to seek is 'the edge of chaos', i.e. not seek for disorder or randomness but the right balance between order and flexibility. Pauwelyn has also stated, at 383, that investment arbitration could be seen as a 'complex adaptive system', i.e. 'a system in which large networks of components with no central and simple rules of operation give rise to complex collective behaviour, sophisticated information processing, and adaptation via learning or evolution'.

96 *El Paso Energy Int'l Co. v. Argentina*, ICSID Case No. ARB/03/15, 31 Oct. 2011, para. 39.

97 For a statistical analysis of the approach of tribunals in relation to precedent, *see* Jeffery P. Commission, *Precedent in Investment Treaty Arbitration*, 24 J. Int'l Arb. 129 (2007).

98 CETA, Art. 8.24 provides that: 'Where a claim is brought pursuant to this Section and another international agreement and: (a) there is a potential for overlapping compensation; or (b) the other international claim could have a significant impact on the resolution of the claim brought pursuant to this Section, the Tribunal shall, as soon as possible after hearing the disputing parties, stay its proceedings or *otherwise ensure that proceedings brought pursuant to another international agreement are taken into account in its decision, order or award*' (emphasis added).

In this regard, however, it must be clarified that, as largely confirmed by the case law,[99] no binding precedent exists in international investment law.

Some authors have talked about arbitral case law as '*jurisprudence constante*', i.e. 'a "persisting jurisprudence" that secures "unification and stability of judicial activity"'.[100] This approach seems to be supported by decisions such as *Saipem*,[101] which held that there is a duty to follow precedents unless there are *strong* reasons not to do so.[102] However, even this approach seems too extreme to represent a system of justice in which we still find decisions such as the aforementioned *LG&E* award which, as we have said above, has completely ignored a previous award (*CMS*) that decided a very similar dispute on the basis of the same BIT.

What seems plausible in light of the taking into account approach is to talk of the *persuasive* value of previous awards. This means that well-reasoned awards, rationally justifiable and legally correct, can be considered by arbitrators to be more valuable than others in order to reach their decisions.[103]

For the above reasons, it seems possible to state that, even if it is still impossible to talk about a system, a *network* of tribunals 'which act *as if* they are part of a single system of dispute resolution'[104] exists in international investment

[99] It is possible to mention, e.g. what was stated by the arbitral tribunal in *LESI S.p.A. & Astaldi S.p.A. v. Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006, para. 56. In this award, notwithstanding the fact that the tribunal was the same as that in *LESI-DIPENTA Consortium Groupement LESI-DIPENTA v. République algérienne démocratique et populaire*, ICSID Case No. Arb/03/8, and the circumstance that the parties had accepted that the documentation of the earlier proceedings could be considered in the second dispute, the tribunal stated that 'la présente procedure est formellement indépendante de la première' and refused to consider the latter as a binding precedent. *See* in this regard, Andrés Rigo Sureda, *Precedent in Investment Treaty Arbitration*, in *International Law for the 21st Century, supra* n. 38, at 830.

[100] Bjorklund, *supra* n. 74, at 265. *Jurisprudence constante* can be defined as a 'slighter' version of *stare decisis* which has been developed by French case law, according to which previous decisions of the higher courts must be applied as quasi-binding precedents unless there are strong reasons not to do so.

[101] *Supra* n. 66. The President of the Tribunal in *Saipem* was Prof. Kaufmann-Kohler, who (as shown *supra*) endorses an approach according to which consistency with precedents should have a pivotal role in awards.

[102] This opinion is also sustained by Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 Fordham Int'l L.J. 1014, 1016 (2007). Similarly, Jason Haynes, *The Emergence of a Doctrine of de jure horizontal stare decisis at the Caribbean Court of Justice: Fragmentation or Pluralism of International Law?*, 5 J. Int'l Disp. Settlement 498, 521 (2014), has talked about a '*de facto* system of *stare decisis*'.

[103] This is what is sustained by Valendina S. Vadi, *Towards Arbitral Path Coherence & Judicial Borrowing: Persuasive Precedent in Investment Arbitration*, 5 TDM 1, 2 (2008). Obviously, it must be remembered that other very important elements of persuasion are the reputation and status of the tribunal issuing the award.

[104] Emphasis added. Palombino, *supra* n. 72, at 195. The word 'network' has been used by Jurgen Kurtz, *Building Legitimacy Through Interpretation in Investor-State Arbitration: On Consistency, Coherence and the Identification of Applicable Law*, in *The Foundations of International Investment Law: Bringing Theory Into Practice* 257, 258 (Z. Douglas, J. Pauwelyn, J. E. Viñuales eds., CUP 2013), who talked about international investment law as a 'diffuse and heterogeneous network'. However, the use of such word has been strongly criticized by Salacuse, *supra* n. 58, at 430, who stated that 'the problem with the term "network" is that it suggests the existence of a structural connection between the constituent

arbitration. This means that a certain degree of internal coherence, at least from the point of view of the reasoning of arbitral awards, is usually achieved in investment decisions.

A second element of internal coherence is given by the quite uniform application of standards of treatment by tribunals in international investment law. In this regard, it can be said that, even if there is obviously no general agreement on all the constitutive elements which may lead to the breach of a treaty standard, it has never occurred that a tribunal has based its reasoning on, for example, 'the fair and equitable standard according to BIT X' rather than on 'the fair and equitable treatment' *tout court*.[105] Indeed, as it has been correctly stated by Bekker, BITs 'contain a wide variety of often broadly worded, cross-referencing provisions – making for a "spaghetti bowl" of investment agreements imposing overlapping obligations from which it is difficult to distill clear-cut rules for application in individual cases'.[106] It seems therefore reasonable to affirm that standards of treatment of foreign investment exist to some extent disregarding the text of the individual treaty and operating through the work and the pronouncements of arbitrators, who (as demonstrated above) have a duty to take into account previous decisions.

In light of the above, it is possible to conclude that internal coherence requires that decisions which ignore what previous tribunals did are not to be welcomed in international investment law. Looking at the state of necessity issue, therefore, it seems possible to appreciate what occurred, e.g. in *Continental Casualty Co.*, where the tribunal started its analysis by referring to the work of the *CMS* ad hoc committee.[107] On the contrary, the approach of the *LG&E* tribunal, where the previous *CMS* decision was simply ignored, is not to be welcomed because it could undermine the credibility of investment arbitration as a system of adjudication.

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parts of the network. However, no structural connections exist among investment treaties; each is separate, independent and freestanding'. This criticism seems too formalistic: the connection between arbitral tribunals is given by the fact that they apply similar (if not identical) standards and by the fact that arbitrators, as a matter of fact, usually take into account other decisions.

[105] *See* in this regard, Juillard, *supra* n. 20, at 91, stating that '[t]he same clauses always appear in the same order; definition, admission of investment, standards of protection, expropriation and compensation, and then a dispute settlement procedure. These seem to form the basic core of each and every model. Further, these clauses seem to rely upon the same basic notions: fair and equitable treatment … This would appear to warrant the conclusion that *there is not much dissimilarity between basic provisions from one model to another and, as a consequence, from one BIT to another*' (emphasis added).

[106] Pieter H. F. Bekker, *Recalibrating the Investment Treaty Arbitration System Through Non-Compartmentalized Legal Thinking*, 55 Harv. Int'l L.J. 1, 5 (2013).

[107] Even if, according to Alvarez & Brink, *supra* n. 40, at 358, the tribunal completely failed in giving an explanation for its decision to follow the WTO approach.

4.2 External coherence

The fact that international investment law cannot be considered as completely detached from international law is clearly demonstrated, first of all, by the fact that international investment law is founded on rules and treaties of public international law,[108] and investment treaties are to be interpreted 'in accordance with the general rules of international law as reflected in the Vienna Convention on the Law of Treaties'.[109] International law is very often directly applicable to investment disputes according to the text of relevant applicable treaties (it suffices here to mention Article 42(1) of the ICSID Convention and the several BIT clauses on applicable law directly referring to international law). Our thesis is demonstrated, secondly, by the continuous references that international investment arbitral tribunals make to other areas of international law and to other international courts' work,[110] which confirm the integration of international investment law within the larger framework of international law.[111] This position is perfectly explained by what has been stated in *AAPL v. Sri Lanka*,[112] where the tribunal stated that:

> the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.[113]

[108] *See* Conforti, *supra* n. 69, at 2. This concept is also expressed by the ILC Report on Fragmentation, *supra* n. 62, at 100, in which it is stated that 'Third, the term "self-contained regime" is a misnomer. No legal regime is isolated from general international law. It is doubtful whether such isolation is even possible: a regime can receive (or fail to receive) legally binding force ("validity") only by reference to (valid and binding) rules or principles *outside it*' (emphasis in original). The concept of cross-fertilization among tribunals pertaining to different areas of international law is analysed by Daniele Amoroso, *L'influenza dei precedenti della Corte di giustizia europea nella giurisprudenza della Corte di giustizia dell'Unione economica e monetaria dell'ovest africano (UEMOA)*, in *Evoluzione dei sistemi giurisdizionali regionali ed influenze comunitarie* 199 (P. Pennetta ed., Cacucci 2010).

[109] *See* Art. 1 of the Tokyo Resolution by the Institut de Droit International, *supra* n. 20.

[110] Chester Brown, The Use of Precedents of Other International Courts and Tribunals in Investment Treaty Arbitration, 5 Transnat'l Disp. Mgmt. 1, 3 (2008), has talked about a continuous cross-fertilization between different international tribunals.

[111] *See* inter alia, Anne van Aaken, *Fragmentation of International Law: The Case of International Investment Protection*, 17 Finnish Y.B. Int'l L. 91 (2008); Savarese, *supra* n. 27, at 233; Prislan, *supra* n. 46, at 453–481.

[112] *Asian Agricultural Products Ltd. (AAPL) v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, para. 21.

[113] Another clear statement in this sense can be found in *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 Apr. 2009, where the tribunal stated that 'international agreements like the ICSID Convention and BITs have to be analysed with due regard to the requirements of the general principles of law, such as the principle of non-retroactivity or the principle of good faith'.

As a confirmation of the general acceptance of the proposed approach, it is worth mentioning the recently approved wording of Article 8.31 of the CETA, according to which:

> [w]hen rendering its decision, the Tribunal established under this Section shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, *and other rules and principles of international law applicable between the parties*. (Emphasis added)

With regard to the reference to other areas of international law, it is possible to mention the 2016 decision in *Charanne v. Spain*,[114] in which the tribunal, in order to establish its jurisdiction, analysed both Article 344 of the TFEU and the concept of EU public policy. Similarly, other tribunals have analysed and/or applied other areas of international law. In this regard, it is possible to mention the *SPP v. Egypt*[115] award, which made reference to (even if it did not directly apply) the 1972 UNESCO Convention Concerning the Protection of the World Cultural and National Heritage in order to understand whether the protection of important archaeological interests could play a role in determining the state's responsibility for cancelling a project related to the construction of a tourist complex near to the area of the pyramids. Several other examples come from the human rights area.[116]

In this regard, it is worth noting that the application of other areas of international law in investment arbitration could be carried out by way of systemic integration under Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties. It is not possible here to make an analysis of such provision, which is analysed in-depth in the ILC Report on fragmentation[117] and in scholarship.[118] It suffices here to say that, from an analysis of the case law, it seems that investment tribunals rarely made reference to systemic integration.[119]

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[114] *Charanne B.V. & Construction Investments SARL v. Kingdom of Spain*, SCC Arbitration No. 062/2012, Award, 21 Jan. 2016, 121–125. For a comment on this decision, *see* Anna De Luca, *Lodo favorevole alla Spagna a conclusione del primo degli investment arbitrations sorti da impianti fotovoltaici: un precedente rilevante?*, 30 Diritto del commercio internazionale 250 (2016).

[115] *Southern Pacific Properties (Middle East) Ltd. v. Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992.

[116] *See* e.g. *Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 Dec. 2016, paras 1110–1211.

[117] *See* ILC Report on Fragmentation, *supra* n. 62, at 206–244.

[118] Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 ICLQ 279 (2008); Anne van Aaken, *Defragmentation of Public International Law Through Interpretation: A Methodological Proposal*, 16 Ind. J. Global Legal Stud. 483 (2009); Bruno Simma & Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, in *International Law for the 21st Century, supra* n. 38, at 678; Di Benedetto, *supra* n. 22, at 134–146.

[119] It is possible to find references to Art. 31(3)(c) in only a few investment decisions, among which it is possible to mention *Philip Morris Brands Sàrl, Philip Morris Products S.A. & Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 10 July 2016, para. 290 et seq.; *Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 24 Sept. 2008), paras 86–88; *Saluka Investments BV v. Czech Republic*, PCA/UNCITRAL, Award (17 Mar. 2006), paras 254–255.

In addition to the above, it can be remarked that investment tribunals usually make reference to the case law of the International Court of Justice (ICJ) and find guidance in it. Indeed, as has been demonstrated by Pellet,[120] there are certain decisions of the ICJ (or of the former Permanent Court of International Justice) that are always the starting point of discussions related to certain arguments. It is here sufficient to mention that, for example, with regard to the legal standing of shareholders, every discussion starts by mentioning the *Barcelona Traction* decision,[121] while, concerning a state of necessity, all discussion starts by referring to *Gabčikovo Nagymaros*.[122]

However, investment tribunals do not rely only on decisions by the ICJ.[123] In *Tecmed v. Mexico*,[124] the tribunal expressly quoted, in order to understand whether certain state measures could amount to indirect expropriation, the decision of the European Court of Human Rights (ECtHR) in *Matos and Silva v. Portugal*.[125] Similarly, the *Saipem*[126] tribunal relied on the ECtHR decisions in *Stran Greek Refineries v. Greece*[127] and *Brumarescu v. Romania*[128] in order to assess whether decisions by national courts can amount to expropriation. Finally, in *Toto Costruzioni v. Lebanon*,[129] the tribunal quoted and relied on the due process principle in Article 14 of the International Covenant on Civil and Political Rights (ICCPR), as interpreted by the ICCPR Committee.[130]

In sum, it is evident that, given the current legal framework, international investment law is not an isolated regime which can disregard the rest of international law.

Looking at state of necessity, the approach of the *Continental Casualty Co.* tribunal, which referred to WTO law, seems to be fully justifiable, even if, as it will be shown below, the award has been criticized for not having provided a clear explanation of the legal basis which led to the decision.

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120 Alain Pellet, *The Case Law of the ICJ in Investment Arbitration*, 28 ICSID Rev. 223, 232 and 234 (2013).

121 *Barcelona Traction, Light & Power Co., Ltd. (Belgium v. Spain)*, Judgment, 5 Feb. 1970.

122 *Case Concerning the Gabčikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 25 Sept. 1997.

123 *See* Puma, *supra* n. 22, at 215–226.

124 *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 116.

125 *Matos e Silva, LDA, et al. v. Portugal*, ECtHR, Application no. 15777/89, Judgment, 16 Sept. 1996).

126 *Supra* n. 66, Decision on Jurisdiction and Provisional Measures, 21 May 2007, para. 130.

127 *Stran Greek Refineries v. Greece*, ECtHR, Application no. 13427/87, Judgment, 9 Dec. 1994.

128 *Brumarescu v. Romania*, ECtHR, Application no. 28342/95, Judgment, 20 Oct. 1999.

129 *Toto Costruzioni generali S.p.a. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 Sept. 2009, para. 144.

130 In this regard, Andrea K. Bjorklund & Sophie Nappert, *Beyond Fragmentation*, UC Davis Legal Studies Research Paper Series No 243 (2011), ssrn.com/abstract=17399977 (accessed 31 Mar. 2016), have talked about an 'inter-nuclei communication model, whereby international tribunals look to each other's decisions, in appropriate cases, for influence and guidance in areas of international law involving similar concepts'.

5 ESSENTIAL ROLE OF ARBITRATORS IN ENSURING COHERENCE

The above discussion has demonstrated the importance of ensuring both internal and external coherence in order to ensure the legitimacy of international investment arbitration as a dispute resolution mechanism. This section has the goal of briefly highlighting the essential role of arbitrators in enabling such an objective to be reached. Indeed, in the absence of rules requiring tribunals not to disregard the legal framework in which they operate, it is obviously the *sensibility* of every single arbitrator that should drive them to achieve a coherent approach to decision-making.

In this regard, it is possible to say that several authors have already talked about the 'judicialization'[131] of international investment law, of the role of arbitrators as 'essential law makers'[132] and as 'agents of a larger global community'.[133] These expressions are aimed at underlining the role of arbitrators as more than simple judges of a single dispute and as operators of a larger legal framework in which they cannot simply ignore each other. Arbitrators are the real balancing factor between the necessity to issue a just award in the case at hand and the need to grant that such an award is integrated within the legal framework in which it will operate. They are, on the one side, *guarantors* of the issuance of a fair award and, on the other side, *intermediaries* between the single dispute and the surrounding legal framework.[134]

The idea to grant to adjudicators a central role in ensuring the legitimacy of a system of justice is not new in international law. The ICJ and several authors have indeed often referred to the very broad concept of 'good administration of justice'.[135] According to this concept every international judge has an inherent duty to ensure that the *utilitas singulorum*, i.e. the needs and rights of the parties in the case at hand, is fairly balanced with the *utilitas publica*, i.e. the more general values that are affected by judicial proceedings and that must, therefore, be

[131] Savarese, *supra* n. 27, at 230.

[132] Schill, *supra* n. 65, at 19.

[133] Stone Sweet, *supra* n. 41, at 47. Similarly, Bekker, *supra* n. 106, at 14, has talked about arbitrators as 'agents of diffusion'.

[134] Massimo Iovane, *Metodo costituzionalistico e ruolo dei giudici nella formulazione dei principi generali del diritto internazionale*, 13 Ars Interpretandi 103, 119 (2008), used the above words with regard to the role of judges in the formulation of general principles of international law. *See also* for a similar comment, Reinisch, *supra* n. 54, at 123. *See also* Valentina S. Vadi, *Fragmentation or Cohesion? Investment versus Cultural Protection Rules*, 10 J. World Inv. & Trade 573, 574 (2009).

[135] *See* inter alia, *Territorial and Maritime Dispute (Nicaragua v. Columbia)*, ICJ, Application by Honduras for Permission to Intervene, Judgment, 4 May 2011, para. 36; *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, ICJ, Judgment on Preliminary Objections, 15 Dec. 2004, para. 33; *Panevezys-Saldutiskis Railway Case*, PCIJ, Order on Preliminary Objections, 30 June 1938, PCIJ Series A/B No. 75, 7. *See also* Hironobu Sakai, *La Bonne Administration de la Justice in the Proceedings of the International Court of Justice*, 55 Japanese Y.B. Int'l L. 110 (2012); Robert Kolb, *La Maxime de la 'Bonne Administration de la Justice' dans la Jurisprudence Internationale*, 27 L'Observateur des Nations Unies 5 (2009).

protected.[136] Such a duty is, in the opinion of this author, even greater in international investment arbitration, where ad hoc disputes (in which only the *utilitas singulorum* should be relevant) influence and affect public rights and needs.

Arbitrators are, hence, responsible for finding a point of optimality between commitment and flexibility,[137] by way of satisfying the needs of the parties according to the wording of the relevant treaty or contract (flexibility) without disregarding the necessity of ensuring coherence (commitment), which is considered to be a form of safeguard for the stakeholders and the respect of which is, finally, essential in order to ensure the legitimacy of the method of dispute settlement.

Moving back to the Argentinian cases involving the state of necessity issue, this means that arbitrators should have paid more attention to integrating the decision issued in any single case within the framework in which it operated. In this regard, the approach of the *LG&E* tribunal has been several times (negatively) remarked upon. Similarly, it is also possible to highlight that the strong criticism related to the *Continental Casualty Co.* award has been motivated by the fact that it just applied WTO law without providing an adequate reasoning for such an approach.[138] If arbitrators had paid more attention to justifying their decisions in light of the surrounding legal framework, the resulting awards (and, as a consequence, the entire method of dispute settlement) would probably have been considered more legitimate by commentators.

6 CONCLUSIONS

Lack of coherence is considered to be one of the strongest factors in the legitimacy crisis which, according to several authors, is affecting international investment law.

This article has, first of all, tried to ascertain the existence of orderliness within international investment law and arbitration, and, secondly, to understand how international investment law relates to the other areas of international law. It has emerged, from the former point of view, that international investment law and arbitration can be seen as a *network* of BITs and tribunals, which cannot operate while simply disregarding each other (we have talked, in this regard, of internal coherence). This is demonstrated by the application of the taking into account approach with regard to the issue of precedent in international arbitration and by

[136] Sakai, *supra* n. 135, at 116; Kolb, *supra* n. 135, at 6–7, have highlighted that, generally speaking, it is possible to counterpose the *utilitas publica* of judicial proceedings and the *utilitas singolorum* of arbitral proceedings. This statement obviously referred to ad hoc commercial arbitration, and cannot be applied in investment arbitration for the reasons highlighted *supra*.

[137] These words have been used by Anne van Aaken, *International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis*, 12 J. Int'l Econ. L. 207, 537 (2009). *See also* McLachlan, *supra* n. 89, at 381.

[138] Alvarez & Brink, *supra* n. 40, at 358.

the fact that the content of standards of treatment of foreign investment are largely determined by case law. From the latter perspective, it is arguable that international investment law is not an autonomous system of law but is closely connected to the other areas of international law. International law indeed regulates the genesis, the interpretation, the *lacunae* and the failures of international investment law, and investment arbitrators continuously make reference to the case law of courts and tribunals which operate in other areas of international law. This means that international investment tribunals are also responsible for ensuring that values which are competing with the protection of foreign investment and that are protected by other areas of international law find a place in international investment arbitration (we have talked, in this regard, of external coherence).

Arbitrators play a crucial role in ensuring the legitimacy of international investment law and the good administration of justice. Such a role should be carried out by balancing the *utilitas singulorum*, i.e. the needs of the parties in dispute (to be ensured by issuing a fair and appropriate award), with the *utilitas publica*, i.e. the interests of all the stakeholders involved in international investment arbitration (to be ensured by granting that such an award is perfectly integrated in the surrounding legal framework).