Reasons for Reasons: The Tribunal's Duty in Investor-State Arbitration

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(★)

I Introduction

There comes a poignant moment in every arbitration when the parties finally complete their last submission, or despatch their last post-hearing brief and, after months or (more likely) years of endeavour, formally pass the matter over to the tribunal for its determination. The tribunal then withdraws to the privacy of its own deliberations, and may not be heard from again, sometimes for a considerable period, until the publication of its award. The crafting of the decision remains a confidential process, beyond the grasp and scrutiny of all. Yet it is a process at the very heart of the arbitral mandate. Beyond the simple expression of a verdict, it is the tribunal's opportunity to reassure all concerned that they have been both heard and understood; to justify whatever the outcome of the process may be; and to ease the acceptance of its decision, primarily by persuading the losing party of the weaknesses of its case. Indeed, it is the nature and quality of the award itself, as opposed to the actual decision it contains, that will frequently dictate the success or failure of the arbitration as a whole.

It is perhaps surprising, therefore, that awards come in so many shapes and sizes. They may be reasoned or unreasoned; and the reasons themselves – if any – may range from the long to the short; the comprehensive to the incomplete; and the compelling to the bewildering.

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Much has been written on the adequacy of reasons in the field of commercial arbitration. Notably, in 1988, in his Freshfields Lecture in London, the Rt Hon Lord Justice Bingham (later Lord Bingham of Cornhill) analyzed why the giving of reasoned judgments has become a standard feature of judicial proceedings; why the provision of full and cogent reasons is essential to a fair process; and why the same standard of decision-making should appertain to commercial arbitration. (1)

Since 1988, the landscape of international dispute resolution has been transformed by the rise of investor-State treaty arbitration. Disputes have become larger, more complex, more public and more sensitive. The interests and issues at stake have broadened. And the arbitral process has been shifted into a new realm of unprecedented political significance. And yet there are still marked fluctuations in the quality of awards in this field.

These variations in quality, and in particular in reasoning, have prompted increasing concerns, and have already been the subject of a few empirical studies. (2) What has so far received little or no attention, however, are the underlying reasons for reasons in this form of arbitration. It is this underlying rationale that must first be analyzed, in order properly to calibrate the appropriate standard of drafting that should apply in this field.

So it is, twenty years on, that the time has come to re-visit Lord Bingham's analysis, and to explore whether the reasons for reasons by national court judges and commercial arbitrators should now be applied in the same way to the determination of investor-State disputes.

As elaborated below, it is suggested that Lord Bingham's analysis is applicable to investor-State treaty arbitration – but the application is fundamentally different as compared to commercial arbitration. Indeed, such is the radically different nature of investor-State arbitration that commercial arbitration is now a false analogy, and new “reasons for reasons” must be addressed.

It is the intention of this paper to highlight these new reasons for reasons, and to urge upon treaty arbitrators a fresh conception of their mandate, divorced from the paradigm of commercial arbitration. The increased responsibility, indeed in some respects unprecedented responsibility, that their role entails brings with it a correlative duty in the crafting of their awards, and the realization of this change in role may ultimately be critical to the very survival of this field of dispute resolution.

The analysis below proceeds in four stages:

(a) a brief restatement of Lord Bingham's “reasons for reasons” in the context of national court judgments;

(b) a review of the “reasons for reasons” by commercial arbitrators; and

(c) consideration of the extent to which (a) and (b) apply – and are sufficient – in the new world of treaty arbitration;

(d) a brief, generalized and “no names” review of some of the more common failures by arbitral tribunals in their approach to reasoning.

II Court Judgments

In his Freshfields' Lecture, Lord Bingham's starting point was to question why it is customary for judges to give reasoned judgments at all. As he observed, a reasoned judgment, as distinct from a bare decision, is not, after all, a necessary feature of formal dispute resolution. In Lord Bingham's words:

... it might well be thought that parties who have endured the tedium and anguish of legal proceedings would wish to be spared yet another journey through country made distasteful by gross over-familiarity.

Lord Bingham then identified five distinct reasons why reasoned judgments have become a standard feature of judicial proceedings. These may be distilled briefly as follows:

1 The parties are entitled to be told why they have won or lost

It is a basic function of judges not only to resolve disputes, but also to explain to each party why it has won or lost. This reason requires little further explanation. A bare decision, without more, is likely to leave open many issues of fact and law, to which the litigating parties expect answers (just as they expect a final result). Further, there is a therapeutic element: the absence of reasons may well render acceptance of the judgment more difficult for the losing party. Worse still, it may engender resentment or a lack of confidence, and thereby threaten the integrity of the litigation process itself, or at the very least lead to an uncertain peace between the parties. Thus, it is now an accepted element of most court procedures that judgments include a justification for the acceptance of the winning party's position, and (more importantly) discounting the losing party's position.

2 A safeguard against arbitrariness

The second of Lord Bingham's reasons is closely connected to the first. A requirement that a decision be justified constitutes a safeguard against arbitrariness, private judgment, biased judgment, or "an irrational splitting of the difference" between the parties' respective cases. It is now a principle entrenched in most modern legal systems that a judge must decide disputes by the rational application of principle and authority, and not his or her own personal view of the justice of the case. The provision of reasons is the litigant's guarantee in this regard, and naturally follows from the basic proposition, in Lord Hewart CJ's words, that "*justice should not only be done, but should manifestly and undoubtedly be seen to be done*". (3)

3 A guide to future conduct

This reason has two elements.

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First, in systems where judicial precedent constitutes a source of law, the provision of reasons may well be essential in order to enable other courts to distinguish a "*ratio decidendi*" from an "*obiter dictum*".

Second, and beyond the technical confines of the doctrine of precedent, wherever conduct is of a kind that may be repeated, the giving of reasons may provide an essential guide both to the immediate and all other interested parties. More often than not, it is the reasons in a judgment, over and above the final result, that provide direction and instruction to those in the same field, and to allow them, as put by Lord Bingham, to "learn from the forensic experience of others".

4 Enabling an appellate court to review the decision and decide whether it is subject to reversible error

Depending upon the scope of review or appeal that might exist, the giving of reasons in a judgment will often be essential in enabling a higher court to conduct its own review, and to apply whatever standards it has available in deciding whether a decision should be upheld, reversed or varied. As Lord Bingham observed:

It is notorious that the worst judgments, namely those in which the findings of fact are most skimpy and the legal rulings most deficient, are often the hardest to challenge. How can the advocate challenge findings of fact when there are none or pinpoint errors of legal reasoning when the judge has eschewed any discussion of legal principle or authority?

5 An intellectual discipline for the decision-maker

Lastly, in what he considered a "half reason" for reasons, Lord Bingham identified the intellectual discipline which the requirement of reasons brings to bear upon the decision maker:

I cannot, I hope, be the only person who has sat down to write a judgment, having formed the view that A must win, only to find in the course of composition that there are no sustainable grounds for that conclusion and that on any rational analysis B must succeed.

III Commercial Arbitration

Having identified five reasons for reasons in the context of court judgments, one may next consider the extent to which these apply to commercial arbitral awards.

The starting point here must be the basic proposition that "commercial arbitration" is nothing but an umbrella term for a wide range of different procedures, which may have very little in common, save for the core characteristic that they all involve an agreement to the binding resolution of a dispute by a third party. Just as awards come in all shapes and sizes, so do commercial arbitrations. Historically, a major component in international arbitration has been the simple, one issue, trade disagreement, that requires a speedy answer, where the answer itself is far more important than the reasons. Hence, for example, the so-called "look-sniff" commodity arbitration, in which tribunals are appointed for their skill and experience in commerce, rather than language. Again in Lord Bingham's words: "... tapioca pellets either are, in the experienced judgment of a trade arbitrator, of fair average quality or they are not; whichever way his opinion goes there is probably not much that he can usefully add by way of exegesis".

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But this is one end of a rich spectrum. At the other end lies the complex high level international dispute, which requires an extensive investigation, and detailed, sophisticated analysis of fact and law (and often multiple laws).

If one takes a generalized view across this spectrum, it is suggested that four of Lord Bingham's five "reasons for reasons" have an important role to play.

1 The parties are entitled to be told why they have won or lost

It is sometimes suggested that, if asked, commercial parties would say that the speedy and final determination of the dispute (whichever way this goes) is the most important feature of arbitration, and that a detailed assessment of the merits of each side's case, in contrast, is of little or no importance. This is anecdotal and not easily tested. It also, most likely, reflects a lingering tendency to conceive of commercial arbitration in terms of the (historically important) simple trade dispute. At the other end of the spectrum, however, the assertion is more difficult to accept. International commercial arbitration in its contemporary form is often an extremely elaborate and extensive process, with little connection to its historical roots. It frequently requires the investment of very substantial time and funds by all parties. As the demands – and in particular the costs – of the process increase, so do the expectations of the parties as to the quality and detail of the award. In short, sophisticated parties expending large sums tend to want their money's worth. If in any given case, the parties truly consider a final result more important than the reasons, they remain free to agree to a specially streamlined procedure, including an unreasoned award.

Whatever the precise type of arbitration, the basic proposition remains in all cases that arbitrating parties are entitled to know why they have won and (more importantly) lost. Indeed, given that arbitral awards, unlike court judgments, are generally not self-executing, but require either voluntary performance or separate enforcement action, this factor is of heightened importance here. If the absence of reasons, or adequate reasons, renders acceptance of the award more difficult for the losing party, the success of the arbitration may be directly impugned. Hence, in commercial arbitration, this is much more than a purely "therapeutic" element.

2 A safeguard against arbitrariness

This second reason applies with equal force to commercial arbitration, in so far as parties have not expressly empowered their tribunal to proceed "ex aequo et bono", by way of "amiable composition", or otherwise in disregard of defined laws or rules of law. The prevailing approach of modern arbitration laws and rules follows Art. 28 of the UNCITRAL Model Law on International Commercial Arbitration (the Model Law), by which arbitral tribunals may only apply broad principles of equity (as distinct from law or rules of law) if the parties have expressly so agreed. It follows therefore, that in the absence of such an agreement, parties are just as much entitled to a safeguard against arbitrariness as litigants before a national court. Indeed, one may argue that parties to a commercial arbitration have a *greater* right to this safeguard than parties to litigation, given the absence of any appeal in most arbitrations, and the finality of the process.

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Lord Bingham's third reason is the one that probably has little role to play in commercial arbitration. Because of the widespread adherence to confidentiality in this field, and because of the absence of any doctrine of precedent, the possible guidance to future conduct that reasons might provide is generally limited to the immediate disputing parties. As such, it is unlikely to be a compelling factor in the crafting of an award – particularly if (as is often the case) the particular facts of the dispute are unlikely to repeat themselves. There are, of course, exceptions, such as the construction of a particular industry standard form contract, or the analysis of an occurrence upon which many disputes depend, but even in these situations the normative value of awards will rarely compare to that of judgments. Certainly, the provision of guidance beyond the immediate disputing parties would be seen by most as squarely beyond the arbitral tribunal's mandate.

4 Enabling an appellate court to review the decision and decide whether it is subject to reversible error

Lord Bingham's fourth reason has an obvious application to commercial arbitration, albeit that this will vary from forum to forum, depending upon the availability of recourse against awards. In the main, such recourse will comprise either a procedural challenge at the arbitral seat (as per Art. 34 of the Model Law), or the resisting of recognition and enforcement (most likely per Art. V of the 1958 New York Convention 1958). In each case, the provision of reasons may be essential from a court's perspective in order to assess the challenge – and essential from the arbitral tribunal's perspective in order to insulate its award from any such recourse.

5 An intellectual discipline for the decision-maker

Lastly, Lord Bingham's fifth reason has equal application in the field of commercial arbitration, as many arbitrators would readily admit.

Given these four reasons for reasons, it is little surprise that most modern arbitration laws (4) and rules (5) now impose an obligation upon arbitrators to provide reasons for their awards (in the case of some rules, unless the parties have agreed otherwise). Equally, the issue as to the "adequacy of reasons" has been an abundant source of debate.

Further still, the absence of reasons (or adequate reasons) is a matter that many courts take very seriously. This all the more so when the parties have agreed (e.g., by selecting any Model Law arbitral seat) that awards be reasoned. Indeed, on this basis, a failure to provide adequate reasons could amount to a failure by the arbitral tribunal to comply with the parties' agreement. One recent case has gone a step further. In its decision of 11 March 2008 in *Smart Systems Technologies Inc v. Domotique Secant Inc*, (6) the Quebec Court of Appeal refused to recognize and enforce a foreign arbitral award (which had already been recognized at the seat of arbitration – Albuquerque, New Mexico). It did so on the grounds that the parties having agreed to the application of the Model Law; the award being unreasoned; and the absence of reasons impeding the court's ability to consider the validity of the award and a number of serious errors alleged, the arbitral tribunal's failure to provide any reasons for its award was contrary to public policy (or "*public order as it is understood in international relations*").

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IV Investor-State Treaty Arbitration

There is then the core question as to what "reasons for reasons" apply in the field of investor-State treaty arbitration. And here there is a persistent view that this form of arbitration may simply be added to the same spectrum of general commercial arbitration identified above. It is accepted by most that there are compelling "reasons for reasons" in this field, and assumed by many that they are the same – if arguably heightened – considerations as apply to any other form of commercial arbitration.

This, it is suggested, is a fundamental misconception. It is based, in turn, on the premise that investor-State arbitration consists simply of commercial arbitration in the context of a treaty – a premise no doubt enhanced by the fact that investor-State tribunals generally comprise the same body of individuals that dominate commercial arbitration, and that these arbitrators, just as the counsel that appear before them, frequently began, and have since spent the bulk of their professional lives, in commercial arbitration.

But commercial arbitration is an incorrect paradigm for this process. Notwithstanding the superficial similarities between the two forms of dispute resolution, and notwithstanding that one system borrows a procedural structure from the other, the two are in truth radically different. When considering the "reasons for reasons", it is imperative that this difference is fully appreciated. This may be elaborated by reference to each of Lord Bingham's five reasons.

1 The parties are entitled to be told why they have won or lost

There is no doubt that the parties to an investor-State treaty arbitration have an entitlement to be told why they have won or lost. But in this field, they are not the only ones. A broad range of other interests may also have the same entitlement. Further, depending upon the dispute, the nature of the entitlement itself, and the correlative duty upon the tribunal, may well be of a wholly different order to that arising in commercial arbitration.

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These points flow from the peculiar nature of investor-State arbitration. As elaborated in a number of recent studies: (7)

(a) In terms of its positioning and standing, investor-State arbitration as a process is akin to inter-State arbitration (and unlike commercial arbitration) since both the existence and mandate of investor-State tribunals depend upon the consent on the part of two (or more) sovereign states, itself established by a sovereign act (the conclusion of an international treaty). It is, of course, true that investor-State arbitrations also depend upon the consent of investors, but such consent constitutes no more than the pulling of a trigger established by the international agreement of States. By way of setting, this peculiar provenance sets the process apart from a mere private or contractual arrangement.

(b) In terms of its function, investor-State arbitration is more akin to a form of public law adjudication, rather than commercial or contractual dispute resolution. Unlike commercial arbitration, its focus is generally regulatory disputes between individuals and a State (a vertical relationship), as distinct from reciprocal disputes between private parties, or between a private party and a State acting as a commercial entity (a horizontal relationship, in which both disputing parties are equally capable of possessing legal rights and obligations). In other words, BIT disputes, by their very nature, force tribunals to rule on the manner in which States exercise their sovereign discretion, and govern. To this end, they raise broad policy issues that reach far beyond the mutual rights and obligations of parties to a particular contract – issues that may well interact with the lives of ordinary people and the way they are governed. Whether or not this is the intention of such tribunals as they determine the dispute before them, it will frequently and necessarily follow, in so far as one class of individuals is protected by constraining the conduct of governments that continue to represent everyone else. It is this "regulatory" dimension of investor-State arbitration that distinguishes it from the simple determination of contractual rights and obligations – even if one of the parties to a contract is a State.

(c) In the exercise of this function, investor-State tribunals are endowed with powers of review that far exceed those available to national court judges. Given the principles of attribution in customary international law, States are responsible for the acts of each of their constituent elements, including their executive, their legislative and their judiciary. So it is that investor-State tribunals now routinely review, second-guess, and sanction the conduct of governments, parliaments and courts. The ambit of this power would be simply unthinkable in the context of most municipal systems of administrative law, and whilst perfectly understandable as a matter of international law, it is difficult to reconcile with accepted (municipal law) notions of judicial independence, and parliamentary sovereignty.

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(d) Further, investor-State tribunals are mandated to conduct this review by the application of extremely broad, open-textured, standards, as prescribed in BITs (e.g., restrictions on "expropriation"; guarantees of "fair and equitable treatment"; requirements of "non-discrimination" or "national treatment" or "most favoured nation" standards, amongst many others). The language of treaties is often the product of difficult cross-cultural negotiations, and the establishment of a consensus frequently requires the use of generalized and somewhat bland language (which may be susceptible of more than one interpretation). (8) Indeed, in most cases, anything more precise would have been impossible to agree. The result, for investor-State tribunals, is the delegation by States to private arbitrators of a vast discretion in the application of substantive standards to the particular facts of a dispute – a discretion that far exceeds that available to most national court judges who may be empowered to review sovereign conduct.

(e) The lack of guidance in the substantive standards to be applied is further compounded by the absence of any doctrine of *stare decisis* in this field (as is the general position in international law). However detailed previous elaborations of the applicable standards may be, investor-State tribunals do not operate in a hierarchical or unitary system that requires them to follow precedents, or to adopt the conclusions of other courts or tribunals. As succinctly noted by the tribunal in *SGS v. Philippines*: (9)

> ... there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision. There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals.

Thus, the discretion of each investor-State tribunal remains, at least in theory, relatively unrestricted. (10)

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(f) This extraordinary power of review is coupled with an equally extraordinary power on the part of investor-State tribunals to discipline States by the imposition of damages awards. The scale of these awards may well be very significant indeed. As Van Harten notes by way of one example, in *CME v. Czech Republic* (2001), (11) the tribunal ordered the Czech Republic to pay US$ 353 million to the investor. This amount, according to Van Harten, roughly equated to the Czech Republic's entire health-care budget for the relevant year. If adjusted for population size and gross national income, the award was equivalent to an award of US$19 billion against the United Kingdom; US$ 26 billion against Germany; and US$ 131 billion against the United States. (12) In substance, awards as vast as these constitute material allocations of public funds, which may, in and of themselves, have a direct impact beyond the immediate parties to the dispute. And yet they are allocations effected by private individuals who operate in a sphere completely removed from the limitations, checks and balances that would ordinarily apply to those empowered to make such allocations in a domestic context.

(g) Further still, investor-State tribunals exercise these relatively unstructured and wide-ranging powers in a procedural regime that – again unlike national court judges:

i. lacks any system of substantive appeal;

ii. is often insulated from, or susceptible of only limited, procedural review by national court judges; and
iii. leads in many cases – at last in theory – to compulsory international recognition and enforcement (whether under the Washington Convention 1965, or the 1958 New York Convention).

Against these factors, the simple assertion that "parties are entitled to be told why they have won or lost" will not do. In truth, the position in investor-State arbitration goes much further than this.

First, the investor-State tribunal's audience comprises not only the immediate parties, but all other entities that may be affected by the decision. As explained above, depending on the issues at stake, this could well include broad sections of a given population. A dispute, for example, between a foreign investor and a State over the exercise of the State's emergency powers (e.g., an urgent decision to nationalize a major bank, in order to alleviate a rapid economic slowdown or "credit crunch") could well be as critical for the domestic population as it is for the foreign investor. There may also be other non-parties with a legitimate interest in the substantive matters at stake, such as NGOs, international policy and funding institutions (such as the World Bank) or even other governments. Crafting adequate reasons in order to satisfy such a broad and diverse audience is likely to be a completely different task from simply explaining to the immediate parties why they have won or lost.

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Second, the importance, complexity, and political sensitivity of the actual issues themselves (i.e., the exercise by a State of its sovereign discretion) is likely to call for a level of, and care in, reasoning, beyond that required for a commercial transaction. It is one thing (for example) to describe the rights and obligations of parties to a commercial sale, or indeed the quality of tapioca pellets. It is quite another thing (for example) to determine the adequacy of an elected government's black empowerment or land distribution policy; or a State's exercise of emergency powers; or (more broadly) its economic or foreign policy; or the activities of an elected legislature; or the determinations of a Supreme Court. This all the more so, if (as is common) the dispute takes place against a backdrop of widespread public debate and activism; if the decision might inflame an already polarized and fragile situation; and if (as suggested earlier) a key function of reasoning is to ease the acceptance of the award.

Third, and leading on from all these points, there is the ever-more critical question of the very legitimacy of the investor-State arbitration process itself. For some time, the system has been under attack from those who argue that it is a process without adequate checks and balances, in which unelected, unrepresentative, and unaccountable individuals wield unjustified power. The rights and wrongs of this debate lie well beyond the scope of this paper. But even if completely misplaced, it is a fact that such criticisms of the process exist, and are gathering pace. It is therefore incumbent on those responsible for operating the system to tailor the arbitral process, in so far as possible, with these pressures in mind. This is not just a broad policy issue regarding the future of BIT dispute resolution as a whole. Rather, it is a concrete matter for each individual case, and each individual tribunal, since to disregard this wider debate may well risk the integrity of the immediate process, and the ultimate award.

One key approach for tribunals is to enhance the transparency of the arbitration, in so far as feasible. Another is to allow the participation of non-parties who may have a legitimate interest in the dispute (whether as third parties or amici curiae), and may require their own "day in court". (13) But the success of all such measures still largely depends on the quality of the final award. There is little to be gained by enhanced transparency, or the inclusion of all interested parties if, at the end of the day, questions remain on the part of those concerned as to precisely how their position was actually taken into account, and why an investor-State tribunal has arrived at the position it has. Indeed, with increased transparency, and increased participation in the process, there is much more pressure on the investor-State tribunal to take into account and reflect all positions in its final determination, and to perfect the presentation of its award.

Once again, these are all dynamics that militate in favour of very carefully and fully reasoned awards. They bear equally on each of Lord Bingham's four other reasons for reasons and, importantly, they are absent in the field of commercial arbitration.

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2 A safeguard against arbitrariness

In light of the analysis above, Lord Bingham's second reason for reasons has an obvious application in this field. But as with the first reason, it is greatly enhanced here, given the importance and sensitivity of the issues at stake, and the nature of the tribunal's audience.

3 A guide to future conduct

Unlike the position with commercial arbitration, Lord Bingham's third reason for reasons has an important application to investor-State arbitration, but it requires adaptation in this context. There are two key components here.

Future "Case Law": First, there is the need for coherence and stability in what is a nascent but fast-evolving jurisprudence. Unlike commercial arbitration, investor-State arbitral awards are, in the main, public, and indeed widely publicized and debated. In its relatively short life, the

field of investor-State arbitration has already generated a huge body of decisions which, in turn, have spawned textbooks, articles, discussion fora, and international conferences. Over and above the numerous BITs themselves, it is the awards of arbitrators that have become the true engine in the development of this field. But this body of decisions has also given rise – already – to marked divergences of approach. There are competing lines of decisions on many key procedural and substantive issues. To name but a few random examples, one may point to the range of approaches on the juridical effect of prescribed preconditions to the commencement of arbitration; to the definition of "investor" and "investment"; to the meaning and effect of "umbrella clauses"; to the analysis and application of "most favoured nation" provisions; to the definition of the components of "fair and equitable treatment" and their relationship with customary international law; and so on. (14) The list, in truth, is now extensive, as reflected in the size of textbook now customarily produced. Some of the inconsistencies involve a single treaty. (15) Some of the inconsistencies involve a single event. (16) Some involve a single dispute. (17) To an extent, these divergences are unsurprising, given the relative youth of the field; the need for doctrine to develop and settle; and the accepted fact that there is no applicable doctrine of precedent or *stare decisis*. (18) Further, (as emphasised, e.g., in the *MOX Plant Case*), (19) identical or similar provisions of different treaties may not necessarily yield the same interpretive results once differences in respective context, objects and purposes, subsequent practice of parties, and *travaux préparatoires* have been taken into account. But, even allowing for this, the overall result remains a growing, and worrying, incoherence, and instability in this area. There is, at least as yet, little predictability, and perfectly understandable concerns when comparable cases lead to very different outcomes. Indeed, as a practical matter, it is currently almost impossible to provide useful advice to disputing parties since, ultimately, so much will depend upon the identity and tastes of the particular arbitrators appointed. All this is welcome fodder for the critics of the system.

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Notwithstanding the absence of a doctrine of precedent, there is a common search for consistency. Hence most investor-State tribunals carefully review, and place heavy reliance upon, previous arbitral decisions. As put by the tribunal in *Saipem v. Bangladesh*: (20)

> The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law. (21)

This, it is respectfully suggested, is the correct approach. Unlike commercial arbitration, investor-State tribunals have at least some responsibility beyond the simple resolution of the immediate dispute before them. This is not to be overstated. It is certainly not the case that tribunals must follow previous decisions. Equally, it is not the case that each tribunal has a mandate, or indeed the ability, to make sweeping jurisprudential pronouncements, or to resolve doctrinal debates for all time. As put by one commentator: "There is no multilateral grant of authority over objective interpretation granted to individual tribunals sitting in cases of particular investor-State disputes." (22)

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Rather, the collective responsibility of tribunals in this field, at this early stage of its existence, is to pave the way for an orderly development of the law (and even, in so far as possible, to provide momentum for a "*jurisprudence constante*" on key issues). In a system of ad hoc adjudication such as this, and given the absence of a single institution, this can only be done by taking sufficient care in the articulation of awards, such as to render them of use in subsequent cases. Specifically, this entails:

(a) A duty to consider, and to explain departures from, or concurrences with, relevant previous decisions. It bears emphasis that the point here is one of articulation only. There is no difficulty in tribunals refusing to follow earlier relevant decisions. The point, rather, is that such departures should be reasoned. The same is true if previous decisions are to be followed. If little or no regard is paid to previous relevant decisions, and if tribunals look no further than the immediate treaty and the immediate dispute before them, the multiplicity of approaches in this field, and the consequent disorder, will continue.

(b) A duty to elaborate sufficient reasons such as to enable future tribunals to assess the award, and decide whether or not to follow it. This is the correlative of (a) above. If awards are poorly or minimally reasoned, this will impede subsequent tribunals from discharging their duty. There are several dangers here. The poorly reasoned award, which is impenetrable or difficult to analyze, is likely to be ignored by future tribunals, and thereby remain yet another decision isolated from the mainstream of the jurisprudence. Whilst, in Paulsson's conception of a Darwinian "natural selection" amongst awards, such decisions may "flicker and die near-instant deaths", (23) they may also persist, as a testament to the incoherence of the law. Worse still, such decisions may be misunderstood and misused by future parties, tribunals or commentators, in their respective searches for consistency.

Future Conduct: As noted, Lord Bingham's third reason for reasons also has a further, quite different, application in this field. To many, the modern law of foreign investment is primarily concerned with promoting the flow of capital into host States, and the protection of aliens'

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property and interests. There is, however, a broader conception that focuses upon the role of BITs in the development process of host States, and in particular, the imposition by way of treaties of "externally anchored economic reform and good-governance principles", (24) In short, "top-down" development. As explained by Wälde:

> ... the role of investment treaties is to provide an external anchor for economic policies that are in the long-term sensible for national economies and the global economy, but which are imperilled by forces of, usually short-term, domestic pressures.... External disciplines play a role that can in some aspects be compared to the role of national constitutional law and the prototypes of international constitutional law – as embodied, for example, in WTO and EU law or the European and Latin American Human Rights Conventions.
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> (....)
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> By providing external disciplines applied by an international adjudicatory process, much like the WTO inter-State trade litigation system, investment treaties provide sanctions for non-compliance in individual cases, but, and perhaps more importantly, they provide a signal for the domestic policy discussion on how economic governance should be....
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> The accountability that arises in litigation before an investment tribunal may not be fully immune, but is less subject to political manipulation than any domestic processes – political, administrative or judicial. The prospect of international accountability provides leverage to the good-governance forces within a Government. The prospect of an international sanction and international accountability strengthens the hand of politicians and officials within a national Government who advocate a fair course of dealing rather than yielding too easily to domestic agitation with short-term political advantages and much higher long-term economic and then also political costs usually borne by subsequent Governments. (25)
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> This external imposition of standards is, thus, not just a matter for treaties. Arbitral awards play a critical role, given that these are the vehicles for detailed interpretation and application of the generic principles set out in treaties. Further, this is not just a question of disciplining host States. As many arbitral awards have now elaborated, there is a key principle of "investor responsibility" that conditions the rights of investors, and just as an investor-State tribunal may set out standards of good governance for a State, so it may also elaborate standards of conduct for investors.
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> In each case, this is a function beyond the immediate resolution of the dispute, which bears directly upon the quality of reasoning required – and is a factor absent in commercial arbitration.

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4 Enabling an appellate court to review the decision and decide whether it is subject to reversible error

Lord Bingham's fourth reason for reasons has a similar application here as it does to commercial arbitration. Investor-State arbitration may take a number of different forms, each with its own regime for review. BIT arbitrations conducted under the auspices of ICSID will be limited to the ICSID annulment procedure, and insulated from the grasp of national courts. BIT arbitrations conducted under the UNCITRAL Arbitration Rules or other institutional forms of arbitration are likely to be subject to at least a limited procedural review by the courts of the seat. In all cases, there may be further scrutiny at the stage of recognition and enforcement. Just as with commercial arbitration, the provision of reasons is essential not only to facilitate such reviews, but also to insulate awards from undue attacks.

5 An intellectual discipline for the decision-maker

Lastly, Lord Bingham's fifth reason for reasons is as valid here as in any other adjudicative process.

V Common Failures

The question then is whether investor-State tribunals are generally meeting the standard of reasoning that is required of them. Others have already conducted detailed and empirical analyses of particular areas, and particular awards. (26) This lies beyond the scope of this paper. Rather, what is set out below (on a "no names" basis) are three of the more common, general failures by arbitral tribunals in their overall approach to reasoning in this field.

a A Tendency towards Minimalism

In his Freshfields Lecture, Lord Bingham noted that Common Law courts are often criticized for what he termed a "tendency towards over-elaboration" – a tendency of which he warned commercial arbitrators to be wary. The tendency in investor-State arbitration, it is suggested, veers the other way. It is true that awards in this field tend to be long. More often than not, however, the bulk of the pages comprises an extremely lengthy recitation of the procedural history of the matter, followed by an even more lengthy "cut and paste" from each side's submissions on each point. As one ploughs through this great mass of material, one's expectations may rise as to the analysis to come. And yet, as one finally reaches the promising title "*Analysis*" or "*Conclusions*", one's hopes are frequently shattered, as the award suddenly

peters out, and ends, not with a bang but a whimper. (27) In the few pages left between the heading and the dispositive order, very little is often given away as to the tribunal's thinking.
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The flavour of such awards is one of minimalism – or the expression of no more than is strictly necessary for each proposition, in order to connect the final disposition to at least some of the parties' submissions. In some cases, reasons are given, but by way of short and compressed statements. In others, reasons are pared down in number to the fewest possible propositions. In others, conclusions are given, instead of any reasons at all.

This is a style of drafting that may well have its roots in commercial arbitration. It is motivated by a belief that the tribunal's mandate is simply to resolve the immediate dispute, and in so doing to avoid any possible "hostages to fortune". Hence, even if in deliberations the tribunal has conducted a detailed analysis, the tribunal sees its task in drafting as the pronouncement of its final destination, rather than the voyage by which it arrived there. The overly cynical might also suggest, quite unjustifiably, that this approach also maximizes the role of the tribunal's legal secretary (or juniors in the firm), who may be solely responsible for the drafting of the longest portions of the award.

But this approach fails to address the reasons for reasons set out above. On the basis of these reasons, it is suggested that in the drafting of their awards in this context, it is imperative that tribunals cast off the "commercial arbitration" conception of their role; consider their task afresh; and develop a tendency towards elaboration.

V A Narrow View of "Relevance"

The second general failure is closely connected to the first. As part of the flawed conception that investor-State arbitration is simply commercial arbitration involving a treaty, and the tendency towards minimalism that this engenders, many tribunals in this field deploy an overly narrow view as to what is a "relevant" issue that needs to be addressed, and what is an "irrelevant" issue that may be ignored. In the context of commercial arbitration, the common approach is to address only those issues that are actually and strictly dispositive of the immediate dispute. In the context of both national courts and commercial arbitration, however, Lord Bingham cautioned against an overly rigorous application of this principle: "[Judges] must not avoid mention of events to which any party reasonably attaches significance even if the significance is not in his view very great."

This is not, of course, a plea that arbitrators (or judges) produce overly long decisions that meander through all points raised, whether or not each is in fact of any consequence to the final result. Clearly, this would be in no parties' interests, and positively dangerous for the integrity of the process itself. Rather, the point is to ensure that all parties leave the process with the sense that the key issues that are of particular importance to them have been taken into account.

In investor-State arbitration, there is a key difference: given the peculiar nature of the process, "relevance" must be tested by reference to all interested entities – not just the immediate parties to the dispute. If, for example, a body of NGOs, or perhaps a wider population in the host State, considers a particular aspect of a dispute of vital significance, the tribunal must at least bear this in mind in its delimitation of "relevant" issues that warrant mention in the award – even if, in the tribunal's own view, and as a matter of strict, cold, logic, a final disposition is possible without any mention of the issue at all.

c A Tendency towards Compilation

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It is argued above that given the nature, and youth, of this field, it is incumbent upon tribunals to advert to previous decisions, whether or not they choose to follow them. Most tribunals do so, albeit to greatly varying degrees. However, the way in which previous decisions are addressed is very often by way of a somewhat cursory "string citation", frequently in footnotes. Such an approach is unproblematic as long as the "string" is the product of careful consideration by the tribunal. But the creeping and unfortunate tendency here is to substitute mechanical compilation, for a proper analysis of prior reasoning. (28) How often it is that one follows up on a list of references, only to find that the authorities in question in fact contain no support for the proposition for which they have been deployed. Indeed, the emerging phenomenon is the imprecise citation (or string) in one award, which is then unquestioningly adopted and quoted by tribunals in successive decisions. (Once again, the overly cynical observer might, wholly incorrectly, suggest that the tribunal itself did not take responsibility for the offending footnotes in the award).

It is suggested that the standard of reasoning now required in that investor-State arbitration in turn necessitates a more meticulous approach to the evaluation and citation of prior decisions.

VI Conclusions

There are a number of conclusions that should *not* be drawn from this analysis.

This is not a call for long awards, per se. Nor is it a desire for the production of legal dissertations. Nor is it to encourage tribunals' displays of erudition, for erudition's (or the tribunals') sake. Notwithstanding the reasons for reasons enumerated above, many investor-State arbitrations will be happily and properly resolved by a short and concise piece of work.

Equally, this is not a licence for rambling or overly broad awards. There remain compelling reasons why tribunals in all fields must remain disciplined in the crafting of their decisions, and the selection of matters to be addressed.

Further still, the analysis here must necessarily give way to a range of other factors that may well militate in favour of "less" rather than "more", in the drafting of an award. These include the often complex dynamics within the tribunal and its decision-making process. In particular, there is a real possibility in many cases that all members of the tribunal will be able to agree on the end result, but not on the reasons. In such cases, unanimity may well be more important than a detailed award, and the drafting will then have to be cut back in such a way as to sustain the consensus. (29)

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But these points aside, there is a pressing need for arbitral tribunals in this field to reconsider their approach when drafting awards, and to recognize the duties which this curious form of adjudication imposes.

In particular, it is imperative that tribunals now move away from the commercial arbitration mentality that appears to have infected the practice so far. Given the existing pressures on the system, this is an infection which cannot be left unchecked.

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References

★) Toby Landau: M.A., B.C.L. (Oxford); LL.M. (Harvard); FCIArb; CArb; Barrister (London); also of the New York State Bar; Essex Court Chambers, London.

1) BINGHAM, "Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitral Award", 4 *Arbitration International* (1988) p. 141. Lord Bingham's lecture was written largely by reference to English arbitral practice, and before the promulgation of the English Arbitration Act 1996 which (in Sect. 52(4)) introduced for the first time in English statutory law a requirement that arbitral awards contain reasons.

2) See in particular ALVAREZ and REISMAN, eds., *The Reasons Requirement in International Investment Arbitration*, (Martinus Nijhoff 2008); FAUCHALD, "The Legal Reasoning of ICSID Tribunals – An Empirical Analysis", 19 EJIL (2008) pp. 301-364.

3) *R.* v. *Sussex Justices, Ex parte McCarthy*, [1924] 1 KB 256.

4) See, e.g., Art. 31(2) of the Model Law.

5) See, e.g., Art. 25(2) of the ICC Rules; Art. 26.1 of the Rules of the London Court of International Arbitration.

6) *Smart Systems Technologies Inc v. Domotique Secant Inc* [2008] J.Q. No. 1782, 2008 QCCA 444.

7) See in particular the frequently cited monograph by VAN HARTEN, *Investment Treaty Arbitration and Public Law* (OUP 2007), from which much of this material has been drawn (and greatly over-simplified). See also SUBEDI, *International Investment Law, Reconciling Policy and Principle* (Hart 2008).

8) See, e.g., *Czech Republic v. European Media Ventures SA* [2008] 1 Lloyd's Rep 186, at para. 19 (Simon J), on the notion of "common intentions", in the context of the interpretation of a BIT in accordance with the Vienna Convention:

"The proper approach is to interpret the agreed form of words which, objectively and in their proper context, bear an ascertainable meaning. This approach, no doubt reflecting the experience of centuries of diplomacy, leaves open the possibility that the parties might have dissimilar intentions and might wish to put different interpretations on what they had agreed" (and fn. 10: "Mr. Landau referred to the subversive epigram: a treaty is a disagreement reduced into writing").

9) *SGS v. Phlippines*, Decision on Jurisdiction, 29 January 2004, at para. 97.

10) The issue of "precedent" in investor-State arbitration has been the subject of much analysis. See, e.g., the several contributions in BANIFATEMI, ed., *Precedent in International Arbitration*, IAI Series on International Arbitration No. 5 (Juris 2008); and KAUFMANN-KOHLER, "Arbitral Precedent: Dream, Necessity or Excuse?" 23 Arbitration International (2007) p. 357; DI PIETRO, "The Use of Precedents in ICSID Arbitration: Regularity or Certainty?" 10 Int Arb Law Rev (2007) p. 92. See also the extensive analysis of the new positioning and role of arbitral decisions in this field, as compared with the traditional role of treaties, in WÄLDE, *New Aspects of International Investment Law* (Centre for Studies and Research in International Law and International Relations, Hague Academy of International Law 2004) at pp. 63-154.

11) *CME Czech Republic BV v. Czech Republic*, Award on Damages, 14 March 2003.

12) VAN HARTEN, supra fn. 7 at p. 7.

13) The issues of (a) "transparency" and (b) the participation of non-parties in investor-State arbitration, have both given rise to passionate debates, and copious analysis. For a useful survey, see DELANEY and MAGRAW, "Procedural Transparency" in MUCHLINSKI, ORTINO and SCHREUER, eds., *The Oxford Handbook of International Investment Law* (OUP 2008) Chap. 19, pp. 721-788.

14) See generally on this issue: GILL, "Inconsistent Decisions: An Issue to be Addressed or a Fact of Life?" in ORTINO, SHEPPARD and WARNER, eds., *Investment Treaty Law – Current Issues*, Vol. 1 (BIICL 2006) at p. 23, and FRANCK, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatising Public International Law Through Inconsistent Decisions", 73 FLR (2005) p. 1521.
15) E.g., the contrast between *Occidental v. Ecuador*, Final Award, 1 July 2004, and *EnCana Corp v. Ecuador*, Award, 3 February 2006.
16) Notably the numerous decisions on Argentina's 2002 emergency legislation.
17) E.g., the now notorious *CME* and *Lauder* cases (*CME Czech Republic B.V. v. Czech Republic*, Partial Award, 13 September 2001, and *Ronald S. Lauder v. Czech Republic*, Final Award, 3 September 2001.
18) The absence of any doctrine of precedent, and the fact that tribunals are free to disregard previous decisions, has become something of an incantation in awards in this field. See, e.g., *Amco v. Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 395; *Amco v. Indonesia*, Decision on Annulment, 16 May 1986, 1 ICSID Reports 521, at para. 44; *LETCO v. Liberia*, Award, 31 March 1986, 2 ICSID Reports 346, at para. 352; *Feldman v. Mexico*, Award, 16 December 2002, 7 ICSID Reports 341, at para. 107; *SGS v. Phlippines*, Decision on Jurisdiction, 29 January 2004, at para. 97; *Enron v. Argentina*, Decision on Jurisdiction (Ancillary Claim), 2 August 2004, 11 ICSID Reports 295, at para. 25; *AES Corp v. Argentina*, Decision on Jurisdiction, 26 April 2005, 12 ICSID Reports 312, at paras. 17-33; *Gas Natural SDG SA v. Argentina*, Decision on Jurisdiction, 17 June 2005, at paras. 36-52. But see fn. 28 below.
19) *The MOX Plant Case (Ireland v. UK)*, Provisional Measure, Order of 3 December 2001, 126 ILR (2005) 260.
20) Decision on Jurisdiction, 21 March 2007, at para. 67.
21) See similarly, *Gas Natural SDG, SA v Argentina*, Decision on Jurisdiction, 17 June 2005, at paras. 36 and 52 (in which the tribunal's conclusions were carefully cross-checked with previous decisions).
22) KRISHAN, "A Notion of ICSID Investment" in *Investment Treaty Arbitration: A Debate and Discussion*, Todd Grierson-Weiler, ed. (Juris Publishing 2008).
23) PAULSSON, "International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law" in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series no. 13 (Kluwer 2007), at p. 881.
24) Per WÄLDE, in *New Aspects of International Investment Law* (Centre for Studies and Research in International Law and International Relations, Hague Academy of International Law 2004) at pp. 91-120.
25) WÄLDE, *ibid.*, at pp. 104-107.
26) See references in fn. 2 supra.
27) See T.S. ELIOT, "The Hollow Men" (1925) final stanza: "This is the way the world ends / This is the way the world ends / This is the way the world ends / Not with a bang but a whimper."
28) For some particularly egregious examples, see some of the earlier footnotes in this paper (in particular fn. 18 supra).

29) Cf. in the context of public international law, the debates on the provision of reasons that preceded the First Hague Conference of 1899. At the Committee of Examination's Tenth Meeting on 26 June 1899 (the first reading), the German delegate, Dr. Zorn, requested that there be added a requirement that an award "must state the reasons on which it is based". James Brown Scott's translation of the meeting records:

> Mr. Martens [whose Draft Plan formed the basis of discussions] recognizes the significance of this proposition. He has on more than one occasion mentioned the advantages that would result from a statement of the reasons upon which the awards of arbitrators are based; especially by this means we would succeed in creating a valuable body of law. But on the other hand he is bound to recognize serious objections which he has met on the part of different arbitrators who are of the highest authority in these matters, and who have called his attention to the fact that in an international conflict arbitrators are not only judges; they are also representatives of their Governments. To require them to state the reasons for their decisions would be to impose upon them one of the most delicate obligations, and perhaps even to embarrass them seriously, if their judicial consciences do not find themselves in accord with the requirements of their Governments or the sensibilities of public opinion in their countries. It is indeed going far to require an impartial arbitrator to condemn his own government. Must we also require him to justify himself expressly and thereby aggravate this condemnation? If the arbitral decision contains only a few sentences all of the arbitrators without regard to their nationality may sign it. Will the result be the same if this award, accompanied by a statement of the reasons on which it is founded, implies a severe criticism of or casts blame upon, one of the parties? It is clear that the arbitrator of the country blamed will be obliged to abstain from voting, and consequently that the decision will have less authority. That is why, in the very interest of the growth of the principle of arbitration, the Russian Government has not gone so far as to provide that arbitral decisions shall be accompanied by a statement of the reasons upon which they are based.
>
> At the second reading on 30 June 1899, Dr. Zorn reintroduced his proposal in the belief "that this addition is necessary to the development of the law of nations". A Mr. Asser was recorded as challenging Mr. Martens, pointing to "a strong guaranty of impartiality in the obligation imposed upon arbitrators to sate the reason for their decision. Thanks to this guarantee the award will never be considered arbitrary." Mr. Martens' objections were defeated, and Dr. Zorn's proposal was eventually passed, and found its way into the final Articles.