Is Consistency a Myth?

Gabrielle Kaufmann-Kohler [*]

This contribution addresses whether consistency in investment arbitration is a myth.[1] The term myth has many meanings, from an ancient story dealing with supernatural beings to a popular belief associated with a person. There come to mind the Myth of Don Juan, the Myth of Sisyphus, or the Myth of the Noble Savage. These types of myths are not the ones discussed here. Indeed, there is another meaning that appears more topical.

---

[*] Professor, Geneva University; Partner, Lévy Kaufmann-Kohler. The author thanks James Fry and Dr. Thomas Schultz, respectively research fellow and postdoc at Geneva University Law School, whose work is funded by the Swiss National Science Foundation, for their assistance in carrying out the research and finalizing the footnotes for this article. She also thanks Aurélia Antonietti, associate with Lévy Kaufmann-Kohler, for similar assistance.

[1] On consistency in investment arbitration, see also Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse? – The 2006 Freshfields Lecture*, 23(3) ARB. INT'L 357 (2007); Jeffery P. Commission, *Precedents in Investment Treaty Arbitration: a Citation Analysis of a Developing Jurisprudence*, 24 J. INT'L ARB. 129 (2007); Christoph Schreuer and Matthew Weiniger, *Conversations Across Cases – Is there a Doctrine of Precedent in Investment Arbitration?*, *in* THE OXFORD HANDBOOK ON INTERNATIONAL INVESTMENT LAW (P. Muchlinski, F. Ortino, C. Schreuer eds., Oxford University Press, forthcoming 2008), available at http://www.univie.ac.at/intlaw/conv_across_90.pdf; Andrea K. Björklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, *in* INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 265 (C.B. Picker, I.D. Bunn and D.W. Arner eds., Hart Publishing, 2008); Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 FORDHAM INT'L L.J. 1014 (2007); Jan Paulsson, *International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law*, *in* ICCA CONGRESS SERIES No. 13, INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 879 (A.J. van den Berg ed., Kluwer, 2007).

It deals with a fiction, especially one based on an ideological belief, or, in other words, a belief that does not correspond to reality. This certainly is the meaning of myth that applies here.

Consistency is easier to define. Consistency addresses a logical coherence among things or a uniformity of successive results.

This article will address whether consistency is a myth by asking three subquestions: First, do we have consistency? In other words, is there uniformity of results in investment arbitration today? Second, do we need consistency? More specifically, is there a need for logical coherence among arbitral decisions? Third, if we need consistency, what are the means likely to promote consistency?

I. DO WE HAVE CONSISTENCY?

The answer to this first question is twofold: yes and no. It can be illustrated with four examples, two yes examples and two no examples.

A. First Yes Example: The Distinction between Treaty and Contract Claims

There is consistency on the distinction between treaty and contract claims. The distinction initially was touched upon in certain cases,[2] and was first clearly spelled out in the *Vivendi*

[2] Lanco International, Inc. v. Argentine Republic (ICSID Case No. ARB/97/6), Preliminary Decision on Jurisdiction, Dec. 8, 1998, 40 I.L.M. 457 (2001). All ICSID decisions and/or awards mentioned herein are available on the ICSID website, unless otherwise specified.

annulment decision.[3] Since then, it has been repeated and applied in numerous decisions or awards.[4]

[3] Compañia de Aguas del Aconquija S.A. and Compagnie Générale des Eaux (Vivendi Universal) v. Argentine Republic (ICSID Case No. ARB/97/3), Decision on Annulment, July 3, 2002, ¶ 96.

[4] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco (ICSID Case No. ARB/00/4), Decision on Jurisdiction, July 23, 2001, ¶ 61, [French original] 129 J.D.I. 196 (2002); English translation of French original in 6 ICSID REP. 400 (2004); Consortium R.F.C.C. v. Kingdom of Morocco (ICSID Case No. ARB/00/6), Award, Dec. 22, 2003, ¶ 41 [French original]; SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/01/13), Decision on Objections to Jurisdiction, Aug. 6, 2003, ¶ 161; Azurix Corp. v. Argentine Republic (ICSID Case No. ARB/01/12), Decision on Jurisdiction, Dec. 8, 2003, ¶ 76; Joy Mining Machinery Limited v. Arab Republic of Egypt (ICSID Case No. ARB/03/11), Award, Aug. 6, 2004, ¶ 81; Impregilo S.p.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/3), Decision on Jurisdiction, Apr. 22, 2005, ¶¶ 214–15; CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8), Award, May 12, 2005, ¶ 300; Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/29), Decision on Jurisdiction, Nov. 14, 2005, ¶¶ 166–67; BP America Production Company and others v. Argentine Republic (ICSID Case No. ARB/04/8), Decision on Jurisdiction, July 27, 2006, ¶ 91, available at http://ita.law.uvic.ca/documents/PanAmericanBPJurisdiction-eng.pdf; Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic (ICSID Case No. ARB/03/13), Decision on Jurisdiction, July 27, 2006, ¶ 91, available at http://ita.law.uvic.ca/documents/PanAmericanBPJurisdiction-eng.pdf; Siemens A.G. v. Argentine Republic (ICSID Case No. ARB/02/08), Award, Feb. 6, 2007, ¶¶ 247 *et seq.*, available at http://ita.law.uvic.ca/documents/Siemens-Argentina-Award.pdf; Compañia de Aguas del Aconquija S.A. and Compagnie Générale des Eaux (Vivendi Universal) v. Argentine Republic (ICSID Case No. ARB/97/3), Award, Aug. 20, 2007, ¶ 7.3.10, available at http://ita.law.uvic.ca/documents/VivendiAwardEnglish.pdf; Noble Energy Inc. and Machala Power Cía. Ltd. v. Republic of Ecuador and Consejo Nacional de Electricidad (ICSID Case No. ARB/05/12), Decision on Jurisdiction, Mar. 5, 2008, ¶¶ 205–06, available at http://ita.law.uvic.ca/documents/Noblev.EcuadorJurisdiction.pdf.

SGS v. Philippines may be read differently,[5] but the difference may be due to the interference of the umbrella clause more than to a divergence from the treaty-contract claim distinction. In other words, a true *jurisprudence constante* has evolved, and it is ironic that it was precisely called for by *SGS Philippines*. Whether the distinction is a good or a bad one is a different question. The fact is that it is well-settled.

B. Second Yes Example: Fair and Equitable Treatment

Since the *Neer* case in 1927,[6] there has been an evolution towards more demanding requirements imposed on the host State in the context of fair and equitable treatment. It is true that arbitral tribunals pay great attention to treaty language and facts. However, beyond these case-driven factors, there is a clear emergence of standards on at least three aspects:

- Arbitral tribunals have abandoned the view that unfair and inequitable treatment requires bad faith—an evolution that started with *Mondev*,[7] and was followed by a number of other cases;[8]

---

[5] SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (ICSID Case No. ARB/02/6), Decision on Jurisdiction, Jan. 29, 2004, ¶ 134.

[6] Neer Case (United States v. Mexico), 4 U.N.R.I.A.A. 60 (Gen. Cl. Comm'n 1926).

[7] Mondev International Ltd. v. United States of America (ICSID Case No. ARB(AF)/99/2), Award, Oct. 11, 2002, ¶ 166, 42 I.L.M. 85 (2003), 6 ICSID REP. 192 (2004), 125 I.L.R. 110 (2004).

[8] Técnicas Medioambientales Tecmed, S.A. v. United Mexican States (ICSID Case No. ARB(AF)/00/2), Award, May 29, 2003, ¶ 153; The Loewen Group, Inc. and Raymond L. Loewen v. United States of America (ICSID Case No. ARB(AF)/98/3), Award, June 26, 2003, ¶ 302, 42 I.L.M. 811 (2003), 7 ICSID REP. 442 (2005); CMS Gas Transmission Company v. Argentine

• Tribunals emphasize the need for a stable legal and business framework. This first was mentioned in *Metalclad*,[9] and thereafter repeatedly stressed by *MTD* and others;[10] and

• Tribunals give weight to legitimate and reasonable expectations of the investors.[11]

So much for inconsistent results.

Republic, *supra* note 4, ¶ 280; Azurix Corp. v. Argentine Republic (ICSID Case No. ARB/01/12), Award, July 14, 2006, ¶¶ 368 *et seq.*; PSEG Global et al. v. Republic of Turkey (ICSID Case No. ARB/02/5), Award, Jan. 19, 2007, ¶ 246; Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic (ICSID Case No. ARB/01/3), Award, May 22, 2007, ¶ 263, available at http://ita.law.uvic.ca /documents/Enron-Award.pdf.

[9] Metalclad Corporation v. United Mexican States (ICSID Case No. ARB(AF)/97/1), Award, Aug. 30, 2000, ¶ 99.

[10] MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile (ICSID Case No. ARB/01/7), Award, May 25, 2004, ¶ 205; CME Czech Republic B.V. v. Czech Republic (UNCITRAL), Partial Award, Sept. 13, 2001, ¶ 611, available at http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf; CMS Gas Transmission Company v. Argentine Republic, *supra* note 4, ¶¶ 274 *et seq.*; LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic (ICSID Case No. ARB/02/1), Decision on Liability, Oct. 3, 2006, ¶¶ 125 *et seq.*; PSEG Global et al. v. Republic of Turkey, *supra* note 8, ¶¶ 250 *et seq.*

[11] *See, e.g.*, Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, *supra* note 8, ¶ 154; Eureko B.V. v. Republic of Poland (UNCITRAL), Partial Award, Aug. 19, 2005, ¶ 232, available at http://ita.law.uvic.ca/ documents/Eureko-PartialAwardandDissentingOpinion.pdf; Saluka Investments BV (The Netherlands) v. Czech Republic, Partial Award, Mar. 17, 2006, ¶ 302, available at http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf; International Thunderbird Gaming Corporation v. United Mexican States (UNCITRAL (NAFTA) Arbitration), Award, Jan. 26, 2006, ¶ 147, available at http://ita.law.uvic.ca/documents/ThunderbirdAward.pdf; Azurix Corp. v. Argentine Republic, *supra* note 8, ¶ 372; Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, *supra* note 8, ¶ 262.

C. First No Example: The Umbrella Clause

In this area, the original discrepancy, which was clearly illustrated by the two *SGS* cases,[12] resided between decisions that deemed the umbrella clause to elevate contract claims to treaty claims,[13] and others that denied such effect.[14] Looking at more recent cases, the problem appears to have shifted somewhat towards the question of whether the umbrella clause encompasses only obligations entered into by the state in a sovereign capacity or whether it also covers commercial obligations.[15] Be this as it may, the controversy remains.

D. Second No Example: State of Necessity

The defense of state of necessity has arisen recently in the Argentinean cases, the question being whether Argentina was entitled to take the measures it took during the crisis on the

---

[12] SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, *supra* note 4 and SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, *supra* note 5.

[13] CMS Gas Transmission Company v. Argentine Republic, *supra* note 4, ¶¶ 299 *et seq.*; Eureko B.V. v. Republic of Poland (UNCITRAL), *supra* note 11, ¶ 53; LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, *supra* note 10, ¶¶ 170–71; Siemens A.G. v. Argentine Republic, *supra* note 4, ¶¶ 204 *et seq.*

[14] Joy Mining Machinery Limited v. Arab Republic of Egypt, *supra* note 4, ¶ 81; El Paso Energy International Company v. Argentine Republic (ICSID Case No. ARB/03/15), Decision on Jurisdiction, Apr. 27, 2006, ¶ 70; Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic, *supra* note 4, ¶¶ 105 *et seq.*; CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8), Decision of the *ad hoc* committee on the application for annulment of the Argentine Republic, Sept. 25, 2007, ¶ 95.

[15] Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, *supra* note 8, ¶ 274; Sempra Energy International v. Argentine Republic (ICSID Case No. ARB/02/16), Award, Sept. 28, 2007, ¶¶ 310 *et seq.*

grounds of necessity. So far, there are four decisions against,[16] and one in favor of,[17] resorting to a state of necessity. However, this is a misleading statistic because three of the cases that refused to apply a state of necessity were presided over by the same chairman. The actual result is, thus, more balanced than it appears. In this context, one should also mention the decision of the annulment committee in *CMS*,[18] which adds methodological directions but no answer to the issue of principle. In short, cases so far have yielded clearly inconsistent results on this issue.

II. DO WE NEED CONSISTENCY?

The preceding section shows that we have consistency on some issues and that we do not on others. That leads to the second question: do we need consistency?

When answering the second question, one should not ignore that some solutions are treaty- or fact-specific. One should not ignore the likelihood that a degree of inconsistency is inherent in any legal system and is not intolerable.[19] Beyond these

---

[16] CMS Gas Transmission Company v. Argentine Republic, *supra* note 4, ¶¶ 324 *et seq.*; Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, *supra* note 8, ¶¶ 307 *et seq.*; Sempra Energy International v. Argentine Republic, *supra* note 15, ¶¶ 346 *et seq.*; BG Group Plc. v. Argentine Republic (UNCITRAL), Final Award, Dec. 24, 2007, available at http://ita.law.uvic.ca/documents/BG-award_000.pdf.

[17] LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, *supra* note 10, ¶¶ 339 *et seq.*

[18] CMS Gas Transmission Company v. Argentine Republic, *supra* note 14, ¶ 95.

[19] MATTHEW H. KRAMER, OBJECTIVITY AND THE RULE OF LAW 128–29 (Cambridge University Press, 2007) ("There is a qualitative difference between a system of governance whose norms are replete with contradictions and a system of governance whose norms contain few or no contradictions. Only the

observations, the question is whether on the same legal issues we need the same answers.

This leads one to reflect on the relationship between the law and the practice of following precedents. Legal theory tells us that the rule of law is only the rule of law if it is consistently applied so as to be predictable.[20] It also teaches us that decision-makers have an obligation—whether moral or legal is not relevant here—to strive for consistency and predictability and thus to follow precedents.[21]

This obligation is not the same under all circumstances and in all fields. The scope of the obligation depends on the stage of

---

latter is a legal system."). *See also* I. Laird and Rebecca Askew, *Finality versus Consistency: Does Investor-State Arbitration Need an Appellate System?*, 7(2) J. APP. PRAC. & PROCESS 285, 298 (2005); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1613 (2005) (noting how "a minor degree of inconsistency may be useful, as it permits a challenge to the fundamental principles of the system and fosters the considered evolution of law . . . ."); Susan D. Franck, *The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future?*, 12 U.C. DAVIS J. INT'L L. & POL'Y 47, 68 (2005) (discussing the benefits of inconsistency).

[20] LON L. FULLER, THE MORALITY OF LAW 33, 38–39 (New Haven, rev. ed. 1969); KRAMER, *supra* note 19, at 109 *et seq*.; MATTHEW H. KRAMER, IN DEFENSE OF LEGAL POSITIVISM: LAW WITHOUT TRIMMINGS 142–46 (Oxford University Press, 1999); MICHEL VAN DE KERCHOVE AND FRANÇOIS OST, LEGAL SYSTEM BETWEEN ORDER AND DISORDER 135 (I. Stewart trans., Clarendon Press, 1994). *See also* Kaufmann-Kohler, *supra* note 1, at 373 *et seq*.

[21] FULLER, *supra* note 20, at 42–43; KRAMER, *supra* note 19, at 143; Jacques Chevallier, *L'ordre juridique*, *in* LE DROIT EN PROCÈS 7–8 and 11–14 (PUF, 1983); BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 122–26 (Cambridge University Press, 2004); Richard H. Fallon, *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 3 (1997); JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT Chap. 9, Sec. 124 (1690). *See also* Kaufmann-Kohler, *supra* note 1, at 373 *et seq*.

development of the law.[22] In essence, the less developed the law is, the more important the role of the dispute resolver will be with respect to the creation of the rule.[23] Indeed, rules cannot emerge without consistency.[24]

Obviously, investment law is in its early stages of development and thus requires consistency. In sum, the answer to the second question is that we need consistency for the sake of the development of the rule of law.

III. HOW TO ACHIEVE CONSISTENCY?

If we need consistency but lack it, at least in part, then the question arises how to achieve it for that part which is lacking. One possibility might be to simply wait for consistency to emerge with time in the hope that "good awards will chase the bad [ones],"[25] knowing that rule creation is not linear and that the road to consistency necessarily has dead-ends and u-turns. However, there is a significant risk that simply waiting for consistency to emerge will not produce the results hoped for because certain fundamental disagreements will remain.

In the same vein, another view points to the *esprit de corps* of the arbitrators as a unifying force.[26] With the explosion of the

---

[22] Norberto Bobbio, *Ancora sulle norme primarie e norme secondarie*, 59 RIVISTA DI FILOSOFIA 35, 51 (1968) (translated into French as *Nouvelles réflexions sur les normes primaires et secondaires*, *in* LA RÈGLE DE DROIT 104 (C. Perelman ed., Bruylant, 1971)). *See also* Kaufmann-Kohler, *supra* note 1, at 373 *et seq.*

[23] Bobbio, *supra* note 22, at 51–52.

[24] TAMANAHA, *supra* note 21, at 96 *et seq.*

[25] Paulsson, *supra* note 1, at 889.

[26] Commission, *supra* note 1, at 136 *et seq.*

number of cases, with the increasing diversity of arbitrators, it is not certain that the *esprit de corps* will do away with genuine disagreements on legal issues.[27]

If waiting and hoping is insufficient, are there other ways of improving consistency? The following possible ways come to mind. First, because of the limitation of the grounds available, the annulment mechanism cannot play a major role in bringing about consistency.[28] Second, the possibility of creating an appeal mechanism has been discarded so far, for the better because its drawbacks seem to outweigh its advantages.[29]

Another solution lies in today's topic: precedent. For precedents to foster consistency, tribunals would have to systematically rely on a consistent line of cases and depart from it only for compelling reasons. This would amount to a principle of

---

[27] For instance, the decision of the *ad hoc* committee in CMS, *supra* note 14, is certainly not a testimony to *esprit de corps*.

[28] The CMS *ad hoc* Committee for instance said so expressly: "Both parties recognize that an *ad hoc* committee is not a court of appeal and that its competence extends only to annulment based on one or other of the grounds expressly set out in Article 52 of the ICSID Convention." (*supra* note 14, ¶ 43). *See also id*., ¶ 136 (asserting that "the Committee cannot simply substitute its own view of the law . . . for those of the Tribunal.").

[29] Gabrielle Kaufmann-Kohler, *In Search of Transparency and Consistency: ICSID Reform Proposal*, 2(5) TDM 5 (2005). *See also* Laird and Askew, *supra* note 19, at 300 (noting how appellate review is not likely to be a panacea to all inconsistency problems, as the main problem arising from the Lauder arbitration cases was that these were not consolidated, not that they were not reviewed by an appellate body); Jan Paulsson, *Avoiding Unintended Consequences*, *in* APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 241, 242, 262 (K.P. Sauvant ed., Oxford University Press, 2008) (mentioning how proposals for a universal appellate mechanism are unrealistic); Hans Smit, *Note, Dispute Resolution in Patent Pooling Arrangements: The Arbitration Solution*, 16 AM. REV. INT'L ARB. 547, 548–59 (2005) (noting how appellate review by *ad hoc* tribunals might just add another layer of inconsistency to international arbitration).

stare decisis applied not to a single case but to a line of cases, or *jurisprudence constante*. Over time, that practice could develop, as Thomas Wälde have suggested,[30] into customary international law, implying a well-established practice and an *opinio juris*. Reasonable minds may differ on whether such a doctrine of precedent may work in a decentralized mode of regulation with *ad hoc* tribunals and no supervising institution binding them together. If one has serious doubts, one could consider instituting a system of preliminary rulings along the lines of Article 234 of the EC Treaty.[31] Such a creation would require a strong political will and careful crafting. This option does not appear likely in the short or medium term. Hence, precedent remains the main tool to promote efficiency.

In conclusion, one may answer the question posed at the outset as follows: Consistency is not a myth. Consistency is a reality and a necessary objective at the same time.

---

[30] International Thunderbird Gaming Corporation v. United Mexican States (UNCITRAL (NAFTA) Arbitration), Separate Opinion of Thomas Wälde, Jan. 26, 2006, ¶ 16, available at http://ita.law.uvic.ca/documents/ThunderbirdSeparateOpinion.pdf.

[31] For more details, see Gabrielle Kaufmann-Kohler, *Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are there Differences?*, *in* IAI INTERNATIONAL ARBITRATION SERIES NO. 1, ANNULMENT OF ICSID AWARDS 189 (E. Gaillard & Y. Banifatemi eds., Juris Publishing, 2004). *See also* Schreuer and Weiniger, *supra* note 1, at 17–18.