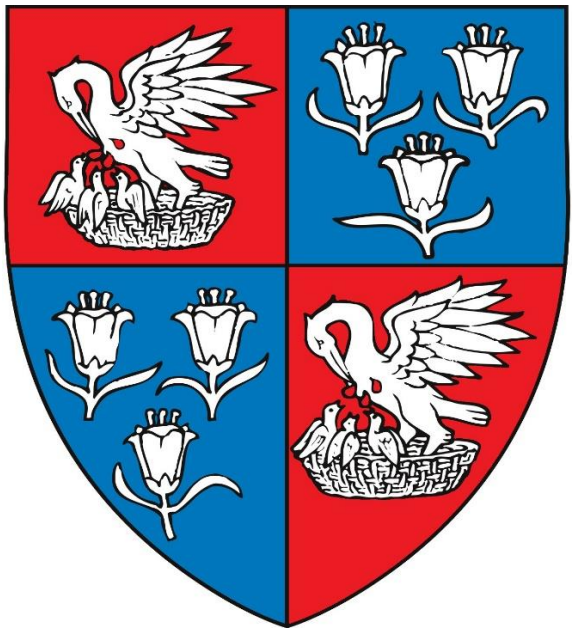

“Authorities” in International Dispute Settlement: a Data Analysis

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June 2020

This dissertation is submitted for the degree of Doctor of Philosophy

Preface

This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in this Preface and specified in the text.

It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text.

I further state that no substantial part of my dissertation has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text.

This thesis, including footnotes, does not exceed the permitted length.

Introduction

This thesis regards legal argumentation in international law. Its main object are the precedents and doctrinal teachings that enter this argumentation as "authorities".

The argument starts with an uncontroversial observation: international litigation and arbitration, indeed every kind of international legal advocacy, to a large extent turns on the use (and, sometimes, misuse) of authorities. Parties and adjudicators spend time and effort marshalling supportive authorities, distinguishing or refuting unhelpful ones, and monitoring legal developments in unrelated cases and in academic debates to bolster their arguments.

This practice is essentially the same before all international courts and tribunals, although the most relevant authorities can change. It has profound implications, for many important issues of international law (its sources, the role of precedents, its fragmentation, etc.) are also questions about the nature, scope and relevance of authorities in international law. In short, the practice of citing authorities warrants a comprehensive inquiry into its modes and consequences.

There is little research on what parties, courts and tribunals do when they cite a case or a doctrinal authority, and even less *empirical* research on this practice. Likewise, very little research has tried to elucidate what makes an authority authoritative. As a result, assumptions – such as the idea that authorities are merely cited for their persuasive power – have yet to be scrutinised. This thesis closes those gaps in the literature: its main purpose is to investigate the practices of citing authorities in international dispute settlement, as well as their characteristics and consequences.

Based on international judgments and awards (and the citations therein) treated as a dataset, this thesis sheds light on what makes an authority "authoritative"; how parties and adjudicators use authorities; and the broader consequences of authority-based argument for international law.

Chapter I defines "authorities" as a material used in support of legal reasoning, and examines their place in international law. Chapter II reviews the gaps in the existing literature when it comes to authority-based argumentation, and describes the methodology underlying this thesis.

Chapter III questions the idea that authorities are only cited in function of their inherent persuasiveness, and identifies and investigates the factors that may underlie the "authoritativeness" of authorities, such as the identity of the "author", their age or language.

The next three chapters consider the practice of citing authorities by three different actors in international disputes: courts and tribunals (Chapter IV); individual judges and arbitrators in opinions (Chapter V); and parties in their pleadings and submissions (Chapter VI). These practices vary alongside the strategic considerations of these different legal protagonists.

Finally, Chapters VII and VIII review two systemic consequences of the use of authorities and conclude to their important role in two aspects of international law: in developing the judicial dialogue between international judicial bodies, and in developing and defining international law.

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Chapter I – "Authorities" in legal argument

Authorities, as mentioned several times below, are material from the past informing the present. It is therefore especially appropriate to start this study of authorities with reference to a past when authorities reigned supreme in argumentation, and to travel back in time to a sunny day of March 1148. Before cardinal and bishops gathered in Council at Reims, Gilbert of Poitiers, a former professor at the University of Paris, stands for trial before Pope Eugene III. He is expected to defend his writings against several counts of heresy brought by Fra. Bernard of Clairvaux.[1]

For our purposes, the story matters not for its place in the history of the medieval Church, but for Gilbert's defence strategy. Indeed, on the first day of trial, Gilbert's entry into the courtroom is an event in itself: assisted by his clerks, he carries with him voluminous books that, he solemnly declares, prove the rightfulness of his theses.[2] Bernard's secretary Gottfried of Clairvaux later noted, somewhat coyly, that by contrast the authorities Bernard intended to invoke fitted on a single page.[3] Sources further indicate that the stunt, together with Gilbert's erudition, allowed him to prevail against Bernard.

Gilbert of Poitiers's (literally) book-heavy argument belonged very much to the intellectual framework of his time, when "authorities" were a primary element of intellectual argumentation.[4] Disputes in medieval times, and legal disputes especially,[5] were centred around the authorities that supported the propositions in debate.[6] Gilbert only had the good sense to make this reliance highly

1 C. Monagle, "The Trial of Ideas: Two Tellings of the Trial of Gilbert of Poitiers" (2004) 35 *Viator: medieval and renaissance studies* 113. Monagle reports how this trial was part of Bernard's strategy to use "the adversarial structure of a trial to impose a polemical split between monastery and school, and also between himself and the cardinals who were present at the case."

2 Otto von Freising, *Ottonis Gesta Friderici I. imperatoris*, lib. I, cap. LVIII. Tellingly, Otto also described Gilbert as someone who "from his youth had subjected himself to the instruction of great men and put more confidence in the weight of their authority than in his own intellect."

3 Gaufridus de Clara-Valle, *De condemnatione errorum Gilberti Porretani*, at 589C: "… et nos paucas auctoritates Ecclesiae in sola schedula haberemus".

4 J.M. Ziolkowski, "Cultures of authority in the long twelfth century" (2009) 108 *Journal of English and Germanic Philology* 4, at 447. See also D. Ibbetson, "Authority and Precedent", in Mark Godfrey (ed.), *Law and Authority in British Legal History, 1200-1900* (Cambridge University Press 2016), at 69.

5 *Ibid.*, *supra* note 4, at 63: "The jurists of the medieval *ius commune* recognised the value of arguments from authority", and pointing out that these authorities included Homer and Vergil, for they are cited in the *Digest* and the *Institutes*. Compare with the practice of "authoritativeness by association" mentioned below in Chapter III.

6 Another example is revealing: Abelard was once accused of having cited no authority on a sensible question. Confronting one of his critics, he advised him to open the book in which the challenged proposition was found, and then to turn the page: sure enough, a citation by St. Augustine was then provided, and the critic and his followers "blushed by embarrassment" ("obstupefacti erubescant"): see Ziolkowski *supra* note 4, at 445. Compare this, *inter alia*, with the *ad hoc* committee in *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment (29 June 2005), at §49, finding that "again, the Republic [of Seychelles] cites no authority for the proposition that such an error necessitates annulment."

visible, and to complement the intellectual weight of his arguments' supporting authorities with their sheer weight in parchment, calf-skin and ink.

Such a staging of authority remains a crucial part of the legal craft even today. It straddles the common-civil law divide (although the most relevant type of "authority" in use might differ),[7] and is undoubtedly prevalent in international law, where "judicial decisions and the teachings of the most highly qualified publicists of the various nations" are recognized as a formal, albeit subsidiary, source of law.[8] Because international law is for the most part neither codified nor regulated by a central legislator or lawmaker, it is a particularly fertile field for authority-based legal argumentation.[9]

If (sadly) no one nowadays enters a court room pushing forth carts loaded with medieval manuscripts,[10] international adjudicators are still confronted with the weight of (presumably supportive) materials attached to the parties' submissions. Judge Bedjaoui deplored the length and extent of the pleadings before the International Court of Justice ("ICJ"), as every annex is meant to be printed in the ICJ Reports.[11] Alain Pellet similarly complained of the increasing size of submissions in international disputes, opining that "[t]oo much is too much and we are well over too much."[12] International arbitrators routinely ask for parties to print only the necessary minimum,

7 Although "precedents" might not figure in disputes in civilian jurisdictions as much as in disputes in common law jurisdictions, appeals to the "doctrine," another type of authority is very common, especially in the conclusions of the Advocate General where such an institution exists. While this varies in different civil law jurisdictions (see J. Bell, *Judiciaries within Europe: a comparative review* (Cambridge University Press 2009)), the rarity of explicit citations to cases in civil law judgments is often counterbalanced by the role of *implicit* citations, which are the common manner for some continental courts to signal their agreement with a precedent by adopting its language: see M. Van Der Haegen, "The Influence of Belgium's Court of Cassation on the Lower Judiciary: Building a Legal Citation Network" (2016) 13 *Utrecht Law Review* 65.
See also J.Z. Liu, L. Klöhn and H. Spamann, "Precedent and Chinese Judges: An Experiment" (2019) *American Journal of Comparative Law*, finding on the basis of an empirical experiment that although Chinese judges are explicitly prohibited from citing precedents in judgments, precedents nonetheless have a "significant influence" on their decision-making.

8 ICJ Statute, article 38(1)(d).

9 H. Lauterpacht, *The Development of International Law by the International Court* (Cambridge University Press 1934), at 14, explaining that judges must follow precedent, or explain why they depart from it: "These considerations are of particular urgency in relation to international jurisdiction, which is essentially voluntary in character."
See also I. Scobbie, "Rhetoric, Persuasion, and Interpretation in International Law", in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds.), *Interpretation in International Law* (Oxford University Press 2015), at 11: "International law [...] is a rhetorically oriented rather than an axiom-oriented system because it is neither codified nor based on precisely formulated basic principles which can operate as major premises in deductive syllogistic reasoning."

10 Consider however the sometimes impressive "hearing bundles" prepared by parties – and carried by interns, modern-day Church clerks – in some international proceedings. See, e.g., the *ICCA Drafting Sourcebook for Logistical Matters in Procedural Orders*, available at https://www.arbitration-icca.org/media/3/14314586363730/icca_reports_2_final.pdf, which acknowledges the possibility of "voluminous" bundles at hearings, and yet recommend parties to prepare additional "key" or "core" bundles.

11 M. Bedjaoui, "The 'Manufacture' of Judgments at the International Court of Justice" (1991) 3 *Pace International Law Review* 29, at 39.

12 J. Crawford, A. Pellet and C. Redgwell, "Anglo-American and Continental Traditions in Advocacy before International Courts and Tribunals" (2013) 2 *Cambridge Journal of International & Comparative Law* 715, at 14.

knowing too well that printing *in extenso* all authorities is a useless waste of paper.[13] This does not prevent them from citing numerous authorities in deciding a case, likewise invoking their own virtual mountains of ink and paper.[14] Similar mountains cast their tutelar shadow over international legal argumentation in state practice or in academic debates.[15]

This thesis is interested in the implications and characteristics of this practice in international dispute settlement, and this introductory chapter lays the groundwork. **Section 1** below will identify what makes an "authority" for the purposes of a "citation": shortly put, an authority is material that informs a legal reasoning with content-independent reasons for action; a citation is the act of invoking that authority in support of a legal reasoning.

Section 2 will then review the place of such "argument from authority" in legal argumentation.[16] **Section 3** analyses the few international rules that govern the use of authorities in international law, before zooming on the two main types of authorities that are central to this inquiry: precedents and "teachings".[17] **Section 4**, finally, reviews how "authorities" (plural) relates to the broader concept of an "authority" (singular).

1. The definition of "authority"

A) A typology of authorities

Authorities are central to law and to legal argumentation.[18] Under most models of legal adjudication, decision-makers cannot render discretionary decisions absent a rule to this effect. Judicial power is delegated power, and the widely-recognised norm that judges should not "legislate

13 The standard procedural order in ICSID proceedings directs parties not to print legal authorities: see, e.g., *Abertis Infraestructuras, S.A. v. Argentine Republic*, ICSID Case No. ARB/15/48, Procedural Order No. 1 (11 October 2016), at §13.6: "Las autoridades legales deben presentarse solamente en formato electrónico, salvo que el Tribunal específicamente solicite una copia impresa." See also at the ICJ, Practice Direction IX *ter*: "The Court has noted the practice by the parties of preparing folders of documents for the convenience of the judges during the oral proceedings. The Court invites parties to exercise restraint in this regard […]."

14 The modern practice of filing electronic (or "soft") copies of legal authorities might have only strengthened this inclination. As mentioned below (Chapter IV to VI), the number of authorities cited in judgments, individual opinions and pleadings has been growing for the last two decades.

15 For the view that "legal argumentation" encompasses all these different instances, see Scobbie, *supra* note 9, at 5. For the role of precedent in government practice, see B. Jia, *International Case Law in the Development of International Law* (Brill Nijhoff 2017), at 188.

16 The specific reasons why different legal protagonists might choose to orient their legal reasoning around authorities are further studied below in Chapters IV to VI.

17 Throughout this thesis, the term "teachings" is used to indicate the writings, scholarship, etc. that is used in international legal disputes.

18 F. Schauer, "Authority and Authorities" (2008) 94 *Virginia Law Review* 1931, at 1934: "law is, at bottom, an authoritative practice, a practice in which there is far more reliance than in, say, mathematics or the natural sciences on the source rather than the content (or even the correctness) of ideas, arguments, and conclusions." See also R. Posner, "The Theory and Practice of Citations Analysis, with Special Reference to Law and Economics" (The Law School, the University of Chicago 1999), available at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1577&context=law_and_economics, at 6, discussing law as an example of an "authoritarian" institution.

from the bench" means that their decisions must hinge on a legal – that is, authoritative – basis.[19] Few legal propositions or judicial pronouncements can be valid – or even *appear* valid – without supporting authorities. Consequently, the arguments of parties in legal proceedings are also based on authorities; typical legal debates revolve around the scope, and the appropriateness of the use of the adjudicator's powers given such authorities.[20]

This "authoritative basis" can take many forms and command varying levels of "authoritativeness".[21] In its common meaning, an authority can refer to a law or an equivalent positive rule from the legislator, which leaves little room for discretion for the adjudicator that must apply the rule to the case. The term can also refer to a private treatise on the subject at hand,[22] which can safely be disregarded in reaching a legal conclusion. All these are "materials" that will inform legal reasoning, building blocks that lead to a legal conclusion.

What is an "authority" is therefore indissociable from the question of the "sources" of international law. These sources represent the valid authorities to be applied to a dispute.[23] These "valid authorities" are not always readily discernible, however. Their existence and relevance sometimes need to be established by other authorities. This relationship between authorities and sources is a feature of article 38(1) of the ICJ Statute, the most prominent legal rule governing the use of authorities in international law (as explained below, in **Section 2**).

The range of what qualifies as an "authority" is thus relatively open-ended. Grappling with the ambiguity of the term in the Middle Ages – when "authorities" were the main building blocks of argumentation –[24] Bartolus of Saxoferrato offered the following typology:

- Descriptive authorities (historians, geographers, etc.); or
- Prescriptive authorities, among which:

19 J. d'Aspremont, "Bindingness", in Jean d'Aspremont and Sahib Singh (eds.), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar Publishing 2018), at 68.

20 N. MacCormick, *Rhetoric and the Rule of law: a Theory of Legal Reasoning* (Oxford University Press 2005), at 530. See also H. Thirlway, *The Sources of International Law* (Oxford University Press 2010), at 127.

21 Throughout this thesis, the rather awkward term "authoritativeness" refers to the authority of an authority.

22 Briefs, especially when modelled on the US example, usually include many different sources in their "table of authorities". See, e.g., *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Claimant's Reply (21 August 1988), in which cases, statutes and textbooks are listed in the claimant's table of authorities.

23 See Schauer, *supra* note 18, at 1947, esp. footnote 54: "the entire shape of legal argument is determined by what sources can and cannot be used." See also *id, Thinking like a lawyer* (Harvard University Press 2009), at 66.

24 In the Middle Ages, the sources of persuasive argumentation "were not always seen to be the same, but authority was always one of them"; see Ziolkowski, *supra* note 4, at 432.

- those that have the power to make the law,[25] such as the Emperor, or Roman jurists with the emperor's assent (*necessary authority*); and
- others, such as medieval commentators and glossators (*probable authority*).[26]

This typology remains useful to understand the use of authorities today. As explained below, precedents and teachings most often operate as probable authorities in international law.[27] These materials can be confronted one with another, distinguished, or even contradicted. They contrast sharply with necessary authorities, which in most cases directly and definitively resolve a case when applicable.[28] Yet, these categories are neither closed nor hermetic: a precedent can serve in one context as a descriptive authority, and in another as a probable authority;[29] a treaty rule can be a necessary authority when applied in a case that calls for its application, and a probable authority when used as an analogy in a different case.

What is the common link between these varying forms of authorities, and what explains their use in international dispute settlement?

B) Content-independence

The authoritativeness of legal authorities in legal argument results from their content-independence, in the fact that they possess weight regardless of their content.[30]

25 Compare this with S. Sivakumaran, "The Influence of Teachings of Publicists on the Development of International Law" (2017) 66 *International & Comparative Law Quarterly* 1, at 5.

26 See Ibbetson, *supra* note 4, at 64, citing Bartolus's *Commentaria*, D.12.1.1.

27 Precedents and doctrinal works were already classified as probable authorities in medieval times; see Ibbetson, *supra* note 4, at 69.

28 The debate will then turn over whether or not the alleged necessary authority is applicable to a case. Often enough, this debate will be fought based on other authorities (necessary or probable), as "subsidiary means" of identification of the relevant necessary authorities.
The practice of (some) international law adjudicators display some confusion (or, perhaps, some candid forthrightness) about the consequence of different kind of "authorities" on decision-making: witness the tribunal in *Bilcon v. Canada* citing probable authorities and then opining that these "[…] authorities in public international law *require* a high standard of factual certainty to prove a causal link between breach and injury". *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award on Damages (10 January 2019), at §110. (my emphasis)

29 See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 2007 I.C.J. 43, citing the judgments of the ICTY in *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, Judgment (7 May 1997), both as an evidentiary source (at §312) and probable authority (at §402).

30 See N. Krisch, "Liquid Authority in Global Governance" (2017) 9 *International Theory* 237, at 242, linking authority to "content-independence – a 'surrender of judgment' – that contrasts with acts that result from substantive persuasion." In the same sense, see also B. Çali, "Authority", in d'Aspremont and Singh, *supra* note 19, at 41.
The classic treatment of the subject can be found in L.A. Hart, *Essays on Bentham* (Clarendon 1982), at 261: "[…] it is clear that the notion of a content-independent peremptory reason for action or something closely analogous to it enter into the general notion of authority, […]."

Frederick Schauer regards content-independence as the defining feature of authorities: they compel adjudicators to rule despite their own best judgment.[31] In this narrative (and as seen in further details below), authority and "persuasion" are distinct notions: the terms "persuasive authority", although frequently used in international law literature (and in international decisions), is nonsensical. Something that is persuasive does not need authority.[32]

Schauer's argument has the greatest force with respect to what he refers to as "genuine authorities": statutes, codes, and precedents in a *stare decisis* system.[33] These sources are content-independent due to their very existence, as an adjudicator must necessarily apply them (if they apply to the case at hand). In Herbert Hart's terminology, they embody "content-independent peremptory reasons for action."[34]

Probable authorities do not command the same level of authoritativeness; and yet, they can also be described in terms of content-independence. For some of them (e.g., influential treatises, decisions of another court of appeal in the U.S. federal system, etc.), this independence stems from the trust put in them, and their roles as cognitive tools.[35] Adjudicators rely on these probable authorities because they know themselves as non-expert on a subject, and these authorities are sources in which they trust or have reasons to trust. For Grant Lamond:

> The role of theoretical authorities might be described as ultimately epistemic. The function is to assist others to form sound judgments over matters where they lack either the knowledge or the understanding to form a credible view of their own.[36]

This does not cover all authorities, however; there remains a category of materials that are not cited because they are mandatory, or because the citing party necessarily trusts the expertise

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31 Schauer, *supra* note 18, at 1935: "the characteristic feature of authority is its content-independence." Schauer sees in such obedience to authorities the hallmark of legal and judicial reasoning, whereas most other "decision-making environments" function on the basis of the decision-maker's best judgment.

32 *Ibid.*, at 1945; *id.*, *supra* note 23, at 67: "persuasion and authority are fundamentally opposed notions."
In the same sense, see also A. von Bogdandy and I. Venzke, "The Spell of Precedents: Lawmaking by International Courts and Tribunals", in Cesare Romano, Karen Alter and Yuval Shany (eds.), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013), at 510-511.
In most critical accounts of the question, the notion of authority likewise excludes in equal part persuasion and coercion: see F. Zarbiyev, "Saying Credibly What the Law Is: On Marks of Authority in International Law" (2018) 9 *Journal of International Dispute Settlement* 291, at 295.

33 In short, Bartolus's "necessary authorities."

34 See Hart, *supra* note 30, at 268.

35 In some respects, this is similar to Walton's point that the argument from authority might be nothing more than relying on the presumption that we can later ask the cited authority for further proof of the proposition supported by the authority; see D. Walton, *Appeal to Expert Opinion* (Pennsylvania State University Press 1997), at 72.

36 G. Lamond, "Persuasive Authority in the Law" (2010) 17 *The Harvard Review of Philosophy* 19, at 21. Grant Lamond's "theoretical" authorities correspond to the "probable" authorities studied here.

underlying them. Content-independence, nonetheless, still explains these materials' authoritativeness, although it operates differently. The mere *existence* of an authority, indeed, grants that authority some measure of possible authoritativeness, as this existence proves that the argument it is meant to support is not arbitrary.[37] Authorities can be used as an "anti-arbitrariness vaccine",[38] as a signal that an argument is not made of whole cloth.

These authorities are cited merely because citing *anything* makes for a better argument. With respect to precedents, for instance, Mark Jacob opines that:

> it is often easier to convince a colleague of one's position when a decided case is invoked […] there is some psychological comfort in turning to past decisions, since it suggests that any blame one might attract ultimately ought to be laid at another doorstep.[39]

Under this view, some citations to authorities in international decisions (or briefs) can be retraced to a worried drafter who sought a tiny bit of material to put in a footnote – even if that authority has but the remotest relation to drafter's argument. "The lawyer who points to an authority for support is in effect claiming an endorsement for her argument, and in law, as in life, having one endorser is at least better than having none at all."[40]

Consequently, authorities can be defined as a material that inform a legal reasoning with content-independent reasons for action: a citation to that material will enhance the source material by providing "authority" to the legal argument being put forward.

C) *"Authoritativeness" and "persuasiveness"*

Lawyers cannot however cite *anything* in support of their arguments. Probable authorities need to be *selected* before they can be cited[41] (as opposed to necessary authorities that apply necessarily as soon as they are identified).[42] This selection is based, in turn and to an extent, on the authoritativeness of the selected authority.[43]

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37 Schauer, *supra* note 23, at 74: "[…] it is worth noting that requiring minimal support is still a form, albeit a weak one, of genuine authority."

38 The expression is from J. Paulsson, "The Role of Precedent in Investment Arbitration", in Katia Yannaca-Small (ed.), *Arbitration under International Investment Agreements. A Guide to the Key Issues* (Oxford University Press 2010), at §4.16.

39 See M. Jacob, "Precedents: Lawmaking Through International Adjudication" (2011) 12 *German Law Journal* 1005, at 1013.

40 Schauer, *supra* note 23, at 74.

41 See Scobbie, *supra* note 9, at 150.

42 The adjudicator who failed to identify the proper authority that dispose of the case could be reproached for deciding *per incuriam*.

43 Scobbie, *supra* note 9, at 17.

Authoritativeness does not derive entirely from the persuasiveness of an authority.[44] As further explained in Chapter III below, the idea that the "persuasiveness of the reasoning" is the most relevant aspect of an authority is mistaken, theoretically and empirically. Authoritativeness and persuasiveness complement each other: both enhance the relevance of an authority, and its likelihood of being cited. Tellingly, Oppenheim cites both on the same level, when he observed that "the authority and persuasive power of judicial decisions may sometimes give them greater significance than they enjoy formally."[45] Up to a point, persuasiveness can compensate for authoritativeness, and *vice versa*.

This does not mean, however, that the relationship between authoritativeness and persuasiveness can be pictured as a spectrum. Although somewhat intuitive, the idea that "the higher the persuasiveness of the authority, the closer it is to be content-independent" is incorrect.[46] It cannot be the relative soundness of the content that moves an authority closer or farther from content-independence, because content-independence, by definition, is independent of this content in the first place.

Rather, true content-independence most often proceeds from second-order rules or reasons that require the need to follow or take account of authorities irrespective of their content. *Stare decisis* is such a rule but is inapplicable in international law.[47] Chapter III will identify some other possible candidates for what makes an authority authoritative, such as the notion of consistency in international law,[48] the respect due to the expectations of the parties,[49] or the "tendency to follow

44 See H.G. Cohen, "International Precedent and the Practice of International Law", in Michael Helfand (ed.), *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism* (Cambridge University Press 2015), at 188, opining that authoritativeness depends on reasons that are external and internal to the authority. See also *id*, "Theorizing Precedent in International Law", in Bianchi, Peat and Windsor, *supra* note 9, at 17, holding that such authority – at least for precedents – can be explained as a "burden" placed by the precedent over later interpretation or discussion of the same rule: "In the absence of any prior interpretation, an interpreter has a lot of latitude to choose a particular interpretation of a rule. Evidence of a prior interpretation seems to change that equation." The notion of precedents (and other authorities) as "argumentative burdens" is further developed below.

45 R.Y. Jennings and A. Watts (eds), *Oppenheim's International Law* (9th ed, 1992), at 41.

46 B. Jia, *supra* note 15, at §202: "precedents are either authoritative or persuasive in international law, with no halfway house of decisions occupying the space between the two extremes."

47 See M. Shahabuddeen, *Precedent in the World Court* (Cambridge University Press 2008), at 97: "[…] it is universally accepted that stare decisis does not apply in relation to the Court […]". But see also Thirlway, *supra* note 20, at 120 for more nuanced takes on this question.

48 Shahabuddeen, *supra* note 47, at 135, citing Lauterpacht, *supra* note 9, at 14.

49 *Japan – Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Appellate Body Report (1 November 1996), at 14: prior decisions "create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute."

language tested by settled principles."[50] All these factors[51] can influence the authoritativeness (content-independence) of authorities, which in turn makes citations to them more likely.[52]

2. Arguing from authority

Parties and adjudicators in international legal disputes are usually not obliged to cite authorities on any given point or to point to content-independent material in support of their arguments.[53] And yet, citing authorities is a ubiquitous practice in international dispute settlement.[54] If anything, as this thesis shows, the proportion of citations in international disputes has tended to increase in recent decades.[55] The following section reviews the place and function of arguments from authority in these disputes.

A) The argument from authority

Citations generally come in two different forms. They can take the shape of a footnote (or, more rarely, an endnote) inserted in a text following a proposition asserted or discussed.[56] Or they can be a full part of the main text where the proposition is found, often in a distinctive style (italics for case names), sometimes as a paragraph-length quotation. This difference in the "physical" display of authorities, be it deliberate or not, is likely meaningful.[57]

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50 Shahabuddeen, *supra* note 47, at 211.

51 Jacob, *supra* note 39, at 1017, listing as relevant factors "equality, fairness, unity, stability, continuity, legal certainty, and the protection of legitimate expectations."

52 Although these second-order rules can explain the use and benefits of such "authoritativeness," they do not explain the *degree* of an authority's authoritativeness. This depends on other factors further investigated in the following chapters.

53 Although international court and tribunals sometimes explicitly require parties to identify the authorities they wish to rely on: see, e.g., *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Procedural Order No. 5 (4 June 2018), on post-hearing briefs, at 1(i), but also at 5, 6. Questions from the tribunal included, at 1(ii): "Is there any NAFTA or other authority directly answering the foregoing questions either in the affirmative or the negative?" or at 1(iii): "Please identify the NAFTA or other authorities addressing the question of […]."

54 And at least for precedents: see H.G. Cohen, "International Precedent and the Practice of International Law", in Michael Helfand (ed.), *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism* (Cambridge University Press 2015), at 172.

55 For an empirical confirmation, see below at p. 137.

56 See A. Grafton, *The Footnote: A Curious History* (Harvard University Press 1997) for the historical background of the footnote. See also Ridi, N. Ridi, "The Shape and Structure of the 'Usable Past': An Empirical Analysis of the Use of Precedent in International Adjudication" (2019) 10 *Journal of International Dispute Settlement* 200, at 240, for an empirical analysis of footnotes.
The relevance of a footnote's formatting is sometimes acknowledged in international decisions: see *UP (formerly Le Chèque Déjeuner) and C.D. Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award (9 October 2018), at §6

57 These two forms of citing likely reflect different levels of emphasis on an authority and its authoritativeness.
Footnotes are usually peripheral to the main text and can be overlooked when focusing on the main argument. To an extent, they reproduce the distinction between the medieval *glossae* and the text that is glossed, always central; on this point see N. Jansen, *The Making of Legal Authority: Non-Legislative Codifications in Historical and Comparative Perspective* (Oxford University Press 2010), at 105.
In-text citations, by contrast are part of the legal language being developed. The italicized text, the quotes in themselves, sometimes in slightly shifted paragraph, stress the role of the authority in developing an argument. It as though, just like justice, it matters that citation *be seen done*.

Both forms of citations, however, do not appear in a vacuum: citations follow an idea or proposition. While other motives might prompt a citation, the argumentation's audience usually perceives citations as supporting that idea or proposition. Citations are thus a part of the legal discourse developed by the citer, a discourse that is, for the most part, argumentative in nature (counsels want to prove their case; adjudicators explain their reasoning). It follows that citations are argumentative devices, and since most citations refer to authorities, most citations can be analysed as "arguments from authority."[58]

Authorities are sometimes cited for the purposes of being distinguished or contradicted. In these instances, it is true that the authority *itself* does not directly serve to support a reasoning, although the *citation* does. In the argument *a contrario*, the authority indirectly supports the argument by showing that it does not stand in the way, that it is not an argumentative burden that needs to be overcome.

As explained below in Chapter II, however, this type of citation is rare and the greater bulk of authorities are cited because they support a reasoning, i.e., as an argument "from authority". This is a traditional argument type with a background and history in Western logic and rhetoric.[59] The standard form of the argument from authority is as follows:

- X is an authority/expert in field F
- X says that P (in field F) is true (false)
- There are some grounds to believe (or deny) that P is true (false)

In both cases should be kept in mind the commanding words of R. Whately, *Elements of logic* (1826), at 229, who warned against the fallacy of giving *references*, "trusting that nineteen out of twenty readers will never take the trouble of turning to the passages, but, taking for granted that they afford, each, some degree of confirmation to what is maintained, will be overawed by seeing every assertion supported, as they suppose, by five or six Scripture texts."

58 See, e.g., A. Pellet, "The Case Law of the ICJ in Investment Arbitration" (2013) 28 *ICSID Review* 223, at 228-229: "In the absence of any treaty rules, or of clear treaty rules, international courts and tribunals resort to case law – an easy and reassuring argument of authority […]." See also L.M. Soriano, "The Use of Precedents as Arguments of Authority, Arguments *ab exemplo*, and Arguments of Reason in Civil Law Systems" (1998) *Ratio Juris* 11, at 90-102.

Of course, citations are sometimes used as other types of argument, and these are in any event not mutually exclusive. Precedents are sometimes cited as analogies; yet the argument by analogy implies that the cited precedent was correct in its appreciation of the law; to this extent, it is also an implicit form of argument by authority. See also C. Perelman and L. Olbrechts-Tyteca, *Traité de l'Argumentation, la nouvelle réthorique* (UB Libre 1958), who also explain the use of "precedents" as arguments *ab exemplo* (at 477), and as arguments of formal justice (at 288).

Lack of authorities, meanwhile, frequently serves as an argument *a contrario*: see, e.g., *Stans Energy Corp. and Kutisay Mining LLC v. Kyrgyz Republic* (II), PCA Case No. 2015-32, Decision on Jurisdiction (25 January 2017), at §233. This point is further investigated below in Chapter VI.

59 Walton, *supra* note 35, at 32-63.

Arguments from authority have periodically attracted criticism by authors interested in rhetoric and in logic. The criticism usually goes as such:

> Logically, a proposition is either right or wrong, and what X might think about it is irrelevant. Given that what matters is the truth of the proposition (*tantum valet auctoritas, quantum valet ratio*),[60] at best arguments from authority are useless, at worst they are a fallacy.[61]

Avatars of this argument are identifiable in the legal context,[62] often when writers insist on the "logic" of the law. A *Manuel de logique juridique* by French 19th century lawyer Berriat de Saint-Prix presented a forceful example, as he opined that "[t]he barrister who bases the soundness of its case on citations of cases and modern books bets on the judge's instinct for imitation, laziness of spirit, shyness and ignorance."[63]

There are echoes of these criticisms and appeals to logic in modern legal debates as well. Dissenting in a case before the Iran-US Claims Tribunal, Arbitrator Noori for instance deplored that the majority decision was fallacious, given its reliance on wrongly-decided decisions as authorities:

> Although the Tribunal's awards must be made on the basis of respect for law, and although precedents – even those set down by the Full Tribunal – are not binding upon the Chambers in adjudicating their cases, it has regrettably been frequently observed at this Tribunal that a majority – simply because it is a majority – reaches a decision in some case by disregarding the most self-evident principles of logic, interpretation and law, and then refers in other cases to that very same earlier, unjust decision, in order to relieve itself of the burden of presenting arguments and reasons – doing so, of course, in such a way as to make it seem as if that previous decision were a splendid achievement in the history of law and justice. This unbecoming

60 See *infra*, note 392.

61 See the example given in Walton, *supra* note 35, at 65-66.
The authorities cited in this thesis could probably incur the same criticisms, and there is certainly some irony in casting doubt on authorities by citing other authorities. Yet, if I am guilty of such inconsistency, I am in good company: see Thomas Aquinas, *Summa Theologica*, Prima pars, quaestio 1, art. 8.2: "[…] locus ab auctoritate est infirmissimus, secundum Boetium."

62 These remarks are valid, once again, only because this chapter focuses on "probable authorities." By contrast, arguments based on necessary authorities are exceptionally strong in law: "argumentum ab auctoritate est fortissimum in lege." See A.X. Fellmeth and M. Horwitz, *Guide to Latin in International Law* (Oxford University Press 2009).

63 Berriat Saint-Prix, *Manuel de logique juridique* (1855) at 48 (my translation). Berriat however also accepts that citations are legitimate from a counsel's point of view, given that any *avocat* worth his salt must try everything to win a case.

> approach constitutes a sort of deception, and an abuse of the fact that readers lack access to the case files and the awards cited.[64]

A second, "pragmatic" criticism is perhaps even more common in the legal context:

> Pragmatically, any "authority" or expert is prone to make mistakes at some points, and therefore the weight given to these arguments without further examination is unwarranted.[65] Besides, you can find an authority for everything and anything.

A variant of this "pragmatic" argument challenges authorities as being cherry-picked to support a given argumentation. In *Ropper v. Simmons*, Scalia J. suspected his colleagues, happy to cite foreign sources, of indulging in this exact sin: "[t]o invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry."[66] Similarly, Shabtai Rosenne expressed dismay at the practice of citing official speeches (such as those in the Security Council) as an indication of what states think the law is, given that these often amount to mere "propagandist" exercises.[67]

Yet these criticisms do not prevent the intensive use of authorities in legal argumentation. Nor should they, for arguments from authority are unavoidable in legal disputes. It is notable, for instance, that Chaïm Perelman and Lucie Obrechts-Tyteca contended that law was a field where arguments from authority are valid.[68] There are two reasons for this.

The first is that the logical criticism laid out above is weaker in the legal field than it would be in other contexts.[69] Formal logic does not fully account for the judicial process,[70] as it competes with other considerations (such as pragmatism, convenience, etc.). Hence a certain plasticity to the solution of a given case, a plasticity accentuated by the fact that, at bottom, the truth-value of legal rules is mostly conventional. Truth in mathematics or physics does not depend on conventions;[71] it

64 *Watkins Johnson et al. v. Iran*, Award No. 429-370-1 (27 July 1989), reprinted in 22 Iran-U.S.C.T.R. 218, Dissenting Opinion of Assadollah Noori, at 258.

65 See T. Fowler, *The elements of inductive Logic* (1883), at 270.

66 *Roper v. Simmons*, 543 US 551, 627 (Scalia J, dissenting).

67 S. Rosenne, *Practice and Methods of International Law* (Oceana 1984), at 120.

68 Perelman and Olbrechts-Tyteca, *supra* note 58, at 412. Notice that this practice in law, at least with respect to precedents, does not perfectly fit Walton's theory of argument from authority as "appeal to expert opinion." Walton himself analyses the use of precedent as an argument from analogy, but he mostly has criminal law in mind: see D. Walton, *Legal Argumentation and Evidence*, (Penn State UP 2002), at 29.

69 Yet, the effectiveness of appeals to experts is documented even in purely scientific fields: see e.g., in the field of mathematics, M. Inglis and J.P. Mejia-Ramos, "The effect of authority on the persuasiveness of mathematical arguments" (2009) 27 *Cognition and Instruction* 1.

70 See MacCormick, *supra* note 20, at 54; and, famously, O.W. Holmes, *The Common Law* (1881), at 1.

71 See R. Posner, *The problems of jurisprudence* (Harvard University Press 1990), at 62: "Authority and hierarchy play a role in law that would be inimical to scientific inquiry."

is undeniably true and cannot be challenged by contrary authorities. "Truth" in a legal system is "fabricated", and often renegotiated anew in the context of new cases and new disputes – distinctions can be made, new categories crafted to accommodate new thinking. What was true of international law yesterday might prove wrong tomorrow, and this invites any party to try their chance at changing the *status quo*. Law's malleability offers ground for the use of authorities, and an otherwise intellectually flawed legal proposition might attract support for its convenience or usefulness.[72]

The second is that, as noted above, external factors support the argumentative power of authorities and ground their authoritativeness. Arguments from authority evidence consistency,[73] or serve as shortcut that introduce otherwise-known legal theories and arguments, for instance.[74] It is also material that international law is, at least partly, a customary legal system, in which judges are merely supposed to discover and ascertain already-existing rules. Those rules are often predicated on the existence of some degree of universality, or of a consensus – a factual, empirical situation that is frequently proven with reference to authorities.[75] In such a context, citing enhances the force of the authority cited as well as the proposition it is cited in support of.[76]

B) The function of citation

According to the literature, citations in international legal argument perform several functions, regardless of the author of the cited work.[77]

First, citations assist in building up the "legitimacy" of a legal reasoning – a crucial element of any legal discourse, and perhaps even more so for international courts and litigants.[78] The "legitimacy" conferred by citations, and by the authoritativeness of the authorities cited,[79] can

72 See T. Schultz and N. Ridi, "Arbitration Literature", in Thomas Schultz and Federico Ortino (eds.), *Oxford Handbook of International Arbitration* (Oxford University Press 2019): "[a] legal decision may be intellectually hogwash, but socially genius, and thus a good decision."

73 L.L. Fuller, *The morality of law* (Yale University Press 1964), at 61.

74 In this respect, see P. Facione and D. Scherer, *Logic and Logical Thinking* (McGraw Hill 1978), at 315. See also Ridi, *supra* note 56, at 225.

75 See L.J. Boer, "'The greater part of jurisconsults': On Consensus Claims and Their Footnotes in Legal Scholarship" (2016) 29 *Leiden Journal of International Law* 1021. For the role of consensus in building up authoritativeness, see further Chapter III below.

76 See C.P. Romano, "Deciphering the Grammar of the International Jurisprudential Dialogue" (2008) 41 *NYU Journal of International law and Politics* 755, at 770.

77 This question is also further taken up, in the context of the decisions of international courts and tribunals, in Chapter IV below.

78 See J. Gibson and G. Caldeira, "The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice" (1995) 39 *American Journal of Political Science* 459, at 460.
The phrase "legitimate authority" is often used in the literature but seldom explained. Closer inspection, however, finds it redundant: see Zarbiyev, *supra* note 32, at 311-312.

79 Authoritativeness should not however be conflated with legitimacy: see Alter, K. Alter, L. Helfer and M. Madsen, "How Context Shapes the Authority of International Courts" (2016) 79 *Law & Contemporary Problems* 1, at 7.

operate in several ways.[80] The main one has been identified above: citations manage to persuade the audience that a legal conclusion is not arbitrary, and, therefore, not illegitimate.[81] Frederic Schauer puts it as such:

> Perhaps surprisingly to many people, a legal argument is a better argument just because someone has made it before, and a legal conclusion is a better conclusion just because another court has reached the same conclusion on an earlier occasion. The use of an authority that is not necessarily more persuasive or more authoritative than the one that could be marshaled for the opposite proposition provides at least the minimal assurance that the user of the authority is not simply making up the argument out of whole cloth.[82]

The ICSID annulment proceedings in the *Mobil v. Argentina* arbitration offered a remarkable illustration of the latter point. In the underlying award, the tribunal had decided that Argentina could not rely on article XI of the Argentina-US BIT (an escape clause in situations of emergency) as a defence, finding that the state had contributed to its financial crisis. Before the *ad hoc* committee, Argentina argued that in so doing the tribunal conflated the customary international law defence of necessity and the BIT's *lex specialis*. The committee agreed and found that the tribunal exceeded its powers in this respect. Remarkably, however, the committee did not think that this excess was "manifest" because previous tribunals, cited in the award, had reached the same conclusion.[83]

Second, citations also strengthen the legitimacy of a reasoning by vouchsafing the intellectual competence and integrity of the citer. Citations evidence the citer's gathering of relevant information and thoroughness in seeking to achieve the right outcome.[84] Citing a range of different sources is a way to signal that no stone has been left unturned; that no credible argument had been left unanswered, and that no possible overlooked authority would have undermined the argumentation's conclusions.

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80 L. Helfer and A.-M. Slaughter, "Toward a theory of effective supranational adjudication" (1997) 107 *The Yale Law Journal* 273, at 319.

81 See Shahabuddeen, *supra* note 47, at 46, citing de Visscher saying that the ICJ cites its precedent, *inter alia*, "to forearm itself against the reproach of illogicality or contradiction."

82 Schauer, *supra* note 23, at 73. See also Lamond, *supra* note 36, at 29.
This "anti-arbitrariness vaccine" (Paulsson) also operated indirectly. By knowing that their decisions might later be cited as an authority, adjudicators are to some extent constrained to adopt legitimate-looking reasons: see Jacob, *supra* note 39, at 1022.

83 See *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Annulment (8 May 2019), at §100.

84 P. Harris, "Difficult Cases and the Display of Authority" (1985) 1 *Journal of Law, Economics, & Organization* 209, at 210.

The importance of this legitimacy-conferring use of citations can be observed in the fact that authorities are sometimes cited in support of proposition they do not stand for – lip-service testifying to the value of what is disregarded. For instance, in the *Continental Shelf* case, Judge Gros deplored that his colleagues hypocritically quoted from a judgment they departed from.[85]

Legitimacy is not however the sole driver of citations. At least four more humdrum explanations explain why legal participants cite authorities in judgments and pleadings.[86]

First, citations can be a matter of elegance and style;[87] the way a point had been made by a former author, tribunal or court can be particularly apt for the case at hand.[88] Likewise, medieval sources described authorities as *sententia imitatione Digna*, a formulation worthy of being repeated. Such imitation has a special importance in international law, where there is a common tendency to re-use similar language and draw from a common lexicon.[89]

Second, citations can also appear for evidentiary purpose, as a "descriptive authority".[90] When used to mention the source of an idea, citation also serve to avoid plagiarism.[91] Third, citing is also sometimes a matter of "professional ethic": international lawyers (and judges) cite because it is a practice rooted in their field.[92] Marc Bloch, the famed French historian, referred to footnotes as a "morale de l'intelligence".[93] In some fields, citing can proceed from a convention to support every statement with an authority, whatever that statement's (or that authority's) worth.[94]

Fourth, authorities can also serve as a starting point for an analysis,[95] in an echo of the traditional rhetorical practice that consisted in starting an argument from a point (a *topoi*) upon

85 See *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, 1982 I.C.J. 18, Dissenting Opinion of Judge Gros, at 151.

86 See G. Marceau, A. Izaguerri, and V. Lanovoy, "The WTO's influence on other dispute settlement mechanisms: a lighthouse in the storm of fragmentation" (2013) 47 *Journal of World Trade* 481–574, at 487, devising a typology of the citations to WTO jurisprudence according to the functions of these citations (i.e., ascertain facts); ., A.Z. Borda, "The Direct and Indirect Approaches to Precedent in International Criminal Courts and Tribunals" (2013) 14 *Melbourne Journal of International Law* 608, at 616 *et seq.*, conducted a similar analysis for criminal courts. By contrast, Sivakumaran, *supra* note 25, at 27 *et seq.*, devised a typology of *manners* to cite (a "see also" is not the same as a "compare / cf.").

87 Additional – and more cynical – reasons, such as currying favours with a cited superior, or showing solidarity with a cited colleague, would presumably be less relevant in a litigation context. For this argument in academia, however, see N. Duxbury, *Jurists and Judges: An Essay on Influence* (Hart Publishing 2001), at 10.

88 See Sir Gerald Fitzmaurice, as quoted in Shahabuddeen, *supra* note 47, at 42.

89 U. Šadl and H.P. Olsen, "Can Quantitative Methods Complement Doctrinal Legal Studies? Using Citation Network and Corpus Linguistic Analysis to Understand International Courts" (2017) 30 *Leiden Journal of International Law* 1, at 334-335. See also Shahabuddeen, *supra* note 47, at 211.

90 *Ibid.*, at 36. See also Posner, *supra* note 18, at 5.

91 See, e.g., Duxbury, *supra* note 87, at 9.

92 Cohen, *supra* note 44, at 189-190, identifying sociological reasons to cite.

93 M. Bloch, *Apologie pour l'Histoire* (Armand Colin 1949), at 53.

94 Schauer, *supra* note 23, at 73.

95 For an empirical finding, see Y. Panagis and U. Šadl, "The Force of EU Case Law: A Multi-Dimensional Study of Case Citations", *JURIX* (2015): "case law is the main building block of the text and the starting point of the Court's argumentation."

which all agree.[96] The frequent practice consisting in interpreting international law instruments by invoking first the virtually unassailable authority of the Vienna Convention on the Law of Treaties (even when the subsequent application of these rules sometimes lacks seriousness[97]) is a fitting example.[98] As further studied in Chapter IV below, however, this kind of citations might often acquire a ritualistic character.[99]

Fifth, and finally, an authority can also lie behind a particular test or doctrine. Citing it is a question of efficiency – it is not necessary to explain it all over again. Citing – especially precedents – saves the time and efforts required to explain the full reasons underlying a particular result. This is especially the case when the citing party has trust in the cited authority and relies on its expertise. Michael Peil explained:

> Where a publicist has conducted a thorough review of State practice and concluded that the threshold for a rule of customary international law has (or has not) been met, judges frequently rely upon those teachings, rather than citing directly to primary evidence of State practice.[100]

A common thread behind nearly all these functions links citations as a *practice* within the broader context of legal argumentation.[101] Law is, above all, an argumentative practice.[102] Legal arguments are built out of a back-and-forth between how an argument has been accepted or refused by an audience in the past, and how a party expects this audience to react to this argument in the future.[103] The high stakes frequently involved in these cases lead to a cumbersome and agonizing process of ever refining the argument made.[104] Citations in this context, regardless of the motives

96 See Scobbie, *supra* note 9, at 1.

97 M. Waibel, "International Investment Law and Treaty Interpretation", in Rainer Hofmann and Christian J. Tams (eds.), *International Investment Law and General International Law : from Clinical Isolation to Systemic Integration?* (Nomos 2011), at 29.

98 W. Werner, "Recall it again, Sam. Practices of Repetition in the Security Council" (2017) 86 *Nordic Journal of International Law* 151, at 161.

99 As observable, to some extent, in the case law of the ICJ: see W. Alschner and D. Charlotin, "The Growing Complexity of the International Court of Justice's Self-Citation Network: Institutional Achievement or Access-to-Justice Concern?" (2018) 29 *European Journal of International Law* 1, at 83. See also Duxbury, *supra* note 87, at 14.

100 M. Peil, "Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice" (2012) 1 *Cambridge Journal of International and Comparative Law*, at 136. See also Lamond, *supra* note 36, at 28. B. Cardozo, *The Nature of the Judicial Process* (Yale University Press 1921), at 149.

101 H.G. Cohen, "Theorizing Precedent in International Law", in Bianchi, Peat and Windsor, *supra* note 9, at 268.

102 MacCormick, *supra* note 20, at 14: "Law is an argumentative discipline."

103 On this point, see Lamond, *supra* note 36, at 33. The notion of "audience" is further taken up in Chapter IV below.

104 P.M. Wald, "The Rhetoric of Results and the Results of Rhetoric: Judicial Writings" (1995) 62 *The University of Chicago Law Review* 1371, at 1375. This point is of course also valid for non-judicial legal writings, such as pleadings submissions, or, indeed, PhD theses.

prompting them, serve as argumentative devices expected to strengthen the persuasive power of this argumentation.[105]

3. Regulating authorities in international law

The ubiquitous use of probable authorities in international legal argumentation does not mean citations are unproblematic.[106] If courts and tribunals feel obliged to consider the relevant authorities on any given subject, they also often escape their reach by distinguishing them or finding them unpersuasive.[107] It is the point of probable authorities that they are not dispositive of a case.

Given the relative open-endedness of the range of citable authorities, courts and tribunals need ways to focus the debate and to signal beforehand what is and what is not an authoritative authority. History is again our guide here: the role of authorities in argumentation was so important in medieval times that forgeries and misattributions were rife,[108] while some fields (such as canon law) were replete with "discordant" authorities. This prompted reform, which notably started with Gratian's *Decretum*,[109] whose aim was to tell proper authorities from improper ones.

The regulation of authorities typically follows one of two approaches. The criterion can be qualitative (i.e., what is a "good" or "bad" authority) or formal (i.e., what categories of sources can and cannot validly be relied upon). Although regulation of authorities is rarely exhaustive and complete,[110] we can find instances of the two methods in international law.

A) Good and bad authorities

Given two conflicting authorities, which one the claim to be more authoritative?

The preference could be for more recent authorities, as pope Alexandre III once decided.[111] Or authorities could be judged depending on the reputation of their authors: St. Gregory was an authority on the matters of morals, Augustine on that of doctrine, and their authorities would have

105 The exception would be, again, citations to ward off plagiarism. However, it is difficult in practice to distinguish this use of citations from any other.

106 J. Paulsson, *International Arbitration and the Generation of Legal Norms: Treaty, Arbitration and International Law* (Kluwer 2007), at 880.

107 But distinguishing is, implicitly, a way to accept the authoritativeness of the distinguished authority. See the observations of Judge Tanaka in *Barcelona Traction Light and Power Company, Limited (Belgium v. Spain)*, Preliminary Objections, Judgment, 1964 I.C.J. 6, Dissenting Opinion of Judge Tanaka, at 70.

108 Ziolkowski, *supra* note 4, at 439.

109 Jansen, *supra* note 57, at 21-23.

110 Schauer, *supra* note 23, at 81.

111 Ziolkowski, *supra* note 4, at 440.

more weight on these respective subjects.[112] Or the preference could go to the authority that is part of a winning *numerical* majority: the late Roman *Lex citationum* introduced head-counting as the proper way to deal with conflicting authorities, and assigned a greater weight to some jurists over others.[113]

There is no (explicit) rule or regulation of the sort in international law.[114] In this respect, the main restraint upon parties citing anything seems to be that, all things considered, and consistent with the use of authorities as argumentative devices, good authorities will be preferred to bad authorities – but in the citer's own assessment of an authority's value.

The only kind of "regulation" available is the guidance found in article 38(1) of the Statute of the International Court of Justice ("ICJ"), which is commonly accepted as a summary of the sources of international law. That article, despite its limitations, also regulates (to an extent) the authorities that the Court can rely on – and, given the Statute's influence, what other international courts and tribunals rely on in priority.[115] While article 38(1)(d) does not provide any particular criterion to distinguish between the "judicial decisions" that can be cited, it does so with respect to "teachings": only writings by the "most highly qualified of the various nations" can serve as a subsidiary source of law.

The reference to the "various nations" hints at some form of worldwide consensus that should likely be embodied in authoritative teachings,[116] although article 38 does not indicate how to assess that consensus. The qualifier "most highly qualified", for its part, begs the question of *who* is meant to be highly qualified.[117] If article 38(1)(d) does not therefore indicate much about which authorities can be cited, it does however foreshadow the Court's exceeding caution in citing scholarship in its judgments (further studied below at Chapter IV).

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112 Ibbetson, *supra* note 4, at 65.

113 Head-counting of the sort can still be occasionally witnessed in contemporary legal debates: see, e.g., Ph. Malaurie, "Baisse des taux d'intérêt, prêts à long terme et renégociation" (1988) *Revue Dalloz*, 317, where the author explicitly counts the *doctrine* writers in favour and against the position he argues.

114 This does not prevent courts and tribunals to have and rely on *implicit* rules: see Jacob, *supra* note 39, at 1006: "All legal systems have rules of precedent, even if these are implicit, terse, or prohibitive."

115 A.Z. Borda, *supra* note 86, at note 28 and the authorities cited therein.

116 Sir F. Berman, "Authority in International Law" (2018) *KFG Working Paper Series*, no. 22, at 15.

117 Rosenne, *supra* note 67, at 119.
Compare with the question-begging distinction of Oppenheim between "writers at large and writers of authority" and describing the latter as those "whose works have gained great influence"; L. Oppenheim, "The Science of International Law: Its Task and Method" (1908) 2 *American Journal of International Law* 313, at 345.

B) Universe of authorities

A blunter way to regulate authorities consists in identifying categories of valid authorities that can, or cannot be cited.

The draft bills or constitutional amendments put forward in some US states with respect to foreign laws are a good example: the point was to discard *ab initio* one category of possible authorities, whatever their merits on particular issues.[118] In the same vein, courts and tribunals sometimes indicate what part of a material is authoritative or not – as when the US Supreme Court clarified that headnotes to its decision were not prepared by the Court itself and therefore not an authority.[119] Rules about the need to distinguish between *ratio* and *obiter dicta* in precedents partake in the same logic.[120]

Here as well, article 38(1)(d) provides some guidance as to what authorities can serve as subsidiary sources for the determination of international law. Only two are listed: judicial decisions and "the teachings of the most highly qualified publicists of the various nations". While these two categories are described as mere "subsidiary" sources,[121] this qualifier is often held as superfluous,[122] for precedent and scholarship are commonly "the principal reference point for understanding the substance of [the parties'] rights and obligations."[123] While precedents and teachings can be disregarded if need be, it remains that they are the prime source of international legal argument.[124]

Singling out these two sources leaves much aside, however. Religious authorities, for instance, do not make the cut now that international law has been "laicized",[125] although they were important

118 See the examples listed in A. Fellmeth, "US State Legislation to Limit Use of International and Foreign Law" (2012) 106 *American Journal of International Law* 107. See also, on this question, W. Pryor, "Foreign and International Law Sources in Domestic Constitutional Interpretation" (2006) 30 *Harvard Journal of Law & Public Policy* 173 and the following contributions.

119 Schauer, *supra* note 23, at 79, citing in particular *United States v. Detroit Lumber Co.* 200 U.S. 321 (1906), 337.

120 Ibbetson, *supra* note 4, at 80.

121 A. Pellet, "Decisions of the ICJ as Sources of International Law?", in Gaetano Morelli Lecture Series (International and European Papers Publishing 2018), at 15.

122 A. Ross, *A Textbook of International Law* (London 1947), at 86-87.

123 S. Schill, "Sources of International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, Soft Law", in Jean d'Aspremont and Sebastien Besson (eds.), *The Oxford Handbook on the Sources of International Law* (Oxford University Press 2017).

124 Notably in the way international law is taught: see A. Roberts, *Is International Law International?* (Oxford University Press 2017), at 135, discussing French and UK textbooks.

125 Thirlway, *supra* note 20, at 27.
But see also the oral pleadings in *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), CR 2010/4, pleadings, at §30, when the counsel for Congo, Tshibangu Kalala, compared the words of the PCIJ to a Bible verse, "divine truth, […] where nothing can be added or substracted." This elicited an answer from Alain Pellet, counsel for Guinea: see CR 2010/5, at §35: "I would nevertheless like to say a word about the 'divine truth' represented, to Professor Kalala's mind, by the Permanent Court's Judgment in the *Oscar Chinn* case. I would be loath, Members of the Court, to call into question this 'Bible verse where nothing can be added or subtracted' – to be sure, more satanic verses do exist."

at earlier stages of international law's development. In opining that spies were undoubtedly permitted by the law of nations, for instance, Grotius cited Moses's envoy of twelve spies to the Land of Canaan.[126] As often happens, religious authorities have faded while leaving behind their vocabulary.[127] Other *corpora* of knowledge (anthropology, sociology, philosophy, etc.) have yet to leave a mark in international disputes.

To be sure, article 38 does not necessarily prohibit reliance on these other sources: it binds only the ICJ, and then incompletely.[128] Economics, for instance, has achieved a certain degree of importance before other international fora.[129] The Court has also never shied away from relying on "descriptive authorities" such as dictionaries or maps.[130] At the end of the day, although a litigating party or an adjudicator is unlikely to cite a statement from a family member in support of an opinion,[131] nothing explicitly disallows such a citation.

Article 38(1)(d)'s endorsement of precedents and teachings reflects that they are the two main types of authorities cited in international legal debates. They are further studied below.

1 - Judicial decisions

The terms "judicial decisions" in article 38(1)(d) are not further defined, although the adjective "judicial" leaves aside non-judicial types of "decisions" (such as those of the Security Council for instance). If the Court can be trusted to help interpret its own Statute, its practice establishes that "decisions" understood here are those, mainly, of international[132] courts and tribunals – and

126 See Grotius, *De Jure Belli ac Pacis*, (1625), Book 3, Chapter 4.

127 See, e.g., Gerald Fitzmaurice declaring that Oppenheim's *International Law* is "the practitioner's Bible": see Sir G. Fitzmaurice, "The Foundations of the Authority of International Law and the Problem of Enforcement" (1956) 19 *The Modern Law Review* 1, at 2.

128 See Pellet, *supra* note 121, at 15: "Article 38 is strongly criticized first of all for being incomplete." See also J. Kammerhofer, "Law-making by scholars", in Catherine Brölmann (ed.), *Research Handbook on the Theory and Practice of International Law-Making* (Edward Elgar 2016), at 308-309.

129 J. Pauwelyn, "The Use, Nonuse and Abuse of Economics in WTO and Investor-State Dispute Settlement", in Franz Stirnimann, Antoine Romanetti and Jorge Huerta-Goldman (eds.), *WTO Litigation, Investment Arbitration, and Commercial Arbitration* (Kluwer 2013), at 169. As Pauwelyn notes, this use can be controversial: the award in *Enron v. Argentina* was annulled partly because the tribunal relied on the opinion of an economic expert, without then translating this opinion into legal terms: see *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Annulment (30 July 2010).

130 See *Case Concerning Oil Platforms (Iran v United States)*, Judgment, 1996 I.C.J. 803, at §45, citing to the Oxford English Dictionary and Black's Law Dictionary in defining "commerce".

131 And yet, references to family members' opinions, if they qualify as another sort of authority, exist: see *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014), at footnote 474.

132 A. Nollkaemper, "The Role of Domestic Courts in the Case Law of the International Court of Justice" (2006) 5 *Chinese Journal of International Law* 301, observing that citations to domestic cases are very rare in the jurisprudence of the Court.

primarily of the ICJ itself (including its advisory opinions).[133] At an earlier point, the Court's preference for its own output was seemingly a formal rule.[134]

Much has already been written about precedents in international law (and the subject is further treated in Chapter IV below),[135] but rarely in terms of authorities used in legal argumentation. Precedents can serve as such authorities because they are based on legal propositions that have broader applications than the particular case they dealt with. As put by Judge Armand-Ugon, "[t]he very idea of a *decision for a particular case* […] is inadmissible."[136] This broader rule can, by its very nature, later serve as an impartial[137] and content-independent authority, provided that the similarities between the two cases are cogent.[138]

If authorities generally are avatars of the past exercising some constraint on the present, then precedents specifically are the authority *par excellence*. The frequently-cited functions of precedent in international law – developing the law,[139] ensuring predictability[140] and certainty,[141] preventing litigants from trying their chance every time the composition of the bench changes,[142] etc. – all qualify as second-order reasons to follow authorities and give further relevance and importance to the citation of precedents *as* authorities (and not merely as persuasive pieces of legal reasoning).

The ubiquity of precedents in international legal debates is indeed empirically established and further studied below.[143] It is now commonly admitted that, even though precedents have no binding

133 D. Charlotin, "The place of investment awards and WTO decisions in international law: a citation analysis" (2017) *Journal of International Economic Law* 279, observing that citations to other courts and tribunals is infrequent in the jurisprudence of the Court.

134 H. Thirlway, *The Law and Procedure of the International Court of Justice. Fifty Years of Jurisprudence* (Oxford University Press 2013), volume I, at note 471, mentioning an "'an unwritten rule of a drafting" in force in the 1960s.

135 See, generally, Shahabuddeen, *supra* note 47; Cohen, *supra* note 44; G. Kaufmann-Kohler, "Arbitral Precedent Dream, Necessity or Excuse?" (2007) 23 *Arbitration International* 357; G. Guillaume, "The Use of Precedent by International Judges and Arbitrators" (2011) 2 *Journal of International Dispute Settlement* 5.

136 *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Preliminary Objections, Judgment, 1964 I.C.J. 6, Dissenting Opinion of Judge Armand-Ugon, at 165.

137 Sir R. Jennings and A. Watts, *Oppenheim's International Law* (9th ed., Longman 1992), I, at 41, §13.

138 Shahabuddeen, *supra* note 47, at 43. See also Schauer, *supra* note 23, at 78.

139 Sir A. McNair, *The Development of International Justice* (New York University Press 1954), at 16. See also C. de Visscher, *Theory and Reality in Public International Law* (Princeton University Press 1968), at 390.

140 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1984 I.C.J. 392, Separate Opinion of Judge Jennings, at 547: "Law develops by precedent, and it is that which gives it consistency and predictability."

141 Judge Tanaka, *supra* note 107, at 65.

142 Lord Wilberforce, a quoted in Shahabuddeen, *supra* note 47, at 146: "Nothing could be more undesirable, in fact, than to permit litigants, after a decision has been given by this House with all appearance of finality, to return to this House in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected."

143 Cohen, *supra* note 44.
Accordingly, most of the empirical research has focused on this type of authority and the ways in which it is used in international jurisprudence, although this is also due to the difficulties in collecting data on citations to other authorities, as recounted in Chapter II below.

force upon later tribunals and parties, they should be followed except for good reason[144] – and therefore qualify as a "probable authority".[145] As Lauterpacht puts it:

> No legal rule or principle can bind the judge to a precedent which, in all the circumstances, he feels bound to disregard. In that case he will contrive to do what he considers to be justice through the elastic process of 'distinguishing' and in other ways. But he is not free to disregard judicial precedent altogether. He is bound to adduce reasons for departing from the obligation of consistency and of observance of settled principles. These considerations are of particular urgency in relation to international jurisdiction, which is essentially voluntary in character.[146]

The predominance of precedent over teachings of publicists (see below) probably explains why modern statutes focus on the former exclusively. For example, article 20(3) of the Statute of the Special Court for Sierra Leone provides that "[t]he judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda."[147] As with article 38(1)(d) of the ICJ statute, such provisions are of limited guidance.[148] They merely express a preference for some decisions, without specifying how they are to be relied on, and more precise statements as to how authorities are to be used and relied upon could be opportune.[149]

2 - Writing of publicists

By contrast, Article 38(1)(d) operates a triple regulation of "teachings": they need to be authored by the "most highly qualified" writers; these must be "publicists," and they must hail "from the various nations."[150] Although the meaning of these qualifications is unclear[151] – and it is even

144 The argumentative structure "precedent is not binding, but we should follow it" can be witnessed in most treatments of the subject, be they academic (e.g., in Sir G. Fitzmaurice, "Some Problems Regarding the Formal Sources of International Law" (1958) *Symbolae Verzijl* 153, at 171), or judicial (see Tanaka, *supra* note 107, at 76).
See also A. Reinisch, "The Role of Precedent in ICSID Arbitration" (2008) 495 *Austrian Arbitration Yearbook* 495, at 497.

145 Decisions of the court may be cited "[a]s 'authority', but not necessarily as authoritative"; see Sir G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Grotius Publication Limited 1986), at note 22. See also Cohen, *supra* note 44, at 174: "precedent is like the embarrassing family member who no one talks about but whose presence is impossible to ignore"; Rosenne, *supra* note 67, at 56: "Precedents may be followed or discarded, but not disregarded."

146 Lauterpacht, *supra* note 9, at 14.

147 Article 20(3) of the SCSL Statute, 2178 UNTS 138. In practice, the SCSL relied extensively on this past jurisprudence.

148 Borda, *supra* note 86, at 641.

149 A. Nollkaemper, "Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY", in Gideon Boas and William Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY* (Martinus Nijhoff 2003) 277, at 296.

150 The qualification that the "publicists" need come from "the various nations" likely indicate the drafters' emphasis on universality. It may answer one particular suspicion attached to "publicists" in international law: that they side with the interests of their home state: see the observations of Max Huber in *British Property in Spanish Morocco* (23 October 1924) II RIAA 615, at 640.

151 Kammerhofer, *supra* note 128, at 307.

unclear whether they are observed in practice –, they indicate that only a limited set of teachings can be accepted as a valid authorities in ICJ disputes.

There are historical reasons beyond the inclusion of this category of authorities in the Statute.[152] The absence of courts and international tribunals gave special importance to scholars, who alone could fill the gaps in international law.[153] Baron Descamps, in drafting the Statute of the PCIJ, allowed the Court to use "the concurrent teaching of the authors whose opinions have *authority*,"[154] mostly in order to avoid a *non liquet*. Teachings were a default option, and one that was less susceptible of unbound discretion by the adjudicators than the under-defined "general principles of law."[155]

The reference to "authors" and "publicists" could mean that the drafters of the Statute precluded any role for groups and institutions.[156] However, the *travaux préparatoires* give resolutions of the Institut de Droit International as examples of such scholarly work.[157] This means that expert bodies such as the ILC or the Hague Conference could qualify as "publicists" – and their output as teachings.[158] Some scholars have recognised this,[159] while others have argued – with some reasons – that ultimately this debate is "artificial".[160] For the purposes of this thesis, works by such institutions (and notably the ILC) will be equated with teachings.

The cautious embrace of scholarship by the drafters of the PCIJ statute in the State is reflected in the suspicion of other authors discussing the role of teachings in international law. Oppenheim cautioned against relying excessively on writers in practicing the "science of international law":

152 M. Shaw, *International Law* (Cambridge University Press 2008), at 112.
153 Oppenheim, *supra* note 117, at 315.
154 As quoted in Peil, *supra* note 100, at 138 (my emphasis). Baron Descamps also cited chancellor Kent: "when the greater part of jurisconsults agree upon a certain rule, the presumption in favor of that rule becomes so strong, that only a person who makes a mock of justice would gainsay it."
155 *Ibid.*, at 139. Yet, Peil is not entirely convinced by the hypothesis that precedent displaced doctrine, noting that doctrine has never been important in the Court's work to begin with: *ibid.*, at 144-145. It is true that writing in 1958, Sir Lauterpacht, *supra* note 9, at 22, saw no explicit reference to such authority in the jurisprudence of the PCIJ and the ICJ (which is not the case anymore). As mentioned in the Chapters below, however, writings used to be extremely common in the *pleadings* of the parties before the ICJ.
156 See, e.g., A. Watts, *The International Law Commission 1949-1998* (Oxford 1999), at 14.
157 *Procès-Verbaux of the Advisory Committee of Jurists* (1920), at 336, comments by Lapradelle.
158 Peil, *supra* note 100, at 148-149.
159 Sivakumaran, *supra* note 25, at 4.
160 Watts, *supra* note 156, at 15.

> For even great authorities make mistakes, are influenced by their political fancies, take usages for customs, take the future for the present, confound their own opinion with what is generally recognized.[161]

Judge Huber in the *Morocco* case further echoed this caution, as he was reluctant to give too much weight to the views of the "auteurs" on the topic of state responsibility, pointing to their incentive to lessen the liability of their own states or governments.[162]

Tellingly, Judge Huber also nodded to the concurrent existence of a growing, and more reliable international jurisprudence on this topic. It is now commonly held that the jurisprudence of an increasing number of courts and tribunals has gradually taken over the function once exercised by scholarship: "as the body of judicial decisions increases, the authority of the commentator diminishes".[163] Other explanations point to the rise of treaties and customs as the central rules of the international legal system,[164] or the "maturation" of international law.[165]

This shift also likely reflects a changing sociology of international law. When most participants could be described as belonging to an "invisible college" composed of interpersonal bonds, citing publicists was probably more potent: everyone respected, or at least knew the authors being cited. When international law includes an increasing number of participants (especially at a time when the number of international law academics also balloon),[166] parties might prefer to focus on higher-authority sources such as precedents,[167] whose number is concomitantly increasing.

The consequence of this shift is clear: despite being put on the same footing in Article 38(1)(d),[168] precedents are now more authoritative than scholarship. With respect to the ICJ, Alain Pellet observed that "[i]f the influence of the doctrinal views on the [ICJ]'s decisions were to be evaluated according to the number of citations in the judgments and advisory opinions, it would be

161 Oppenheim, *supra* note 117, at 345. This echoes the pragmatic and logical criticisms of the argument of authority identified in Chapter I above.

162 *British Property in Spanish Morocco*, Award (23 October 1924) II RIAA 615, at 640.

163 C. Parry, *The Sources and Evidences of International Law* (Manchester University Press 1965), at 105. See also Duxbury, *supra* note 87, at 8.

164 Shaw, *supra* note 152, at 113.

165 Sivakumaran, *supra* note 25, at 2.

166 See James Crawford's comments in Crawford, Pellet and Redgwell, *supra* note 12, at 11. But see also J. Dugard, "The future of international law: a human rights perspective – with some comments on the Leiden school of international law" (2007) 20 *Journal of International Law* 729, at 731.

167 See *infra*, note 976 and Jean d'Aspremont's article.

168 See Pellet, *supra* note 121, at 16.

very close to nil."[169] While scholarship is still cited in other contexts, such as in arbitration proceedings or (even at the ICJ) in the opinions of individual judges, Sir Gerald Fitzmaurice gave what is the most accurate description of the question when he distinguished precedent and scholarship thus:

> No one who has been engaged in any international proceedings can doubt that the parties, their advocates and the tribunal itself, view in quite a different light such (material) sources of law as, for instance, the opinions of jurists (however eminent) and a decision, even if the tribunal giving it is composed of less eminent persons. No want of respect to the eminent jurist is involved in this; it is simply that a decision, if relevant to the case under discussion, has an actuality and a concrete character that causes it to impinge directly on the matters at issue, in a way that an abstract opinion, however good, can never do. This is easily seen in the attitude of both courts and advocates. When an advocate before an international tribunal cites juridical opinion, he does so because it supports his argument, or for its illustrative value, or because it contains a particularly felicitous or apposite statement of the point involved, and so on. When he cites an arbitral or judicial decision he does so for these reasons also, but there is a difference – for, additionally, he cites it as something which the tribunal cannot ignore, which it is bound to take into consideration and (by implication) which it ought to follow unless the decision can be shown to have been clearly wrong, or distinguishable from the extant case, or in some way legally or factually inapplicable.[170]

The data analyses below confirms the by-now subsidiary role of teachings mentioned in this quote (and others[171]). And yet, teachings are still cited regularly in international disputes, indicating that they still play an important role.

4. "Authorities" and "authority"

"Authority" is a word accepting several meanings. The current thesis focuses on authorities as an element in a reasoning; this the "material" sense of "an" authority, not the broader meaning

169 A. Pellet. "Article 38", in Christian Tams (ed.) *Statute of the International Court of Justice*, §321. He adds, mischievously and perhaps unfairly, that "[t]he literature on doctrine in international law is inversely proportional to the use made of it in the Court's decisions – a means for scholars to take their revenge […]." On the contrary, it seems that most of the literature on doctrine focuses on the type of authority that it the most cited: the work of the ILC. Besides, lack of citation does not necessarily indicate a lack of influence: see Kammerhofer, *supra* note 128, at 307.

170 Fitzmaurice, *supra* note 144, at 171-172.

171 Rosenne, *supra* note 67, at 119. See also MacCormick, *supra* note 20, at 67. See also *supra* note 145.

attached to "the" authority, as a concept.[172] That concept's traditional account has often reduced authority as "coercive power". More recent accounts have however found that "authority" could and should be interpreted and studied in a broader sense that goes beyond the power to command.[173] The following chapters are informed by the renewed interest for this broader notion of "authority".

Crucially, most alternative definitions to the traditional understanding – e.g., von Bogdandy and Venzke's "the legal capacity to influence others in the exercise of their freedom, i.e. to shape their legal or factual situations"[174] – blur the distinction between "authority" and an "authority". Parallels are indeed numerous: while Sivakumaran divides teachings into those empowered by states to say what the law is and others,[175] accounts of "authority" in global governance distinguish between entities that have been similarly empowered and those have not.[176]

The traditional understanding has also obscured the common etymological origin of the two concepts – and indeed, led to the paradox about cited "authorities" being, often, the one thing that is debated and challenged, whereas the notion of "authority" (proper) evokes commands that are beyond contest.[177]

This common etymological root however offers a finer understanding of what underlies the two notions: in Ancient Latin, *augeo* referred to creating something new out of one's own.[178] Authorities of both types create something The argument of this thesis is that the "authorities", when cited, create boundaries: one by one, they delineate the scope of what is citable and what is not – that is, the scope of what is international law and what is not.[179]

5. Conclusions

A few conclusions can be drawn from this short foray into what an authority is and how it can be used in international legal argumentation.

172 Çali, *supra* note 30, at 39.
173 J. d'Aspremont, *International Law as a Belief System* (Cambridge University Press 2015), at 15, note 61.
174 A. von Bogdandy and I. Venzke, "Beyond Dispute: International Judicial Institutions as Lawmakers", in Armin von Bogdandy and Ingo Venzke (eds.), *International Judicial Lawmaking* (Springer 2012), at 990.
175 Sivakumaran, *supra* note 25, at 4.
176 Krisch, *supra* note 30, at 249.
177 The distinction between *auctoritas* and *potestas* was one way to discuss this paradox, and a staple in medieval debates. In rhetoric, this dichotomy might find its pendant in the distinction between *administrative* and *cognitive* authority: see Walton, *supra* note 35, at 76-77.
178 M. Zink, "L'*auctor* du Moyen-Age", in Antoine Compagnon (ed.), *De l'autorité* (Odile Jacob 2008), at 8.
179 See Chapter VIII, above.

First, the preceding sections demonstrated that an authority can be defined as **a material that informs a legal reasoning with content-independent reasons for action**. The authoritativeness of this material varies normatively (e.g., between "necessary authorities" and "probable authority"), but derives, at least partly, from this material's content-independence; legal reasoning and arguments are built upon these authorities.

Citations, for the purposes of this thesis, are the **explicit display of these authorities in support of a given legal reasoning**. This support can be either direct or indirect as mediated by argumentative methods (such as an argument *a contrario*). It can be explicit or implicit, in the latter case working on common knowledge or on repeated language.

This thesis studies only probable authorities, and more particularly precedents and scholarship, and only when they are explicitly cited.[180] This is so for normative and substantive reasons. These two types of authority differ from other kinds in their authoritativeness. It is undisputed that international law has no system of precedent, and therefore precedents cannot be equated with "necessary authorities" such as treaties or even UN resolutions. As indicated in Chapter III, precedents and scholarship in theory apply and are relevant to a case only to the extent they are "persuasive". While there are reasons to doubt this narrative, this makes them materially different from other international law authorities. Second, collecting data about other kind of authorities entail very distinct challenges that could not be tackled in a single PhD thesis.

International dispute settlement is rife with citations and arguments to these two kinds of authorities, as well as with debates as to their value and the scope of what are valid authorities in international law. Chapter II will introduce a dataset of more than 180,000 citations, shared between nearly all 8,000 documents (decisions, opinions, pleadings) authored by different kinds of legal protagonists.

Based on this dataset this thesis seeks to investigate the practice of citing authorities in international dispute settlement, in order to discover its variations, characteristics and consequences. This investigation will shed light on three aspects of this practice in particular:

180 To be sure, some authorities are never cited. And many might be cited only implicitly and semi-explicitly: see B. Waltl, J. Landthaler and F. Matthes, "Differentiation and Empirical Analysis of Reference Types in Legal Documents" (2016, available at https://wwwmatthes.in.tum.de/pages/1p0nqp0j8y31v/Differentiation-and-Empirical-Analysis-of-Reference-Types-in-Legal-Documents), which distinguished between tacit, implicit, semi-explicit and explicit citations. This thesis will focus on explicit citations, easier to capture on an empirical basis, and more interesting with respect to the focus on argumentation, sources and signalling.

(i) **Which authority.** Why are some authorities cited more than others? Why is one authority cited in lieu/instead of another? What explains why some authorities are more popular than others?

(ii) **Differences in practices.** Do citing practice of different legal protagonists (courts, individual judges, and litigating parties) differ? If so, can we attach these varying practices to distinct strategic motives?

(iii) **Implications.** What are the consequences of this practice for international law, as well as for the status of these authorities in international law?

Chapter II – Methodology

PhD theses in Law, let alone in international law, are rarely based on large sets of empirical data. This thesis, by contrast, is an empirical enquiry relying on data analysis tools and methods. While the analyses below will rely and take inspiration from the relevant literature, they will also confront this literature with the empirical reality of international dispute settlement as can be observed from the data. In so doing, the discussion will try to shed light on three aspects of the practice of citing authorities in international dispute settlement:

- What makes an authority "authoritative"?, a question investigated in Chapter III. The main answer is something other than "persuasiveness" is involved, as authorities are demonstrably more cited depending, *inter alia*, on their age, the identity of their author, their place in a coherent legal "whole", and the language in which they are expressed.
- Why authorities are cited, and what are the distinct strategies pursued by distinct actors in citing authorities?. These practices and their variations are reviewed in Chapters IV, V and VI, focused respectively on courts and tribunals, individual adjudicators, and litigating parties. To some extent, these distinct citation patterns of these different legal protagonists can be associated with varying strategic motives pursued by these distinct legal protagonists.
- What are some of the systemic effects of the practice of citing authorities? Chapters VII and VIII identify a systemic role for authorities in two contexts: in the judicial dialogue between international courts and tribunals, and in defining international law insofar the range of "citable" sources inform the range of possible legal outcomes.

These three inquiries are made pursuant to the thesis's overarching purpose to investigate the characteristics and consequences of the practice(s) of citing authorities in international dispute settlement.

As explained in further details in this Chapter, empirical methods and data analysis are apt to offer an answer to this research question. Exhaustivity, and therefore an outlook that

encompasses most if not all the empirical practice in this respect, is key. Consequently, instead of relying on case studies or other kind of qualitative research, this thesis mostly relies on quantitative data. This data is taken from a dataset (the "Dataset") of more than 7,100 documents, that together cite 8,739 distinct authorities more than 180,000 times assembled by the author specifically for this thesis in years 1 and 2 of the PhD.

This chapter retraces the methodology followed to create, develop, and prepare this Dataset, and discusses this methodology's assumptions, underpinnings, and limitations. **Section 1** first takes stock of the existing empirical literature in this field and concludes that it has barely touched upon the question studied here. **Section 2** highlights the scope of the Dataset and introduces the courts, tribunals and authorities that are studied. **Section 3** zooms in on the data-collection method. **Section 4** details the methods of analysis and measures that inform the following chapters. **Section 5** reviews in greater detail the empirical approach itself and notes its limitations. Empirical research has advantages and disadvantages.

This empirical study relied, and would not have been possible without the efforts undertaken by others, whether in collecting data or in sharing their experience, and I need at this point to thank Wolfgang Alschner and Aleksander Umov;[181] as well as researchers at PITAD[182] and in particular to IAReporter.[183] I am also grateful for the data available on the websites of the various courts and tribunals studied in the Dataset.

1. The existing literature

This thesis's research question and methodology place it at the intersection of at least two distinct strands of literature, namely (subsection **A**) the scholarship that studied precedents and teaching in international law used as an authority by international courts and tribunals and (**B**) the literature on citation analysis. There are only a few examples of (**D**) citation analysis applied to international dispute settlement, although guidance and inspiration can also be taken from (**C**) the literature that applied citation analysis to domestic courts.

181 W. Alschner and A. Umov, "Towards an Integrated Database of International Economic Law (IDIEL) Disputes for Text-As-Data Analysis" (2016) *CTEI Working Papers* No. 2016-08, http://repository.graduateinstitute.ch/record/294805/files/CTEI-2016-08.pdf.

182 D. Behn, M. Langford, O.K. Fauchald, R. Lie, M. Usynin, T. St John, L. Letourneau-Tremblay, T. Berge and T. Loven Kirkebø, *PITAD Investment Law and Arbitration Database: Version 1.0*, Pluricourts Centre of Excellence, University of Oslo (31 January 2019).

183 Investment Arbitration Reporter, available at https://www.iareporter.com/. See also the disclosure at *infra*, note 253.

A) Authorities in international law

While precedents and teachings are often discussed in the literature in the context of studying the sources of international law, few contributions have focused on them and their use as authorities in dispute settlement in particular.

The larger part of the literature on this question has focused on precedents, in line with their greater role and presence in citations to authorities than teachings. This was notably the conclusion of Shahabuddeen's *magnum opus* on Precedent before the International Court of Justice, for whom "the case law of the Court has been moving in the direction of a marked attachment to precedential authority."[184] Yet, Shahabuddeen's book did not treat at length the question investigated in this thesis. When he did mention or discuss the varying authoritativeness of precedents, as seen below, his empirical claims are not supported by the data.[185] An empirical analysis is thus well-placed to extend and test his and similar works.[186]

Most theoretical studies of the question, in line with Shahabuddeen's, are characterised by a distinct *topos* ("precedent is not binding, yet *de facto* taken into account in most cases"). This frequent argument highlights the apparent paradox that precedents are ubiquitous in international legal argumentation, despite the "uncomfortable doctrinal reality" that they are meant to have no force in the same argumentation.[187] Dissatisfied with the failure of positivist and rationalist accounts of precedent to answer this paradox,[188] Cohen prefers to attach the practice of citing precedents to "communities of practice", and in turn to audiences – such as transnational lawyers – for whom precedents, albeit non-binding, still have meaning and argumentative force. Cohen's focus on authorities primarily as a practice that has meaning for legal protagonists, while remarkable, also calls for an empirical investigation of the differences in citation practices.[189]

184 M. Shahabuddeen, *Precedent in the World Court* (Cambridge University Press 2008), at 241.

185 See, e.g., *ibid.*, at 144, finding a "glimmering of a disposition on the part of the Court itself to attach more persuasiveness to a unanimous decision than to a majority one." As indicated below, in Chapter III, even this "glimmering" might be an overstatement.

186 If B. Jia, *International Case Law in the Development of International Law* (Brill Nijhoff 2017) was perhaps more attuned to the practice of citing precedents, he also barely discussed what makes a precedent more cited than another.

187 H.G. Cohen, "International Precedent and the Practice of International Law" in Helfand, Michael A. (ed.), Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism, (Cambridge University Press, 2015), at 135.

188 Which he investigated at further length in H.G. Cohen, "Theorizing Precedent in International Law" in Andrea Bianchi, Daniel Peat, and Matthew Windsor (ed.) *Interpretation in International Law* (2015).

189 For a different answer to this paradox, as applied to WTO jurisprudence, see notably K.J. Pelc, "The Welfare Implications of Precedent in International Law" in Johanna Jemelniak, Laura Nielsen and Henrik Palmer Olsen (eds.), *Establishing Judicial Authority in International Economic Law* (2016) 137, explaining that states' ambivalence on this question functions as a means to empower weak international courts.

Most of the literature however rarely reviews the role of precedents are they are used in international dispute settlement. Although this literature often acknowledges the importance of precedents in judgments and awards, it rarely elaborates as to what this practice entails for the system of international dispute settlement. Guillaume, for instance, reviewed some examples of the use of precedent by international judges and arbitrators, before advocating a middle position between "the cult of precedent [… and] the rejection of precedent."[190]

The literature on the use of teachings in international dispute settlement is comparable, and Jörg Kammerhofer rightly noted that "some platitudes are repeated over and over despite being of no help in elucidating the legal function of Article 38(1)(d)."[191] Sivakumaran, however, went further than most when he identified multiple categories of teachings varying in their substance or form.[192] Sivakumaran's article is one rare example of a discussion of the exact "influence" of these teachings on adjudicators.[193] In this respect, the author held that citation analysis was a measure of this "influence" (albeit a limited one), "as a citation reveals the interaction between the judge and the writing."[194] This article however touched only tangentially on the determinants of what makes one authority more "influential" (or "authoritative") than another – the topic of Chapter III below.[195]

As such, though relevant as a background to the analyses in the next chapters, the scholarship related to the authorities (precedents and teachings) studied below rarely touched upon this thesis's distinct research question. That literature's concern with the normative causes and consequences of using authorities in international dispute settlement, as well as their lack of empirical depth (examples are often cited, but without any indication that they are, or should be representative) bolsters the case for a data-driven approach to probe their relevance and accuracy.

B) Citation Analysis

Citation analysis has emerged as one of the quantitative empirical methodologies in law. At the turn of the century, Richard Posner notably introduced citation analysis as a solution to what he thought was a "[s]carcity of quantitative scholarship [that] has been a serious shortcoming of

190 See, e.g., G. Guillaume, "The Use of Precedent by International Judges and Arbitrators" (2011) 2 *Journal of international dispute settlement* 5–23, at 23.

191 J. Kammerhofer, "Law-making by scholars", in Catherine Brölmann (ed.), *Research Handbook on the Theory and Practice of International Law-Making* (Edward Elgar 2016), at 307.

192 See S. Sivakumaran, "The influence of teachings of publicists on the development of international law" (2017) 66 *International \& Comparative Law Quarterly* 1.

193 *Ibid.*, at 23.

194 *Ibid.*, at 26.

195 See also **Section 5** below, explaining that this thesis is not concerned with the actual "influence" of authorities over adjudicators.

legal research".[196] The approach proposed by Posner held that, since adjudication is a "citation-heavy activity", citations themselves have become "rich data" that could be leveraged to study adjudicative activities.[197] According to him, citation analysis

> enables rigorous quantitative analysis of elusive but important social phenomena such as reputation, influence, prestige, celebrity, the diffusion of knowledge, the rise and decline of schools of thought, *stare decisis* (that is, the basing of judicial decision on previous decisions—precedents), the quality of scholarly output, the quality of journals, and the productivity of scholars, judges, courts, and university departments.[198]

If Posner's methods at the time were new, citation analysis later benefitted from the development of computer-assisted statistical analysis, and notably network analysis.[199] Instead of merely counting citations, these developments have allowed reliance on more sophisticated measures of importance to study the centrality of authorities in a citation network. In the context of Dutch case law, van Opijnen tested various such measures (such as the PageRank measure used in this thesis[200]) against a composite benchmark of case "authoritativeness" (based, e.g., on annotations and citations to particular cases in academic literature) to assess the performance of these measures, and found that all of them outperformed mere citation-counting.[201]

Not everyone agrees however that citation analysis can yield interesting results or inform legal analysis; as explained in further details below, there is a debate as to the proper remit or even usefulness of such analysis (see **Section 5: Methodology**). And yet, citation analysis is now an accepted method in international legal scholarship. In particular, Urška Šadl and Henrik Palmer Olsen have pleaded for a greater use of citation analysis and associated methods. They notably argued that network analysis enrich citation analysis by going beyond mere counting of citations, which is inappropriate for assessing the importance of precedents.[202] They have also stressed that

196 R.A. Posner, *The Theory and Practice of Citations Analysis, with Special Reference to Law and Economics* (The Law School, the University of Chicago, 1999), at 1.
197 *Ibid.*, at 2.
198 *Ibid.*, at 3.
199 See M. van Opijnen "Citation Analysis and Beyond: in Search of Indicators measuring Case Law Importance", in Burkhard Schäfer (ed.) *Legal Knowledge and Information Systems* (IOS Press 2012), at 95.
200 As explained below, PageRank, the original algorithm powering Google's search results, is a measure of an item's "centrality" in a network of items. Taking the citations between documents as such a network, PageRank identifies the most popular citations.
201 *Ibid.*, at 103. While Van Opijnen finds that PageRank is not the top performer, other works focusing on international law decisions (and not Dutch case law) have however relied on PageRank, as does this thesis; for further details, see *infra* p. 71
202 *Ibid.*, at 334.

empirical methods should not be seen as displacing, but as complementing and strengthening traditional legal scholarship.[203]

C) Citation analysis and domestic courts

The first citation analyses of note, however, have focused on the use of authorities in domestic contexts.

The US Supreme Court, in particular, proved a fertile ground for empirical studies, although most often for political scientists or economists. In a series of articles from 2007 to 2013, James Fowler and his co-authors studied the case law of the Supreme Court as a case citation network.[204] They identified for instance how the Court gradually adhered to a doctrine of *stare decisis*, before departing from it at some junctures (such as at the time of the Warren Court).[205] They also found that the citation practice of individual justices obeyed strategic considerations and that, for instance, majority opinions rely more on precedents the more they are accompanied by dissents.[206] Other studies have refined this analysis of the US Supreme Court,[207] or studied similar case citation networks from other jurisdictions.[208]

Another set of studies, with relevance for Chapter VIII on fragmentation of international law and judicial dialogue, also focused on domestic courts, but with a view to probing these courts' reliance on external precedents: i.e., citations to foreign courts. In this context, scholars have particularly investigated the practice of the US Supreme Court and its Justices when it comes to relying on foreign legal sources. In a 2016 paper, Ryan Black et al. adopted an approach similar to this thesis and sought to investigate the practice of such citation at the US Supreme Court, after finding that the extensive normative debate on the same subject lacked empirical data.[209] They

203 U. Šadl and H.P. Olsen, "Can Quantitative Methods Complement Doctrinal Legal Studies? Using Citation Network and Corpus Linguistic Analysis to Understand International Courts" (2017) 30 *Leiden Journal of International Law* 1, at 330.

204 J. Fowler, T. R. Johnson, J. F. Spriggs, S. Jeon, and P. J. Wahlbeck, "Network analysis and the law: Measuring the legal importance of precedents at the US Supreme Court" (2007) *Political Analysis* 324–346.

205 J.H. Fowler and S. Jeon, "The authority of Supreme Court precedent" (2008) 30 *Social networks* 16–30.

206 Y. Lupu and J. H. Fowler, "Strategic Citations to Precedent on the U.S. Supreme Court" (2013) 42 *The Journal of Legal Studies* 151 – 186.

207 T.S. Clark and B. E. Lauderdale, "The genealogy of law" (2012) 20 *Political Analysis* 329–50.

208 E.g., T. Neale., "Citation analysis of Canadian case law" (2013) 1 *J. Open Access L.* 1; M. Moser and M. Strembeck, "An Analysis of Three Legal Citation Networks Derived from Austrian Supreme Court Decisions" (2019) In *Proceedings of the 4th International Conference on Complexity, Future Information Systems and Risk* – Volume 1: COMPLEXIS, 85.

209 R. C. Black, R. J. Owens, and J. L. Brookhart, "We Are the World: The US Supreme Court's Use of Foreign Sources of Law" (2016) 46 *British Journal of Political Science* 891–913, at 891: "Our goal here is not to take a normative position on whether justices should cite foreign sources of law. Rather, we seek to examine the conditions under which justices in fact cite it." See also the early efforts of D. Zaring, "The Use of Foreign Decisions by Federal Courts: An Empirical Analysis" (2006) 3 *Journal of Empirical Legal Studies* 297–331.

found that Justices were more likely to cite foreign law to support controversial legal positions, and that liberal and conservative Justices were as likely to resort to foreign-law-backed arguments.[210]

A similar approach has investigated the reliance of foreign law between European courts. In a series of articles, Martin Gelter and Mathias Siems have identified around 1,400 cross-citations between ten Supreme Courts in European states over the 2000-2007 period. They found that such citations were relatively frequent, and for the most part meant in support of a comparative exercise.[211] For the authors, greater rate of cross-citations between courts of the same language and legal tradition indicated a low level of cherry-picking, rebutting one of the common objections to this kind of cross-citation.[212]

Gelter and Siems also performed data analyses to identify the courts (although not the individual authorities) most likely to be cited by other courts. They found that low levels of corruption and population size in the cited court's country, for instance, predicted well which courts will tend to be cited or not. A common language between cited and citing courts was also a strong predictor in this respect.[213] (Chapter III below will confirm that language is an important factor in the popularity of some authorities over others.)

While often ground-breaking and full of interesting examples of data analysis, the relevance of this literature is however limited by the fact that it is concerned with domestic systems of law and domestic authorities. To a large extent, the research questions underpinning this literature, such as the weight of *stare decisis* or the role of foreign law, are however inapplicable or immaterial in an international law context.

D) Citation Analysis and International Courts

Often taking these pioneering studies (and notably Fowler's) as a reference, scholars have also applied citation analysis to international dispute settlement – notably in the context of the "turn

210 Ibid., at 908.
211 M. Gelter and M. Siems, "Language, legal origins, and culture before the courts: cross-citations between Supreme Courts in Europe" (2013) 21 *Supreme Court Economic Review* 215, at 238.
212 Notably in *id.*, "Citations to foreign courts—illegitimate and superfluous, or unavoidable? Evidence from Europe" (2014) 62 *American Journal of Comparative Law* 35.
213 Gelter and Siems, *supra* note 211., at 266-268.

to empiricism"[214] in international legal scholarship. Yet, while particularly relevant for this thesis, few pieces shared its scope, methods, and overarching purpose.

Important work has for instance been done on courts and tribunals beyond the scope of this thesis. Yonatan Lupu and Eric Voeten for instance studied the case law of the European Court of Human Rights as a case citation network.[215] They found that citations patterns at the Strasbourg Court fitted strategic motives, whereby the Court was mindful to emphasise its authority in situations that most required it, depending on a case's audience, subject-matter and the divisions within the bench.[216] The two authors also found that the Court's cases could be regrouped in "communities" of cases centred around specific subject matters (such as types of alleged violations).[217] Also studying the ECtHR, Jorge Leitão, Sune Lehmann and Henrik Olsen found that the Court's citations were mostly driven by a rich-get-richer phenomenon: i.e., cases that are already much cited are expected to receive a disproportionate amount of citations over time.[218]

These studies were however limited to the very particular context of the ECtHR as a "regional" international court, and their hypotheses informed by that court's specific relation with domestic courts[219] – considerations absent for the courts and tribunals studied in this dissertation. The same considerations apply for studies that have investigated other international courts and tribunals beyond the scope of this thesis, such as the International Criminal Court,[220] the European Court of Justice,[221] or the Inter-American Court of Human Rights.[222]

Several authors have however focused on one of the fora studied in this thesis, yet generally with a focus either on precedents or on teachings – never both. Jeffrey Commission looked at the citation of precedents by investment arbitration tribunals, relying on a limited, pre-2005 dataset.[223] He found that tribunals invariably professed not to be bound by precedents, but increasingly cited

214 See, e.g., T. Ginsburg and G. Shaffer, "The Empirical Turn in International Legal Scholarship" (2012) 106 *The American Journal of International Law* 1; G. Hernández, "The Judicialization of International Law: Reflections on the Empirical Turn" (2014) 25 *European Journal of International Law* 919.

215 Y. Lupu and E. Voeten, "Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights" (2012) 42 *British Journal of Political Science* 413.

216 *Ibid.*, at 433.

217 *Ibid.*, at 436.

218 J.C. Leitão, S. Lehmann and H.P. Olsen, "Quantifying Long-Term Impact of Court Decisions" (2019) 4 *Applied Network Science* 3,

219 Lupu and Voeten, *supra* note 215, at 438.

220 S. Manley, "Referencing Patterns at the International Criminal Court" (2016) 27 *European Journal of International Law* 191–214.

221 Y. Panagis and U. Šadl, "The Force of EU Case Law: A Multi-Dimensional Study of Case Citations", *JURIX* (2015).

222 E.g., E. Voeten, "Borrowing and Nonborrowing among International Courts" (2010) 39 *The Journal of Legal Studies* 547–576.

223 J.P. Commission, "Precedent in Investment Treaty Arbitration-A Citation Analysis of a Developing Jurisprudence" (2007) 24 *J. Int'l Arb.* 129.

such authorities in their decisions.[224] He also found, in findings relevant for Chapter VIII below, that ICSID tribunals were not averse to cite from non-investment awards, with judgments by the ICJ in particular attracting a lot of citations.[225] Commission also briefly looked at what *should* make an award authoritative, stressing that it all comes down to that award's reasoning, and that the community of investment arbitration practitioners carefully weigh that reasoning when relying on precedents.[226]

Sondre Torp Helmersen, meanwhile, penned what is seemingly the sole thesis-length contribution relevant to this thesis, although his doctoral dissertation on the use of teachings by the ICJ has not yet been published.[227] Helmersen's findings and methods were however partly published in two papers regarding the use of teachings by the WTO Appellate Body[228] or the ITLOS[229] respectively.[230] In both cases, Helmersen found that teachings are rarely cited in these two courts (teachings can be found only in individual opinions at the ITLOS), and identifies some of the underlying causes and reasons. In parallel, Helmersen identifies other reasons *why* some teachings are cited more than others, and these reasons (such as consensus or expertise[231]) overlap to a large extent with the factors identified in Chapter III below. While also of an empirical character, Helmersen's methods differed (data collection was manual) and resulted on a much smaller dataset (around 300 citations for both the WTO and ITLOS). This thesis relies on a much larger dataset, including with respect to citations to teachings.

A handful of scholars have also attempted to study several international courts and tribunals at once.[232] When this was done, it was typically in the context of empirically investigating the fragmentation of international law (the subject of Chapter VII below). An early effort in this direction was published by Nathan Miller, who reviewed "the case law of the ICJ, the ECHR, the ECJ, the IACHR, WTO Panels, the Iran-U.S. Claims Tribunal, the ITLOS, the ICTY and the

224 Ibid, at 148.
225 Ibid, at 150.
226 Ibid, at 154.
227 S.T. Helmersen, *The Application of Teachings by the International Court of Justice* (University of Oslo 2018).
228 *Id*, "The Use of Scholarship by the WTO Appellate Body" (2016) 7 *Goettingen Journal of International Law* 309.
229 *Id.*, "The Application of Teachings by the International Tribunal for the Law of the Sea" (2020) 11 *Journal of International Dispute Settlement* 20–46.
230 For a similar study with respect to the ICJ, see M. Peil, "Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice" (2012) 1 *Cambridge Journal of International and Comparative Law*, at 149.
231 Helmersen, *supra* note 228, at 38.
232 See, e.g., E. De Brabandere, "The Use of Precedent and External Case Law by the International Court of Justice and the International Tribunal for the Law of the Sea" (2016) 15 *The Law & Practice of International Courts and Tribunals* 24.

ICTR".[233] Published in 2002, this paper however relied on a dataset that was then much restricted compared to this thesis's Dataset, and Miller did not use more advanced methods such as network analysis.

A few articles also focused on a subset of citations between two international courts. Christopher Drahozal, for instance, drew upon a limited dataset to investigate citations to the IUSCT from investment tribunals;[234] Alain Pellet did the same with respect to the case law of the ICJ in investment arbitration;[235] and Gabrielle Marceau, Arnau Izaguerri, and Vladislav Lanovoy collected all citations to WTO case law in two dozen international courts and tribunals.[236]

One article in the literature landed closest to the interests of this thesis: in 2019, Niccolò Ridi studied three of the five fora investigated in this thesis (the ICJ, investment tribunals and the WTO) and collected a dataset of comparable size.[237] Ridi was especially interested in how international adjudicators use precedents, and, as mentioned in the Chapters that follow, his conclusions match the conclusions reached in this thesis.

Yet, in common with nearly all contributions listed above, Ridi focused solely on citations by courts and tribunals, and ignored citations by individual judges and, especially, all citations by the parties to a case. In this respect, one of the few, if not the only contribution to have looked at the submissions of the parties in this context is Krzysztof Pelc, who has investigated citations before the WTO panels and appellate body to empirically prove strategic behaviour of the parties in WTO disputes.[238]

The literature on citations in international law is therefore characterised by a large fragmentation of the efforts, such that if a few papers and contributions overlap to some extent with this thesis, none of them had a scope of the same extent as this dissertation. To the extent, as explained below in **Section 5**, that the benefits of empirical analysis partly lie in its exhaustiveness,

233 N. Miller, "An International jurisprudence? The Operation of 'precedent' across international tribunals" (2002) 15 *Leiden Journal of International Law* 483–526, at 487.

234 C. Drahozal, "The Iran-US Claims Tribunal and Investment Arbitration: A Citation Analysis" (2008) 5 *Transnational Dispute Management (TDM)*.

235 A. Pellet, "The Case Law of the ICJ in Investment Arbitration" (2013) 28 *ICSID review* 223–240.

236 G. Marceau, A. Izaguerri, and V. Lanovoy, "The WTO's influence on other dispute settlement mechanisms: a lighthouse in the storm of fragmentation" (2013) 47 *Journal of World Trade* 481–574.

237 N. Ridi, "The Shape and Structure of the 'Usable Past': An Empirical Analysis of the Use of Precedent in International Adjudication" (2019) 10 *Journal of International Dispute Settlement* 200–247.

238 See K.J. Pelc, "The Politics of Precedent in International Law: A Social Network Application" (2014) 108 *American Political Science Review* 547.

examining a larger empirical dataset of the practice of citing authorities would complement and enrich the existing literature.

2. The Dataset

A) The set of international courts and tribunals

The Dataset comprises data from the cases adjudicated by five international courts, tribunals and other adjudicative bodies. Throughout this thesis, the words "courts" and "tribunals" are used interchangeably. Others have expounded on what makes a court or a tribunal, let alone an international one.[239] Although the modern increase in international courts and tribunals is well-documented, this thesis focuses on a handful of the most prominent, for reasons further elaborated below.

Table 1 below offers a bird-eye's view of the courts and tribunals studied together with some main data points.[240]

	Year-Range	# Disputes	# Docs	# Judges	# Words
ICJ	64y	159	1,538	205	43 million
INV	49y	492	1,117	470	28 million
ITLOS	22y	25	242	54	1 million
WTO	23y	199	426	275	32 million
IUSCT	37y	658	1,372	35	5.5 million

Table 1: Main figures[241]

Disputes taking place before these courts cited the following authorities:

	# Authorities	# Citations	# Ratio
Advisory Opinion	28	2193	78.3
Dissenting	282	1192	4.2
Judgment / Award	1431	94986	66.4

239 See, most notably, K. Alter, *The New Terrain of International Law – Courts, Politics, Rights* (Princeton University Press 2014), at 68.

240 The data points correspond to the numbers currently in the Dataset. While the ICJ has heard more than 159 disputes, the documents in the Dataset represent only 159 of these disputes.

241 Including individual opinions, but not standalone pleadings documents. Further info on this latter type of material is included in Chapter VII below.

Order	235	4619	19.6
Provisional Measures	92	2546	27.7
Separate Opinion	252	971	3.8
Teachings	4756	20323	4.2

Table 2: Number of authorities per type and citations to these authorities (absolute and average)

***Reading key**: Advisory opinion in the Dataset received on average 78.3 citations each; dissenting opinions received on average only 4.2 citation each*

These fora and authorities are further introduced below.

The International Court of Justice

The *International Court of Justice* (abbreviated below as "ICJ"), based in The Hague, is the main judicial organ of the United Nations, as instituted through the UN Charter and the Statute of the Court. The Court settles disputes referred by states and offers advisory opinions on matters of international law. It has a rich history, studied elsewhere,[242] and has seen a regain of activity in recent decades (after a noted slump in the 1980s[243]), with a current record number of pending disputes. With nearly 65 years of existence, the ICJ is the forum with the longest lifetime in the Dataset, during which it delivered binding rulings in nearly 160 disputes or advisory proceedings. Data was collected from the ICJ website, available at https://icj-cij.org.

The World Trade Organisation

The World Trade Organisation's *Dispute Settlement Understanding* ("WTO" and "DSU") has been the foundation of a very successful system of dispute settlement, although it has recently come under stress.[244] Under the DSU, WTO members can refer their disputes to panels of trade experts for first instance resolution. An Appellate Body ("AB"), composed of permanent adjudicators, hears disputes on appeal. Additional mechanisms allow for arbitration of disputes on compliance or other matters. So far, more than 580 WTO disputes have been initiated, although not all of them have led

242 The range of the Court's competences and functions, as well as its history, is very helpfully retraced in R. Kolb, *The International Court of Justice* (Hart Publishing 2013), at 913.

243 E. Posner, "The Decline of the International Court of Justice" (2004) *John M. Olin Program in Law and Economics Working Paper* No. 233, at 1: "Adjusted for the increase in the number of states over its sixty year history, usage of the ICJ has unmistakably declined."

244 See, e.g., R. McDougall, "Crisis in the WTO: Restoring the WTO Dispute Settlement Function" (2018) *CIGI Papers* No. 194.

to a first-instance decision. Data was collected from the WTO database (available at https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm), and other sources.[245]

Investment Arbitration

The last few decades have seen an increasing number of disputes between investors and states take place before treaty-based tribunals ("INV"). Most of these disputes are proceeding under one of the more than 3,000 bilateral investment treaties that provide for such arbitrations.[246] The history and impact of these treaties is a controversial topic,[247] but it is fair to say that few expected such a "boom" in investor-state disputes until two decades ago. Talks of reform of the investor-state regime have been going on for nearly a decade now,[248] and in recent years states have met under the auspices of the United Nations Commission on International Trade Law to find a way forward.[249]

As a reflection of the importance of this regime for international law practitioners today, a wealth of data providers has emerged to collect and analyse data related to investment arbitration. This thesis benefitted from the efforts of Italaw,[250] the International Centre for Settlement of Investment Disputes,[251] and the United Nations Conference on Trade and Development.[252] My work over the years with *Investment Arbitration Reporter*[253] has also been incredibly useful for the purposes of this PhD and is the main reason why so many examples of argumentative practices, below, are drawn from that field.

The Iran-US Claims Tribunal

The *Iran-United States Claims Tribunal* ("IUSCT") was instituted in 1981 under the Algiers Accords between the United States and Iran to manage the flurry of litigation that followed the

245 Notably from the dataset entitled "The WTO Dispute Settlement Data Set 1995-2016" made publicly available by Louise Johannesson and Petros C. Mavroidis, available at http://cadmus.eui.eu/handle/1814/44568.

246 See notably the data collected by the United Nations Conference on Trade and Development, at https://investmentpolicyhubold.unctad.org/.

247 For a magisterial survey of the issues in their historical and economic underpinnings, see J. Bonnitcha, L.N. Poulsen and M. Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press 2017).

248 See M. Waibel, A. Kaushal, K.-H. Chung and C. Balchin, *The Backlash Against Investment Arbitration. Perceptions and Reality* (Kluwer Law International 2010).

249 The main issues and challenges of this reform process have been delineated by Anthea Roberts and others in a series of blog posts on Ejil:Talk!. See, e.g., A. Roberts and Z. Bouraoui, "UNCITRAL and ISDS Reforms: What are States' Concerns?" (5 June 2018) *Ejil:Talk!*, available at: https://www.ejiltalk.org/uncitral-and-isds-reforms-what-are-states-concerns/.

250 Available at https://www.italaw.com/.

251 The Centre discloses information about cases it has administered in its database, available at https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx.

252 Their Investment Policy Hub, which includes data about ongoing and past cases, is available at https://investmentpolicyhubold.unctad.org/.

253 Since January 2017, I have been one of the most frequent contributors to www.iareporter.com. IAReporter reports on developments in the field of investment arbitration, and reviews arbitral awards and decisions in investment disputes.

Islamic Revolution of 1979. Private parties with claims over $250,000 were allowed to join proceedings before the Tribunal on their own, while smaller claims were litigated in bulk by the two governments. The tribunal has settled hundreds of disputes, mostly in the 1980s and early 1990s, and has now spent two decades working through the last remaining (and daunting) cases pending between the governments of Iran and the United States directly. Data was collected from Westlaw and the printed reports published by Cambridge University Press.[254] In a dedicated article, I analysed the Tribunal and its work in detail.[255]

The International Tribunal for the Law of the Sea

Finally, the *International Tribunal for the Law of the Sea* ("ITLOS") has been instituted by the United Nations Convention on the Law of the Sea ("UNCLOS"). Its main remit are disputes under the Convention or concerning the law of the sea. Within its timespan, the Tribunal has dealt with 27 disputes, of which 23 have led to a decision. Data was collected directly from the ITLOS's website, available et https://www.itlos.org/.

B) The set of sources and authorities

Four main categories of data were collected from these courts and tribunals: (i) "decisions"; (ii) metadata; (iii) pleadings and submissions; and (iv) scholarship (as cited). These categories are reviewed in turn below, before turning to what was left out in the next subsection.

(i) "Decisions"

As all courts and tribunals differ in how proceedings are conducted, and in the shape of their rulings, there is no universally applicable definition of what constitutes a "decision" of an international court or tribunal. A functional definition ("any finding that is accompanied by binding legal effects"), for instance, would lead to unnecessary debates as to the status, e.g., of advisory opinions or some decisions on provisional measures.

Instead, the Dataset followed the courts' and tribunals' own categorisation of their output in this respect, with a focus on decisions and rulings that embodied a definite and substantive

254 I thank the Lauterpacht Centre for International Law in Cambridge for giving me access to their collection. I obtained approval from Westlaw and Cambridge University Press with help from the University of Cambridge's Digital Humanities group.

255 See D. Charlotin, "A Data Analysis of The Iran-US Claims Tribunal's Jurisprudence – Lessons for International Dispute settlement Today" (2019) 10 *Journal of International Dispute Settlement* 443.

interpretation of the law, especially when that interpretation was contested between the parties.[256] Some procedural decisions (on bifurcation in arbitration, for instance) entered the scope of the analysis, while others (e.g., extension of time-limits at the ICJ) did not. In general, and in any case, the latter category rarely relies on authorities in its reasoning – if a reasoning is even included – such that the omission has little impact on the broader thesis. The same principle informed the selection of what would count as a potential authority, i.e., as the target of a citation. Advisory opinions, for instance, were then counted as any other decision in the Dataset – although they present some distinctive features that are studied further below.[257]

This open-mindedness is in keeping with judicial practice: as Daniel Terris, Cesare Romano and Leigh Swigart noted in their survey of international judges, when these judges cite jurisprudence from other courts and tribunals:

> the formal nature of a judicial finding does not matter. Judges consider decisions of other international courts regardless of whether they are final or preliminary judgments, orders, nonbinding advisory opinions, or anything else. What they look at is the jurisprudence rather than any specific case; what ultimately seems to matter is only that the reasoning that led the other tribunal to a given conclusion is legally sound and persuasive.[258]

All individual opinions of judges or arbitrators also entered the Dataset, regardless of whether they qualify as "decisions" or "teachings" (a point that is debated in the literature).[259] These opinions were grouped in two categories – separate and dissenting, with the former category regrouping all opinions that were not labelled as a dissent (e.g., opinions labelled as "concurring", "separate", or declarations). As mentioned below (in Chapter VI), there are meaningful differences between these types of decisions. Despite the debate as to the extent to which they really depart from the majority's conclusions, [260] I nonetheless counted most individual opinions in the WTO jurisprudence as "dissenting".

256 See A. Pellet, "Decisions of the ICJ as Sources of International Law?", in Gaetano Morelli Lecture Series (International and European Papers Publishing 2018), at 22.

257 *Ibid.*, at 18. See also notes 19 and 20 for caveats as to the difference between judgments and advisory opinions.

258 D. Terris, C. Romano and L. Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Oxford University Press, 2007), at 121.

259 See Pellet, *supra* note 256, at 21, opining that they qualify as writings.

260 See E.Y. Kim and P.C. Mavroidis, "Dissenting Opinions in the WTO Appellate Body: Drivers of their Issuance & Implications for the Institutional Jurisprudence" (2018) 51 *Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2018/51*. The opinions Kim and Mavroidis described as dissenting are sometimes listed as "Separate" in the *WTO Analytical Index* (Cambridge University Press 2017).

Neither citations to decisions in a same case (say, a citation from a decision on the merits to a jurisdictional decision) were counted, nor citations between related (e.g., parallel) cases. These citations are less likely to reflect a decision's engagement with an authority, and more likely to merely recall an adjudicator's past decision;[261] they are thus beyond the scope of this thesis.

(ii) Metadata

Metadata are essential for the analyses below, providing a set of independent variables useful for the purpose of investigating the practice of citing authorities in international disputes. Case metadata (title, date, judges, etc.) was obtained as a by-product of collecting the documents. Additional data, such as the nationality or gender of the individual adjudicators for each dispute, for instance, was collected from available databases when extant, and manually otherwise.

This metadata also includes, to the extent possible, information as to the outcome of the different cases found in the Dataset. Given that the assessment of which party has won or lost a case is rarely a straightforward matter, this particular type of metadata warrants further discussion.

For all cases and all fora, outcomes were noted down at the main document (or "phase") level. In other words, instead of judging the overall outcome of an entire *case*, separate (possibly different) outcomes were tagged for all stages of a dispute: decisions on jurisdiction or on the merits (at first or appellate instance), orders on provisional measures or on challenges. The reason for this methodological choice is that decisions, not cases, are usually cited in later documents.

Outcomes were tagged according to three categories: "CLAIMANT", "RESPONDENT", or "MIXED", reflecting the party that, on the whole, prevailed at any given stage.[262] The following principles were followed in tagging individual documents:

- Decisions on jurisdiction: all decisions that did not put an end to a claimant's case were coded as a victory for that claimant. It is reasonable to think that a claimant prevailed on jurisdiction if *some* of its claims reached the merits stage, regardless of whether or not most of the original request for relief stumbled on jurisdictional objections.
- Decisions on the merits: Likewise, a less-than-total win on the merits was still tagged as a win for a claimant (although see below how this principle varied by forum). The outcome

261 Same methodological choice in Gelter and Siems, *supra* note 212.

262 This reduction to a ternary categorisation of course does not pretend to fully represent the spectrum of possible outcomes. Yet, for reasons further expounded below in **Section 5**, this kind of reduction is a necessary element of data analysis.

on liability was what mattered in this respect: even decisions that found liability but declined to award damages (in investment arbitration, notably) were tagged as a "win" for a claimant.

- Decisions on requests for disqualification: Challenges against party-appointed arbitrators were coded as wins or losses for claimants and respondents depending on who had appointed the arbitrator. In other words, a respondent's unsuccessful challenge against a claimant-appointed arbitrator was tagged as being a "win" for that claimant.
- Decisions on provisional measures: every decision that granted at least some of the measures sought was tagged as a win, regardless of the scope of the original request.

Tagging also differed between the different adjudicative bodies studied in the Dataset, along the following lines:

- ICJ and ITLOS: both the Court and the Tribunal have clear operative sections divided in as many individual determinations (e.g., a vote on ordering the parties not to aggravate a dispute). These determinations were tagged according to the prevailing party, and labelled as MIXED when it was impossible to say. The overall prevailing party was then assessed based on the number of individual "wins", the respective position of the judges *ad hoc* nominated by each party (as *ad hoc* judges are more likely to vote in their appointing party's favour), and the importance of the individual determinations (win on merits that involve reparations have more weight than wins without).

  When this latter determination was impracticable or uncertain (typically in delimitation cases), the overall outcome of a case was tagged as "MIXED".
- Investment Arbitration: the tags relied on the outcome categorisation made by UNCTAD as to whether a case was won by an investor, a state, settled or discontinued.[263] For those cases not in UNCTAD's database, an original assessment was performed according to the principles delineated above.
- WTO: coding relied on the data collected by Johannesson and Mavroidis for all panel and AB decisions up to 2016,[264] which retraced determinations on every claim for every case as "1"s (a win for the complaining party or appellant), "2"s (a loss – and thus a win for the

263 UNCTAD's categorisation is at the case, not document level. Accordingly, for the cases described as "settled", discontinued, or won by the state, I checked if the investor did not beforehand prevail at an interim stage before the dispute settled.

264 See *supra*, note 245.

responding party or appellee) or "3"s (when a claim is dealt otherwise, i.e., set aside on grounds of judicial economy).

For panel reports, the overall outcome of a party was calculated by comparing the number of "1"s to the number of "2"s, with "3"s weighing half as much in favour of a respondent (as they represent a "win", or an averted "loss" for the respondent, but not on the merits). For AB Reports, I added up the scores of each party as appellant and appellee respectively in cases of cross-appeal.

- IUSCT: wins or losses were coded according to the overall claimant in every case. The principles that informed this coding process are further described in another piece that dealt especially with the dataset of IUSCT decisions.[265]

(iii) Pleadings and other submissions

The Dataset includes nearly all written submissions before the ICJ and ITLOS, which are publicly available on their respective websites. It also includes pleadings before investment tribunals and WTO panels, when available (WTO pleadings are sometimes published in an annex to the Panel and AB reports). It also includes submissions and briefs from intervening parties or *amici curiae*.

Importantly, the Dataset also retraced those pleadings that are summarised[266] in decisions, taking care of distinguishing the voice of the tribunal/court from that of the parties. On the basis of headings (when extent), or manually (when no helpful heading existed), every decision was cut into sections covering a case's procedural record, facts, arguments, or substantive determinations. In the Chapters that follow, the analyses often distinguish between "Pleadings" and "Pleadings (in decisions)", unless otherwise specified.

(iv) Teachings

Just as with decisions, the form and origin of the cited teachings was irrelevant: blog posts, for instance, count as scholarship when they are cited.[267] The academic credentials of the writing's

265 Charlotin, *supra* note 255.

266 For the WTO at least, convincing work in this respect has shown that these summaries are meaningful: see M. Daku, K.J. Pelc, "Who Holds Influence over WTO Jurisprudence" (2017) 20 *Journal of International Economic Law* 233.

267 *Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award (25 July 2017), footnote 609 reporting Venezuela's argument, citing M. Paparinskis, "The International Minimum Standard and Fair and Equitable Treatment" (12 August 2013) *EJIL: Talk!*, available at https://www.ejiltalk.org/the-international-minimum-standard-and-fair-and-equitable-treatment/.

author was likewise irrelevant.[268] (As noted below, this does not prevent different types of scholarship to have dramatically different importance in practice.[269]) The distinctive features of teachings as an "authority" are further studied in Chapter I above, and Chapter III, section 2, below.

There is no unified database of the doctrinal works cited by international courts and tribunals, and of the related metadata (title, author, date). Consequently, a different approach was adopted for these authorities, as described in Section 2 below. That approach however means that it is likely that some cited teachings were not detected and failed to enter the Dataset – yet this likely account for less than 10% of all teachings, and the Dataset remains representative.

C) Limitations to the Dataset

Practical and material requirements have meant this thesis is limited to these courts and types of authorities. Below, I explain in more details what was left out of the analysis, and conclude on the consequences of these limitations for the findings below.

Other types of authorities

Other types of "authorities", beyond precedents and teachings, were excluded from this Dataset, for they often appear in the jurisprudence only sporadically. These categories of authorities however remain interesting and a subject for future research.

Descriptive authorities. Maps, dictionaries, etc., were not counted or identified in the analysis,[270] although they sometimes overlap with probable authorities. This category also includes other types of non-legal evidence, such as social science reports and statistics, which are still underused (or at least under-cited) in international decisions. These materials have become important before some fora, yet are not entirely accepted in proceedings before the ICJ, for instance.[271]

These sources however often resemble the probable authorities studied in the following chapters, and often vary in authoritativeness in ways that seemingly matter for international courts

268 See N. Stappert, "A New Influence of Legal Scholars? The Use of Academic Writings at International Criminal Courts and Tribunals" [2018] *Leiden Journal of International Law* 1, at 968.

269 See Sivakumaran, *supra* note 192, at 12.

270 This was also the methodological choice of M. Peil, "Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice" (2012) 1 *Cambridge Journal of International and Comparative Law*, at 149 and 150: see also Helmersen, *supra* note 229, at 24.

271 C.E. Foster, "Social Science Experts and Amicus Curiae Briefs in International Courts and Tribunals: The WTO Biotech Case" (2005) 52 *Netherlands International Law Review* 433, at 436.

and tribunals. In *Saadi v. Italy*,[272] for instance, the European Court of Human Rights opted to rely on reports by NGOs due to "the authority and reputation of [their] authors". These authorities' lack of legal character has however sometimes been a pitfall: the award in *Enron v. Argentina*, notably, was annulled after an *ad hoc* committee found that the award relied too much on economic reports and not enough on legal sources.[273]

An interesting dynamic can sometimes link descriptive and "probable" authorities. For instance, in *OTMTI v. Algeria*, the investor tried to overturn reliance on a probable authority (a precedent) by relying on descriptive authorities (i.e., dictionaries), arguing that the tribunal that decided that precedent did not have the benefit of those (descriptive) authorities.[274] That attempt succeeded, although these dictionaries were only a starting point in the tribunal's analysis.[275]

Law, hard and soft. All references to legal provisions, be they domestic or international (e.g., Civil codes, treaties, UN Resolutions, etc.), fell out of the scope of this research, as they amount to "necessary authorities" and therefore differ from the kind of "probable authorities" of this thesis.[276] Besides, these authorities present distinct challenges in terms of data collection, as they rarely are as easily identified automatically as citations to precedents or scholarship.[277] (Of course, when these provisions were meant to be *evidenced* by a reference to a precedent or some scholarship, the latter was counted.)

This type of authority, which is presumably associated with greater, if not a different kind of authoritativeness, entails its own research questions and would deserve a thesis of its own. There is so far little empirical study of these legal provisions on their own, and of their role in international decisions.[278]

"Soft law" materials, likewise, were not counted as an authority, although they share many common traits with the "probable authorities" studied here. For instance, in *Bankswitch v. Ghana*,

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272 Application no. 37201/06, Judgment (28 February 2008), at §143.

273 See *supra*, note 129.

274 *Orascom TMT Investments Sàrl v. Algeria*, ICSID Case No. ARB/12/35, Award (31 May 2017), at §239.

275 See *ibid.*, at §286.

276 For the distinction between these two types of authorities, see above Chapter I. Of course, authorities that are formally necessary (legal provisions, for instance) are sometimes cited as a probable authority (in an argument by analogy for instance), but distinguishing between these uses would have required manual collection of the data.

277 Both are generally cited as a variation on a common form (e.g., "X v. Y"). While international conventions are sometimes cited with their UNTS number, this is far from being always the case.

278 For an exception, see O.K. Fauchald, "The Legal Reasoning of ICSID Tribunals – An Empirical Analysis" (2008) 19 *European Journal of International Law* 301, looking at how articles 31 and 32 of the VCLT – necessary authorities – are later used in arguments over interpretation.

a commercial arbitral tribunal said of the UNIDROIT Principles that "[they] are not binding on the Tribunal, but have persuasive authority"[279] – a language often deployed to introduce the kind of authorities studied below.

Relatedly, technical standards, such as the IFRS Principles, were not captured in the data collection process.[280] This material can be controversial to the same extent as other authorities: in *Gambrinus v. Venezuela*, the investor (unsuccessfully) challenged the tribunal's award on the basis of its alleged reliance on an accounting principle, IAS 7.[281] Similar challenges to the authorities that informed a decision-maker's reasoning is studied further below (in Chapter IV) with respect to precedents and scholarship.

Non-legal writings. Finally, not every "writing" counted as teaching for the purposes of this thesis: references to literary or non-legal works, while interesting data points, were not counted. This includes, for instance, a quote by Immanuel Kant ("Out of the crooked timber of humanity no straight thing was ever made") that is surprisingly popular in investment arbitration awards, being cited in *Sistem v. Kyrgyzstan*,[282] in a statement itself later quoted in *Valores Mundiales v. Venezuela*,[283] *Gavazzi v. Romania*,[284] and *Koch v. Venezuela*.[285] The same quote can be found in an opinion by ICJ Judge Cançado Trindade,[286] who is fond of citing from a wide pool of literary sources.[287]

Likewise, political and administrative documents and briefs were not counted as "authorities", yet here as well further research could helpfully indicate how parties and judges try to rely on such documents, and debate their importance. Two examples are instructing in this respect: in *Grot v. Moldova*, the claimant relied on a report by the EU and the Council of Europe, which

279 *Bankswitch Ghana Ltd. v. Ghana*, PCA Case No. 118294, Award Save as to Costs (11 April 2014), at §11.170.

280 See, e.g., *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38, Award (14 December 2017), at §442. See also Venezuela's reliance on the International Valuation Standards Council in *Koch v. Venezuela*, at §9.134.

281 *Gambrinus, Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/31, Decision on Annulment (3 October 2017), at §145.

282 *Sistem Mühendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award (9 September 2009), at §155.

283 *Valores Mundiales v. Venezuela*, *supra* note 267, at §668.

284 *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Award (18 April 2017), at §122.

285 *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award (30 October 2017), at §9.5. The two last cases shared the same president in the person of V.V. Veeder.

286 *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), Judgment, 2012 I.C.J. 99, Dissenting Opinion of Judge Cançado Trindade, at §200.

287 To my knowledge, the only non-book "literary" reference in the dataset is the movie "Groundhog Day", cited in *Methanex Corp. v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005), at Part 2, Ch. E, note 18.

Moldova labelled a mere "brochure" unworthy of the tribunal's attention.[288] In *Koch v. Venezuela*, the respondent argued that "the reliance on 'two short marketing publications' created by Honeywell (which are not, contrary to the Claimants' nomenclature, 'position papers') was irrelevant, and, further, those documents are prone to exaggeration and oversimplification."[289] These two examples also show how "labelling" an authority is an important argumentative practice: "brochures" are not "authorities".

Other international courts and tribunals

This research could have been broader and covered international criminal courts, for instance, or to the sprawling jurisprudence from international human rights bodies. There are several reasons, however, why it is limited to the jurisprudence identified above.

First, a lack of time and resources, notably to develop and study the vast datasets of decisions for these two regimes. Developing a dataset is a tedious endeavour. The data is reliably full of (mostly unfortunate) surprises, and individual datasets are characterised by idiosyncratic features, be it in the way the data is stored (older awards collected in the RIAA collection, for instance, are sometimes barely machine-legible), or in its accessibility to external researchers.[290] The length of a PhD was sufficient to study the five fora present in the Dataset; studying other fora might wait for a later book.

More importantly, and as highlighted in a previous paper,[291] criminal and human rights jurisprudence are relatively self-contained systems; they rarely cite to the ICJ, and have even less in common with other regimes. They also, generally, have a more dedicated bench, whereas the same lawyers and adjudicators often straddle the WTO/Investment/IUSCT/ICJ/ITLOS lecterns and benches.[292] Finally, past studies have demonstrated that human rights dispute settlement bodies and international criminal tribunals display deep, sophisticated networks of citations. The ECtHR alone over its lifespan has likely cited more authorities than the entire Dataset,[293] while the dozens,

288 *Zbigniew Piotr Grot and others v. Republic of Moldova*, ICSID Case No. ARB/16/8, Hearing on Jurisdiction and the Merits – Transcript, Day 2 (12 December 2017).

289 See *Koch v. Venezuela*, *supra* note 285, at §9.146.

290 It took me a few months to obtain access to the IUSCT's online database, for instance, only to find out that Westlaw's data was more complete.

291 See D. Charlotin, "The place of investment awards and WTO decisions in international law: a citation analysis" (2017) *Journal of International Economic Law* 279.

292 See for instance S. Puig, "Experimentalism, Destabilization and Control in International Law: Afterword to Laurence Boisson de Chazournes' Foreword" (2017) 28 *European Journal of International Law* 1267, at 1269.

293 See Lupu and Voeten, *supra* note 215.

if not hundreds of procedural decisions by the ICC, for instance, yield a comparable, if not greater, tally. Citation networks of these magnitudes would have complicated the comparisons and data analyses below.

The same reasons explain why only *international* courts – and not domestic fora – are studied in this thesis, although the growing role of the latter in international law would certainly warrant further research into their use of international legal authorities.[294]

Impact on the thesis's findings

To a large extent, these limitations should not affect the findings below. Indeed, for most of these findings, the thesis remains in general agnostic as to the whether they apply more generally beyond (i) the courts and tribunals, and (ii) the set of authorities studied here. In other words, citation practices with respect to other types of "authorities" identified above might differ from precedents and teachings; and other international courts and tribunals might have different citation practices even with respect to these two authorities.

Some findings, nonetheless, are likely generalisable. In common with the entire literature on citation analysis, the analyses below have found citation networks to resemble natural networks where few authorities are disproportionally cited while the vast majority receive nary a citation. Besides, in focusing in particular on three fora specific to international economic law (WTO, INV and IUSCT), this thesis is in keeping with a literature that relied on this vibrant field of international law to study international dispute settlement in general.[295] Unavoidably, this thesis will draw many examples from these three fora, and from the rich dataset of investment tribunals, but an effort to balance all sources has informed it as every step.

3. The data-collection methods

Data-collection is the process by which un-aggregated data points become parts of a single encompassing architecture. As explained in further detail below at **Section 5**, the purpose is to make sense and translate in a single idiom data points as different as judgments from unrelated fora, pleadings, metadata and cited authorities. As such, the data collection methods that built the

294 See E. Benvenisti and G.W. Downs, "National Courts, Domestic Democracy, and the Evolution of International Law" (2009) *European Journal of International Law* 59.

295 Puig, *supra* note 292, at 1269. See also W. Alschner, J. Pauwelyn, and S. Puig, "The data-driven future of international economic law" (2017) 20 *Journal of International Economic Law*, at 217.

Dataset are a crucial element of this thesis. In its breadth and complexity, the Dataset is unique and unprecedented in international legal scholarship.

A) Data and Metadata

All decisions by the courts and tribunals described above were downloaded from these courts and tribunals' respective institutional websites, or from publicly available databases when this proved more convenient. Downloading was mostly performed by way of scripts written in Python, a general-purpose computer language used for data-collection and analysis.[296] These scripts crawled through lists of webpages (e.g., case pages on the ICJ website), scrapped the relevant metadata, and downloaded the text of the decisions.

In most cases, the text of international decisions was embedded in .pdf documents. While a ubiquitous format in modern life, PDF (for "Portable Document Format") is not fit for data analysis, as this is a format mostly dedicated to ensuring consistent printing output across devices. The downloaded documents were therefore converted to .xml, a more data-friendly format.[297] Free alternatives exist, yet none was as handy or powerful as Abbyy Fine Reader 14 to convert all files in the Dataset. Abbyy also automatically detected headings and sections in most documents, which were later tagged semi-manually to identify different parts of every decision (e.g., procedural record, facts, etc.), and notably the pleadings of the parties when summarised. Indications delineating each document's operative section (an identification that proved useful when noting outcomes) were also added.

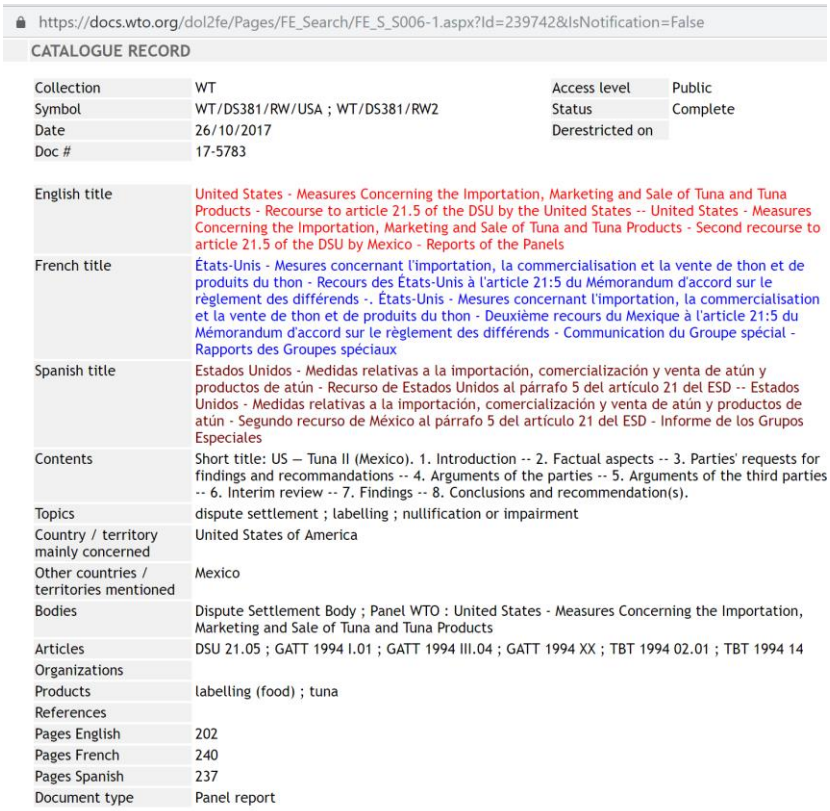
Most of the international courts and tribunals studied in this thesis also provided metadata associated with the documents made available. For instance, the WTO's database provides metadata for every panel or AB reports, including the relevant topics in these decisions, the international agreements cited as well as page numbers (see Figure 1 below). The Python scripts charged with locating and downloading these documents also collected this type of metadata.

This information was inserted into the .xml documents themselves, at attributes of these documents' main element. XML, as a mark-up language, allows to store data points (in this case,

296 I have described Python and its importance for legal data analysis in D. Charlotin, "Identifying the Voices of Unseen Actors in Investor-State Dispute Settlement", in Freya Baetens (ed.), *Legitimacy of Unseen Actors in International Adjudication* (Cambridge University Press 2019), at 395.

297 XML, which stands for "eXtensible Markup Language", is a format that allows for the conservation of data in a hierarchical relation of different elements (more information is available here: https://www.w3schools.com/xml/xml_whatis.asp).

mostly texts) in elements set in a hierarchical relation. Citations, for instance, were stored as elements of parent "paragraph" elements, themselves "children" of section elements, all the way up to a root "body" element. All .xml documents thus eventually contained all parts of the original documents, in elements corresponding to various sections of the original .pdfs: headings, footnotes, paragraphs, quotes, etc. (see Figure 2 below).



https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006-1.aspx?Id=239742&IsNotification=False

CATALOGUE RECORD

Collection	WT	Access level	Public
Symbol	WT/DS381/RW/USA ; WT/DS381/RW2	Status	Complete
Date	26/10/2017	Derestricted on	
Doc #	17-5783		

English title	United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products - Recourse to article 21.5 of the DSU by the United States -- United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products - Second recourse to article 21.5 of the DSU by Mexico - Reports of the Panels
French title	États-Unis - Mesures concernant l'importation, la commercialisation et la vente de thon et de produits du thon - Recours des États-Unis à l'article 21:5 du Mémorandum d'accord sur le règlement des différends -. États-Unis - Mesures concernant l'importation, la commercialisation et la vente de thon et de produits du thon - Deuxième recours du Mexique à l'article 21:5 du Mémorandum d'accord sur le règlement des différends - Communication du Groupe spécial - Rapports des Groupes spéciaux
Spanish title	Estados Unidos - Medidas relativas a la importación, comercialización y venta de atún y productos de atún - Recurso de Estados Unidos al párrafo 5 del artículo 21 del ESD -- Estados Unidos - Medidas relativas a la importación, comercialización y venta de atún y productos de atún - Segundo recurso de México al párrafo 5 del artículo 21 del ESD - Informe de los Grupos Especiales
Contents	Short title: US — Tuna II (Mexico). 1. Introduction -- 2. Factual aspects -- 3. Parties' requests for findings and recommandations -- 4. Arguments of the parties -- 5. Arguments of the third parties -- 6. Interim review -- 7. Findings -- 8. Conclusions and recommendation(s).
Topics	dispute settlement ; labelling ; nullification or impairment
Country / territory mainly concerned	United States of America
Other countries / territories mentioned	Mexico
Bodies	Dispute Settlement Body ; Panel WTO : United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products
Articles	DSU 21.05 ; GATT 1994 I.01 ; GATT 1994 III.04 ; GATT 1994 XX ; TBT 1994 02.01 ; TBT 1994 14
Organizations	
Products	labelling (food) ; tuna
References	
Pages English	202
Pages French	240
Pages Spanish	237
Document type	Panel report

Figure 1: Extract from WTO document database

```
<xml><body class_="Root" TypeJ="Judgment" IDCase="88" Judge=
"WEERAMANTRY|SCHWEBEL|ODA|BEDJAOUI|GUILLAUME|RANJEVA|HERCZEGH|SHI|FLEISCHHAUER|KOROMA|VERESJTSJETIN|PARRA-ARANGUREN|KOOIJMAN
S|REZEK|JENNINGS|EL-KOSHERI" Date="27/02/1998" Symb="088-19980227-JUD-01-00" Case="Questions of Interpretation and
Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v.
United Kingdom)" Author="COURT" Position="TRIBUNAL" AdHoc="0" Vote="Judgment" DocNumber="088-19980227-JUD-01-00" DocType=
"Judgment" Claimant="Libyan Arab Jamahiriya" Respondent="United Kingdom" CasePhase="Preliminary Objections" DocName=
"Judgment of 27 February 1998" MainDoc="088-19980227-JUD-01-00" Outcome="CLAIMANT">
  <div>
    <div>
      <p class="p" id="" IDEl="P_61991"><i>Present: Vice-President</i> Weeramantry, <i>Acting President</i>; <i>President
      </i> Schwebel; <i>Judges</i> Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, FleischHauer, Koroma, Vereshchetin,
      Parra-Aranguren, Kooijmans, Rezek; <i>Judges</i> ad hoc Sir Robert Jennings, El-Kosheri; <i>Registrar</i>
      Valencia-Ospina.</p>
      <p class="p" id="" IDEl="P_61992">In the case concerning questions of interpretation and application of the <a Type
      ="Treaty">1971 Montreal Convention</a> arising from the aerial incident at Lockerbie,</p>
      <p class="p" id="" IDEl="P_61993">
        <i>between</i>
      </p>
      <p class="p" id="" IDEl="P_62009">the United Kingdom of Great Britain and Northern Ireland, represented by</p>
      <p class="p" id="" IDEl="P_62010">Sir Franklin Berman, K.C.M.G., Q.C., Legal Adviser to the Foreign and
      Commonwealth Office,</p>
      <p class="p" id="" IDEl="P_62011">as Agent and Counsel;</p>
      <p class="p" id="" IDEl="P_62012">The Right Honourable the Lord Hardie, Q.C., The Lord Advocate for Scotland,</p>
      <p class="p" id="" IDEl="P_62013">Mr. Christopher Greenwood, Barrister, Professor of International Law at the
      London School of Economics,</p>
      <p class="p" id="" IDEl="P_62014">Mr. Daniel Bethlehem, Barrister, London School of Economics,</p>
      <p class="p" id="" IDEl="P_62015">as Counsel;</p>
      <p class="p" id="" IDEl="P_62016">Mr. Anthony Aust, C.M.G.,</p>
      <p class="p" id="" IDEl="P_62017">as Deputy-Agent;</p>
```

Figure 2: Top of a document with stored metadata (Lockerbie case at the ICJ)

B) Citations

Citations to precedents were collected using Python-based regexes,[298] themselves designed on the basis of the metadata collected with the documents. This means, in particular and with some exceptions,[299] that the universe of cited cases studied here overlaps fully with the universe of the citing decisions in the Dataset. In order to account for shortened or alternative names, every distinct case typically had several regexes associated with it.

To avoid false positives, the Python scripts searched for matches in decreasing order of accuracy. A first search over an entire document identified those cases that were cited at least once (counting, of course, only cases and documents that predated the searched document). Every paragraph was then searched for this whittled down list of cases. When a case was detected in the paragraph of a citing document (thanks to its case number or its name), additional algorithms identified which citable document from that case (i.e., a decision on the merits or on jurisdiction, or

298 Regexes, short-hand for "regular expressions", are rules-based search terms that allow for powerful ways to parse and search texts, by looking for flexible patterns rather than given features or words. For example, the regex "bi.\d" includes the letters "b", "i", and the symbols "." and "\d", which respectively mean (to the regex-based script's digital eyes) "any character and "any number". Applied to a piece of text, this regex would catch the terms "bit6" or "bil5" but not "bilboquet". I described Regexes further in Charlotin, *supra* note 296, at 398.

299 For instance, the rare citations to unpublished cases. On this topic, see below Chapter III, subsection E.

the individual opinion of an adjudicator) was precisely cited, with the help of clues such as dates, keywords, names, etc.

This process was unfit for citations to scholarship, since there is no pre-existing database of all "teachings" cited in international dispute settlement,[300] and the scope of scholarship is virtually open-ended (and not limited to a few hundreds of precedents). To collect these citations, then, a multi-stage "learning model" approach proceeded along the following lines:

- Every paragraph was checked for text corresponding to either:
    - A known author's last name, followed by a comma or a first name; or
    - the pattern of a citation, i.e., any text bracketed by (i) a proper name followed by a comma on one hand, and (ii) a year on the other hand.[301]
- The script then checked if the captured text corresponded to a name already known, and then to a work associated with that name.
    - In case of a match, the script added a "Citation" element to the .xml file at that juncture; or
    - In case a citation was unknown, the citation was prompted on a screen to be coded manually as either (i) a new citation; (ii) a known citation under a different form; or (iii) a false positive.

Following this method, the Dataset of cited teachings (and of cited authors) grew after every document was parsed. The documents were then parsed several times to account for the growing list of known authors, and to make sure an author only found in one of the last documents parsed is not also present, in a non-canonical way (say, in a citation that does not correspond to the usual pattern) in the first parsed documents.[302]

300 Investor-State Law Guide has such a list for most investment awards, but I did not rely on it.

301 For instance, something along the lines: "Damien Charlotin, *Argument from Authorities in International Dispute Settlement*, PhD Thesis (University of Cambridge 2020)."

302 Interestingly, insofar judgments and award preferred to cite precedents over scholarship (a finding of the next chapters), this could also be seen in the difficulties in collecting this kind of data. Scholarship is often eluded, ignored, or referred to in vague terms that prevent identification of the particular works relied upon.
A quote from the annulment committee in *Venoklim v. Venezuela* is typical in this respect, as the committee detailed the precedents but not the scholarship cited by Venezuela: see *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, Decision of the Annulment Committee (2 February 2018), at §138: "On this question, Venezuela referred to the decisions of the committees in MCI v. Ecuador, Fraport v. Philippines, Azurix v. Argentina and Enron v. Argentina, and *to some doctrinal writings*" (translated from the original Spanish, and emphasis added).

4. Methods of analysis and measures of authority

The data analyses relied primarily on two methods: (i) topic analysis; and (ii) network analysis. In addition, these analyses often sought to measure the "authoritativeness" of authorities, and a brief discussion is required about what these measures imply (iii). Other methods, when used for unique analyses, are further described at the relevant junctures below.[303]

A) Topic analysis

Topic analysis seeks to identify the most frequent topics discussed in a dataset of texts. It relies on the co-occurrence of meaningful words in these texts to extract common topics defined by this co-occurring terms. In the literature, topic analysis has been used for instance to identify the references to human rights in national constitutions,[304] or the topics citing paragraphs in the jurisprudence of the International Court of Justice.[305]

In this thesis, the analysis was performed thanks to MALLET,[306] an open-source topic analysis toolkit that operates in two steps:

(i) over the whole (text) Dataset, the algorithm detected words that typically occur together, so as to create a pre-defined number of such clusters of words; for each cluster, the algorithm collected the most important words associated with that cluster ("keys") ; and

(ii) for every document in the Dataset, the algorithm computed the probability of that document belonging to a given cluster. Typically, the probabilities of one text belonging to different clusters follows a power law, with a handful of very probable clusters/topics and then most of them being much less likely.

The clusters were then manually tagged to identify the topics they related to, on the basis of the common concept underlying these keys. For instance, the words "delimitation line para equidistance case equitable relevant method circumstances maritime coasts continental shelf area result boundary court special median areas" were associated with the topic "Delimitation". The

303 See, for instance *infra*, note 831.

304 D. Law, "The global language of human rights: a computational linguistic analysis" (2018) 12 *The Law & Ethics of Human Rights* 111, finding two distinct topics in this respect, represented by a "universalist dialect" and a "positive-rights dialect".

305 W. Alschner and D. Charlotin, "The Growing Complexity of the International Court of Justice's Self-Citation Network: Institutional Achievement or Access-to-Justice Concern?" (2018) 29 *European Journal of International Law* 1.

306 See A. McCallum, "MALLET: A Machine Learning for Language Toolkit", available at http://mallet.cs.umass.edu.

algorithm looked for 150 clusters which, when manually labelled (and once seemingly nonsensical topics were rooted out) resulted in 91 distinct topics (some topics were represented by distinct clusters, possibly representing nuances within these topics).

In common with a solution adopted in another article,[307] however, the topic analysis was not performed over the entire texts of documents, but only over paragraphs or sections that included a citation, as well as the preceding and following paragraphs. The purpose was to prevent the topic analysis from being flooded by facts- or procedure-related topics, but also to focus on the topics that are specific to *citing* paragraphs.

Topics are indicated below as surrounded by square brackets (e.g., [Equity]). The labelling is meant to be self-explanatory, but the keys associated with a topic are also listed in **Annex I** below for reference.

B) Network analysis

The citations collected at the data-collection stage were used to perform network analyses, with a view to identifying the relationship between the different documents in the Dataset and the importance of authorities therein.

Network analysis has its roots in the mathematical subfield of graph theory, a subfield spurred by Euler's attempts to solve the Konigsberg Bridge Problem, namely, how to walk through the city's seven bridges without crossing the same bridge twice.[308] In recent years, network analysis has become a staple of the growing digital humanities scholarship, as it fits that scholarship's goal of identifying relations and associations between a large number of data points. Network analysis is especially relevant for case citation networks, given "that the evolution of law mimics the evolution of other network phenomena and can be studied in the same way."[309]

A chief component of this approach relies on assessing the centrality of a given node in a network of links (also called "edges") between these nodes.[310] To do so, network analysis typically

307 See Charlotin, *supra* note 255.

308 See, e.g., the Wikipedia describing this problem, which Euler eventually concluded was impossible: https://en.wikipedia.org/wiki/Seven_Bridges_of_K%C3%B6nigsberg.
For a longer review of the development of network analysis and its increasing role in legal scholarship, Ridi, *supra* note 237, at 203.

309 See Šadl and Olsen, *supra* note 203, at 333.
Network analysis has however also been used to study "social" networks in international law. See, e.g., M. Langford, D. Behn, and R.H. Lie, "The Revolving Door in International Investment Arbitration" (2017) 20 *Journal of International Economic Law* 301.

310 *Ibid.*

requires two inputs: (i) a list of documents, the nodes in a network; and (ii) a list of links between these documents, the edges between the nodes. On the basis of these edges, a series of algorithmic calculations estimate the relevant distance between the nodes and produce two outputs: (i) visual maps of the relevant relationships between the nodes; (ii) and measures of the nodes' importance in the network.

Network analysis was also used to distinguish **modularity classes** amongst the authorities studied here. This is a kind of cluster analysis,[311] meant to regroup nodes in groups with no *a priori* knowledge of what these groups should be. Nodes in a single modularity class have dense connections between themselves and sparser connections with external nodes and other classes.

Since the characteristics of the nodes/decisions is not taken into account in network analysis, nodes from different fora could in theory be assigned by the modularity algorithm to the same class. In practice, however, and as indicated below,[312] the modularity classes of the full network overlap to a considerable extent with the divisions between the various fora studied, making the few exceptions to this general finding worthy of interest.

C) Measures of authority

As noted above, the introduction of network analysis to empirical legal scholarship brought a more sophisticated approach to citation analysis. In particular, various measures of centrality/authority can be computed by network analysis algorithms from the assumption that cases are part of a citation network. There are several such algorithms, with different inner workings and features, yet they typically go further than just grouping cases that cite each other together or counting incoming citations. A typical algorithm would take into account triangular relationships to better account for authoritativeness. For instance, if case A cites case B and C, and if case B also cites case C (besides being cited by case A), the relationship between A and C is presumably stronger than if case B does not cite case C.

These measures of authority include **PageRank**,[313] the measure powering Google's search algorithm, and which seeks to indicate the importance of a node in a given hub, based not only on how often they are cited, but also to what extent they also cite and are cited by authoritative

311 "Cluster analysis" is also defined in Gelter and Siems, *supra* note 212, at 50.
312 See Figure 11, at p. 166.
313 As based on S. Brin, L. Page, "The Anatomy of a Large-Scale Hypertextual Web Search Engine" (1998) *Proceedings of the seventh International Conference on the World Wide Web* 107.

authorities. PageRank is based on a probabilistic, "random walker" model meant to assess the likelihood that a person randomly walking between nodes on the basis of the links between them will arrive on any particular one.[314] Repeated, these "random walks" converge on a ranking of nodes depending on their centrality to the network,

The literature rightly acknowledges that "[d]ifferent measures should be used to answer different research questions",[315] with the consequence that it remains a matter for debate which measure is the most appropriate in any given case.[316] In this context, PageRank has been recommended to investigate case citation networks in international law,[317] and used to such employ by other scholars in some of the contributions reviewed above at **Section 1**.[318] The analyses below however systematically checked that other measures of authority did not yield contradictory results and that the findings were robust in this respect.

In the Chapters that follow and unless otherwise mentioned, the PageRank score of authorities is therefore taken as a shortcut for their "authoritativeness". In other words, the measure of "authoritativeness" below is not based on a crude counting of citations, but is always computed through mathematical means that take into account a broader range of relationships between authorities.

5. Empirical methodology and its limitations

This thesis's methodology relies on empirical data and statistical analyses. As mentioned at the outset of this chapter, such methods remain relatively unusual in international law literature, especially in the context of a doctoral thesis. The thesis' overall purpose, namely to investigate a *practice*, naturally calls for such a methodology.

The thesis's research question is, to a large extent, a *factual* question, whose answer depends primarily on an analysis of the empirical record; none of these questions is normative in character

314 M. Derlén, J. Lindholm, M. Rosvall, and A. Mirshahvalad, "Coherence out of Chaos: mapping European union law by running randomly through the maze of CJEU case law" (2013) 3 *Europarättslig tidskrift* 517–535, at 523.

315 Šadl and Olsen, *supra* note 203, at 334.

316 Neale, *supra* note 208, at 11.
See also M. Derlén and J. Lindholm, "Measuring Centrality in Legal Citation Networks-A Case Study of the HITS and PageRank Algorithms" (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2910926, at 8, criticizing the measure (initial hub score) used by Lupu and Voeten, *supra* note 215, notably because it fails to take into account precedents that are overturned.

317 *Ibid.*

318 For uses of this measure in similar empirical studies, see, e.g., Y. Panagis and U. Šadl, "The Force of EU Case Law: A Multi-Dimensional Study of Case Citations", *JURIX* (2015); Langford, Behn, and Lie, *supra* note 309, at 322; Neale, *supra* note 208, at 11.

or meant to receive a normative answer.[319] In other words, this thesis is not interested, for instance, in what *should* make an authority authoritative, or in the *legal framework* of the practice of citation, or in *the legal implications* of this practice. Although, as will be seen in the chapters below, the normative answers given to these aspects of the practice studied here can be a useful starting point for the analysis, this thesis's overarching purpose calls for an investigation, at least to some extent, on the basis of the empirical record. As a result, the analyses below are often deliberately descriptive in character; they let the data speak for itself.

The citation practice(s) studied here, besides, has neither been studied under an academic, doctrinal lens, nor has it been particularly rationalised by the practitioners themselves.[320] The magnitude of the citation networks studied below partly explain this state of affairs.[321] An empirical, inductive analysis relying on the actual record is therefore among the most natural ways to investigate it.[322] More traditional legal research methodology, because of their limitations in this respect, would incur the risk of being insufficiently representative or unduly specialised. As explained below, data-driven analysis by contrast permits exhaustivity and allows to draw conclusions from the entire dataset without incurring the risk of sampling bias.

Several recent contributions to the literature have adopted a similar empirical approach, but as noted above thesis-length treatments of this subject are scant, if not so far inexistent. This empirical methodology deserves a brief discussion of its promises and its limits.

A) Empirical analyses and big data

The common intuition underpinning data analysis methods is that objects of study can be usefully compared when reduced to a common – often, mathematical – idiom. Translation is then at the heart of such analyses, and while a translation is, generally, a loss ("traduire, c'est trahir", goes

319 Compare with Black et al., *supra* note 209, at 891: "Our goal here is not to take a normative position on whether [US Supreme Court] justices should cite foreign sources of law. Rather, we seek to examine the conditions under which justices in fact cite it."

320 Likewise, see Helmersen, *supra* note 229, at 22: "A conventional legal methodology, which would focus on cases where judges explicitly decide or comment on legal questions, would be unhelpful here, since ITLOS judges have never said anything explicit about how they view teachings."

321 Ridi, *supra* note 237, at 201: "Doctrinal studies may restrict themselves to identifying specific case studies or selecting a manageable sample, building on what is perceived as strong anecdotal evidence on the development of citation practices. Though their merits of close forensic analyses of what constructs and justifications are invoked when negotiating an approach to the past or the other are readily acknowledged, they cannot capture the complexity of so sizeable a phenomenon."

322 Another approach, taken by Stappert, *supra* note 268, would rely on interviews with practitioners dedicated to this subject. However, as noted in Chapter III, it may be the case that the opinion of practitioners might not match the empirical data. As mentioned by Ridi, *supra* note 237, at 201: "reliance on what adjudicators *say*, rather than *do*, may be counterproductive in the context of the accurate mapping of a phenomenon whose importance also lies in its quantitative measurability." (emphasis in the original)

the French saying), the expectation is this translation will allow the emergence of features, comparisons, analyses, that would not be available under a traditional approach.

Franco Moretti, a scholar in literature, developed the idea of "close reading" and opposed it to a data-led "distant reading". Moretti's works have spurred the birth and development of "Digital Humanities" as a new and thriving academic field, to which this thesis partly belongs. He described the intuition that underpins this academic inquiry as follows:

> in other words: you reduce the text to a few elements, and abstract them from the narrative flow, and construct a new, artificial object like the maps that I have been discussing. And with a little luck, these maps will be more than the sum of their parts: they will possess 'emerging' qualities, which were not visible at the lower level.[323]

Likewise, the methods employed here are an attempt to abstract from the particulars of a given case. One citation to a precedent or a piece of scholarship might indicate nothing more than the idiosyncratic preferences of the citer; ten citations already constitute a pattern that is worth investigating. A hundred citations, in documents as varied as pleadings, judgments and individual opinions, indicate a relatively popular "authority", and its popularity becomes an object of study in itself, regardless of the role of this authority in one particular case or for one particular party, or even the particular motives that led to this citation.

Alschner, Pauwelyn and Puig see three advantages in data-driven analysis, and all three are relevant in the context of this thesis. First, "data-driven analysis, especially through text-as-data and network analysis, can be used to make latent patterns in legal data visible."[324] Practitioners and scholars in international dispute settlement encounter citations chiefly in the context of their practice or their readings of the jurisprudence; their knowledge and understanding of this practice is limited, and does not extend to cases in which they are not involved or not interested: it would take a full year and 7 seven months for someone to read back to back, at an average speed and without pause, the around 110 million words found in all decisions and opinions in the dataset, and probably more than double this if pleadings were included.[325]

Nuance is lost in the process, but this is part of a trade-off with greater exhaustiveness. Data-driven analyses do not share the limitations of traditional scholarship, in which the same "landmark"

323 F. Moretti, *Graphs, Maps, Trees: Abstract Models for a Literary History* (Verso 2005), at 53.
324 See Alschner et al., *supra* note 295, at 223.
325 See https://wordstotime.com/.

cases are endlessly discussed and debated, tunnel vision set in, and the tree is often confused for the forest. Drawing conclusions from subsets of the jurisprudence or of the practice incurs risks in terms of bias and lack of representativeness.[326] By contrast, approaches that seeks exhaustivity – although, of course, they incur their own set of risks – reduces the role of human judgment,[327] and enhance reliability.[328]

While, and as a result, the analyses below often acquire a strong descriptive character, there is however value in such a description, especially if it identifies unknown patterns or counters received ideas.[329] Indeed, these empirical methods can also be used "to debunk widely held truths",[330] as such "truths" are often based on a partial picture of the data available. Chapter III below attempts to debunk one such alleged truth (the idea that authorities are cited *only* insofar they are intrinsically persuasive); other parts of the thesis likewise endeavour to confirm or reject common intuitions, such as the idea that decisions rendered by majority are less authoritative than unanimous decisions.

Thirdly, and relatedly, "text-as-data and network analysis allows us to quantify otherwise abstract phenomena."[331] Such fictions and abstract phenomena play an important role in law. Many key topics of international law, from "legitimacy" to "fragmentation", are embodied by terms that in turn cover a manifold reality. While there are important limits to what quantification can achieve, data analysis allows to take steps towards a better understanding of this reality.

B) The role of theory and literature

No empirical analysis however operates in a vacuum: legal analyses, even empirical legal analyses, are meant to answer or illustrate preconceptions and research questions. In other words, "[d]ata-driven analysis does not […] mean 'the end of theory'",[332] and "at least until computers are able to 'read' and comprehend text, [data analysis will remain] an imperfect mode of inquiry, another

326 Alschner et al., *supra* note 295, at 222: "Selection bias in sampling, missing observations, or unwarranted generalizations can produce a skewed or misleading picture of the larger universe in question."

327 J. Hsiang and J. Nyarko, "Precedent Citation at the WTO-Shifting the Empirical Focus to Panelists" (2016), available at http://acle.uva.nl/binaries/content/assets/subsites/amsterdam-center-for-law--economics/conferences/celse-2016/conference-papers/session-iii/paper-hsiangnyarko-2016.pdf?1466066673136, at 12: "[t]he obvious advantage of using the frequency of references as a measure for reliance on precedent is its objectivity and reproducibility, as human judgment does not factor into our analysis.".

328 C. M. Oldfather, J. P. Bockhorst, and B. P. Dimmer, "Triangulating Judicial Responsiveness: Automated Content Analysis, Judicial Opinions, and the Methodology of Legal Scholarship" (2012) 64 *Florida Law Review* 1189, at 1233: "One of the virtues of an automated approach is that it maximizes reliability."

329 See, likewise, Helmersen, *supra* note 229, at 24.

330 Alschner et al., *supra* note 295, at 224.

331 Ibid.

332 Ibid, at 221.

tool in the scholar's toolbox, rather than a replacement for what has come before it."[333] Legal expertise, in short, remains necessary to identify relevant legal queries or legal distinctions between different empirical datums.

Accordingly, this thesis also relies on the existing literature regarding authority and citations in international law, even if this literature was itself not empirical. Such academic literature often serves as a starting point to the analyses below; the analyses in turn seek to probe, disprove, or complete on the basis of empirical data the intuitions of theoretical scholars. Empirically-based measures of an authority's authoritativeness, for instance, can then be compared with more qualitative assessments.[334] The goal is, insofar as feasible, to shed light on doctrinal debates and ideas. This is also the approach adopted by the literature reviewed in **Section 1**.

As mentioned above,[335] there could be a *prima facie* paradox in studying citations to authorities on the basis of citations to authorities. However, there are important differences between the use of authorities in dispute settlement settings and in an academic context.[336] And while it is true that some of the analyses and conclusions below could undoubtedly be transposed to this latter context,[337] this thesis does not pretend to challenge the legitimacy or the property of citations or the use of authorities in any context; if it seeks to identify patterns and to shed light on this practice, this is merely with descriptive or analytical, not normative conclusions in mind.[338] The academic field, maybe even more than the legal field, is built upon citations and the work of past scholars.[339] This makes it an interesting object of study, but one that goes beyond this thesis's scope.[340]

333 Oldfather et al, *supra* note 328, at 1241.

334 J. Frankenreiter, "Network Analysis and the Use of Precedent in the Case Law of the CJEU – A Reply to Derlén and Lindholm" (2017) 18 *German Law Journal* 687, at 692-693.

335 Chapter I, *supra* note 61.

336 See W. Landes, R. Posner, "Legal Precedent: a theoretical and empirical analysis" (1976) 19 *Journal of Law and Economics* 2, at 251: "Scholarly citations, however, are not examples of the use of precedent. The normal function of the scholarly citation is not to adduce authority for a proposition but to give credit for prior original work, to refer the reader to corroborative or collateral findings by other scholars, and as a method of incorporating by reference relevant theorems, proofs, etc."

337 In non-legal fields, citation analyses typically focus on citations as they in the academic literature. Posner, *supra* note 196, at 2, noted that "both adjudication, a central practical activity of the legal system, and legal research are citation-heavy activities."
For a example of this type of research in the legal field, see, e.g.,

338 In other words, if the citations in this thesis might, like citations by courts and tribunals, be influenced by more than the persuasiveness of the cited authority, it does not mean that it should refrain from citing.

339 For a history of how citations have come to be predominant in humanities, see Grafton, *The Footnote: A Curious History* (Harvard University Press 1997).

340 International law scholarship has been partly studied by T. Schultz and N. Ridi, "Arbitration Literature", in Thomas Schultz and Federico Ortino (eds.), *Oxford Handbook of International Arbitration* (Oxford University Press 2019).

C) Data Collection and bias

The "light" that can be shed by empirical legal analysis, however, should always be qualified; the methods, the inquiries, introduce bias in the research question that should not be ignored.[341] The collected data can be skewed in one way or another, and noise risks to be confused for patterns.[342]

This is also why this Chapter took the time to retrace in detail the methodological choices that have informed the data collection and the analyses. Data collection is a product of choice, sometimes important ones. Collecting outcomes of cases, for instance, is fraught with pitfalls.[343] A binary win-lose metric can hide more than it enlightens, and its limitations should be borne in mind.[344] Nevertheless, once sufficiently qualified (for instance, "win/lose in jurisdictional contexts"), data on outcome can be helpfully used.

A related concern – and another caveat that applies to all following chapters – regards the implied nature of the international adjudication process that underpins this thesis. Adjudication rarely proceeds through a smooth process whereby parties are experienced and helpful, the decisionmakers competent and diligent, and the most "naturally" authoritative authorities being ultimately relied upon.[345] The reality of international dispute settlement is sometimes altogether different; and at all steps of the analysis, it needs to be acknowledged that some degree of arguing through and with citations is a human practice: with its flaws and drawbacks. Finally, it is a rare dataset that is perfectly clear of errors and inconsistencies. Notably, data converted from the .pdf format is prone to errors and imperfections.[346] Errors of this kind are an expected reality of data analysis.

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341 See Hernández, *supra* note 214, at 923: "[…] an attempt to address and create knowledge through facts carries with it certain consequences, not least of which is that the choice to privilege certain facts in constructing a description is one that is inevitably value-laden."

342 See, e.g., X.-L. Meng and others, "Statistical paradises and paradoxes in big data (I): Law of large populations, big data paradox, and the 2016 US presidential election" (2018) 12 *The Annals of Applied Statistics* 685–726.

343 C. Rogers, "The Politics of International Investment Arbitrators" (2013) 12 *Santa Clara Journal International Law* 223, at 239.

344 See K. Skubiszewski, "The Role of *ad hoc* Judges", in Connie Peck and Roy Lee (eds.), *Increasing the Effectiveness of the International Court of Justice* (Martinus Nijhoff Publishers 1997), at 389: 'I am not very convinced that the statistics about voting behaviour, like statistics about the number of ratifications of treaties and similar statistical games, tell us much about the law and the real posture […].' But see also Charlotin, *supra* note 255, at 25, note 103.

345 See J. Paulsson, "The Role of Precedent in Investment Arbitration", in Katia Yannaca-Small (ed.), *Arbitration under International Investment Agreements. A Guide to the Key Issues* (Oxford University Press 2010), at §4.21.

346 To the extent possible, the most flagrant ones were corrected during the data-collection process (for instance, the frequent "Teemed" typo for "Tecmed").

Yet, if the high burden of proof placed on empirical analyses is sometimes unfair,[347] this is because it stems from a misunderstanding of what the analysis tries to achieve. Legal data analysis does not seek to offer a final, distinct answer to legal questions, nor even to supplant or displace other types of legal analysis. Empirical research is limited; it can rarely prove anything beyond doubt, and as such should not be overinterpreted.[348] The efficiency gained by computational analysis, instead, is one side of a trade-off with the nuance and accuracy a human could achieve over a smaller dataset – especially when no human capacity could code or analyse the immense datasets in question.[349]

D) Limitations of citation analysis

Likewise, a misunderstanding of the goals and principles of data analysis often feed a further, common criticism that goes at the heart of this thesis's underlying assumption, in denying that citations, the explicit display of the use of authorities, could in themselves be a proper and meaningful research object.[350]

This thesis is not the first, nor the only scholarly to work from this assumption: as indicated above in the literature review, several recent academic endeavours have used citation analysis to shed light on the workings of international courts and tribunals. The list of citation-based scholarly works grows increasingly longer as scholars have found citations an interesting object of study.[351] And yet, replies to these works insist that the practice of citing, since it rarely obey any king of formal framework, is characterised by heterogeneity (of citing parties, of authorities, of motives to cite, etc.) and individual idiosyncrasies, such that no conclusion can be drawn from this data – at least not without extensive qualifications regarding these citations.[352]

Citations can indeed serve many different roles in a reasoning: they can support that reasoning with legal reasons from the cited authority; distinguish or contradict an unsupportive authority; or

347 Alschner et al., *supra* note 295, at 229: "computational legal scholarship faces another, more unique hurdle in the sense that tools often have to be perfect to convince in the eyes of many lawyers."

348 Rogers, *supra* note 343, at 240, cautions: "The problem is that, while these contentions [about investment arbitration] cannot be proven, an audience eager for data may be too willing to (mis)interpret the research as definitive proof of the policies they seek to promote."

349 A. van Aaken, 'Opportunities for and Limits to an Economic Analysis of International Law', 3(1) *Transnational Corporations Review* 27 (2011), at 43, "[b]eing shortsighted is usually better than being blind".

350 For a history of citation analysis, see Ridi, *supra* note 309, at 202.

351 *Ibid.*, at 200.

352 Landes and Posner, *supra* note 336, at 251: "The basic data for the empirical analysis are case citations appearing in judicial opinions. An initial problem is that a case citation is not the same thing as a precedent. Sometimes a case is not cited as a precedent; an example is a citation of the decision of a lower court (or courts) in the same case." See also R.A. Posner, "An economic analysis of the use of citations in the law" (2000) 2 *American Law and Economics Review* 381–406, at 383 *et seq.*

serve as a mere "ornamental" illustration of a particular outcome.[353] Some citations are mere noise in the data,[354] and do not indicate or signal anything else than the random process that led to their inclusion in a decision.[355] Other authorities might have been cited due to an unscrupulous clerk or junior lawyer who copied and pasted other sources.[356] Explicit citations, besides, may be the tip of an iceberg of influences that does not tell us much about the process that led to a decision. Some sources might be very influential on a judge or arbitrator yet left uncited.[357] There is anecdotal evidence that adjudicators are sometimes influenced by authorities that are deliberately not cited in the opinion.[358]

This range of concerns has led some scholars to opine that citations can teach us very little, and in particular that they are a poor proxy to understand the authoritativeness of some sources, as usage is in any case not dispositive of the real, inherent "authority" of some materials.[359] Since there is no hope to assess their actual influence, citations are a subpar guide to the process of decision-making, this argument goes.[360]

These concerns are however unsatisfactory, and, as explained below, they proceed from a misunderstanding what the empirical method seeks to achieve.

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353 See, e.g., Gelter and Siems, *supra* note 211, at 38, identifying several such "ornamental" citations in the jurisprudence of some European Supreme Courts.

354 Landes and Posner, *supra* note 336, at 252, for whom critics of legal data analysis "assume that judges' citation practices are altogether too idiosyncratic to be illuminated by general theory and statistical aggregation. Whether a judicial opinion cites many cases or few, old cases or new, is, they believe, more a function of the judge's personal style, tastes, erudition, pedantry, etc. than of systematic characteristics of the legal process."

355 Pelc, *supra* note 238, at 1: "[i]t is difficult to measure the degree to which precedent influences decisions, since in any given instance, there is little means of distinguishing courts' sincere appeals to precedent from opportunistic ones."

356 N. Duxbury, *Jurists and Judges: An Essay on Influence* (Hart Publishing 2001), at 1-2. As put by one early study, citation analysis "reflect[s] only the superficiality of citation and not the deep undercurrents of unacknowledged reliance"; see J. Scurlock, "Scholarship and the Courts" (1964) 32 *UMKC Law Review* 228, at 230.

357 The most influential authorities, the unavoidable works that leave deep imprints on the legal imagination of lawyers and judges, might, precisely because of their ubiquity, be left uncited: see Sivakumaran, *supra* note 192, at 34; Posner, *supra* note 352, at 388.
Likewise, materials such as the ILC Articles on State Responsibility and their Commentary are so authoritative that they can probably stand on their own: see *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award (22 December 2017), at note 1250, where the Tribunal cites this Commentary while acknowledging that the parties did not introduce it to the record.

358 S. McCaffrey, Remarks on the panel "The Role of International Tribunals in Managing Coherence and Diversity in International Law" (2011) 105 *American Society of International Law Proceedings*, at 170.

359 Kammerhofer, *supra* note 191, at 307.

360 *Ibid.*, at 322 *et seq.*
See also Frankenreiter, *supra* note 334, at 689, describing Derlén and Lindholm's network analysis of the CJEU: as "limited to informally comparing various descriptive statistics and plots derived from the application of methods developed in network analysis to the network of citations of both courts. As a result, despite the authors' pledge to improve the study of precedent use through quantitative methods […], their findings appear rather subjective."

Empirical Analysis and heterogeneity

As explained at the outset of this section, the very point of data-driven empirical analysis is to iron out heterogeneity and idiosyncrasies and convert different data point to a common measure that allows for comparisons and analyses, and for observing larger trends invisible when focusing on single cases. Such "big data" analyses are premised on the important assumption that in a dataset that is sufficiently large, idiosyncrasies, and errors should be normally distributed and therefore have a limited impact on the analyses.[361] In other words, even though some citations might be missing, wrong, unexpected or distinctive, a multitude of them, as found in regular and recognizable patterns, are enough for the purposes of data analysis.[362]

As a result, what the study of the authorities cited at the individual case level cannot reveal, a pattern of cases maybe can. The value of the Dataset in the following Chapters resides in its breadth. For instance, it is impossible to know if citing more authorities than the opposing party helped any party to prevail *in a given case*; as explained in Chapter IV, however, over the entire Dataset and *on average* this seems to be the case. All analyses below, it is important to repeat, purport only to describe phenomena and relations on averages.

While, again, some nuances might be lost under this approach,[363] and these nuances would certainly enrich this thesis and its conclusions, data-driven empirical analyses need to proceed from a level of generality that (i) is workable; (ii) requires the least amount of discretion; while (iii) remaining informative.[364] The level of generality chosen here fulfils these three conditions.

First, the most important distinctions between citations are already taken into account, and indeed these distinctions are what makes most of these analyses possible.[365] All cited authorities are

361 Posner, *supra* note 352, at 390: "Critics of citations analysis often fail to note that if errors in data are randomly distributed with respect to the variable of interest (such as research quality or impact), they are unlikely to invalidate the conclusions of the study, provided that the data sample is large."

362 Landes and Posner, *supra* note 336, at 251: "However, the question whether or not the use of precedents is systematic does not have to be decided on a priori grounds; to the extent that judicial citation practices exhibit regularities explicable within a systematic analytical framework, a statistical analysis of precedent should reveal them."

363 See Clark and Lauderdale, *supra* note 207, at 330: "Opinion texts can be analyzed at several levels of abstraction, each of which involves different trade-offs between automation and careful definition of quantities of interest."

364 In this sense, see Posner, *supra* note 352, at 386: a same citation can "can signify an acknowledgement of priority or influence, a useful source of information, a focus of disagreement, an acknowledgment of controlling authority, or the prestige of the cited work or its author. All of these are forms of influence, in a broad sense, and that may be enough to justify lumping them together for purposes of citations studies concerned with measuring influence." See also ibid., at 387: "imperfection of data is nothing new – nor, as we shall see, does it disable useful statistical analysis."

365 Authorities are sometimes cited in the reasoning of a decision-maker as an authority first introduced by a party. However, in this instance this type of authority becomes part of that decision-maker's own reasoning. As indicated in Chapter IV, the greater part of what parties cite is indeed never taken up or acknowledged in the resulting decision. The conscious choice to focus on some of these citations in particular in the context of a legal reasoning is therefore meaningful and indicates, presumably, the importance of the authority in question

associated with their document's metadata, in order to distinguish them according to their source (i.e., whether they are cited by parties, a court or in an individual opinion), forum, age, topic, etc. These are already plenty of distinctions to work with, and the analyses below reach meaningful conclusions on this basis alone.

Second, going any further and distinguishing between different types of citations depending on these citations' "motive", however interesting and enriching, would entail immense challenges in terms of data collection and to categorise with accuracy different categories of citations.[366] This is all the more the case as any additional distinctions would be far from clear-cut in practice,[367] and the distinguishing exercise might too often come down to an exercise of judgment and discretion.[368] In other words, "[a]n individual, substantive assessment of each [citation] would allow the researcher to ascertain the reasons for the reference […b]ut this would come at the expense of both labor and objectivity, as the measure would then depend on the individual's contextual understanding and thus is prone to change based on the researcher assessing the document."[369]

Third, the analyses below, which found interesting regularities and patterns in the citation practice of different parties in international dispute settlement, testify that this level of generality remains informative.[370] Again, this is not to deny that any more granular analysis would not enrich the thesis and these analyses; it would certainly do. However, in view of the material challenges this would entail, the choice was made to work with this level of generality.

The research question

This choice was also made because additional distinctions based on the motives of the parties would be, for the most part, unnecessary for the purposes of this thesis. Indeed, while it is always possible to distinguish ever-more granular nuances of citations and uses of authorities, nearly all

366 See, for instance, the experience of S. Manley, "Referencing Patterns at the International Criminal Court" (2016) 27 *European Journal of International Law* 191–214, at 198, who opted for a manual data collection method, and consequently had to restrict his inquiry: "The situation in the Democratic Republic of the Congo – the second matter to reach the ICC and the only other situation in which trials have commenced (and, in the case of Thomas Lubanga, resulted in a conviction) – was not chosen because the number of records generated (1,810) would have made a timely analysis unfeasible. Naturally, a higher number of records would result in superior data, and, in fact, a study that included all records from all situations would be preferable, but the author submits that the data presented herein – although limited – nonetheless provides meaningful insight into the ICC's use of precedent."
Likewise, while citations between footnotes and main text, varying stylistic choices between courts and tribunals introduce such variety that it would be hard to draw any kind of conclusions (not to mention that some courts, like the ICJ, do not use footnotes).

367 Posner, *supra* note 352, at 386.

368 Manley, at 198, mentioning that his own distinction between citations to a supporting precedent and citation to part of the procedural record was "a matter of judgment. At times, the distinction was a difficult one to make."

369 Hsiang and Nyarko, *supra* note 327, at 12.

370 Compare with Oldfather et al, *supra* note 328, at 1233, in the section entitled "viability of automated assessments", in which the authors confirm that their automated approach yields results equivalent to a more labour-intensive, manual coding approach.

citations in the Dataset qualify as defined above, as "explicit display of an authority in support of a legal reasoning".

That definition is interested in citations as signals of what is permissibly invokable as an "authoritative basis" – a source – to support a legal argument, however the actual (and unknowable) role of this source in the mind of the citing party. That this does not shed light on authorities' *inherent and potential* authority, or on their influence on an adjudicator in any given case, is true enough. Yet citations do indicate the extent of these authorities' authoritativeness in practice.[371] Even if a citation, in reality, played no practical and material role in a given reasoning, this citation would still inform parties and future decision-makers as to what is, at least, *citable* – and what is not. Authorities can be self-fabricated and self-referential – but then, so is (international) law itself.[372] In short, a citation, whether it endorses or reject an authority, whether it comes *sua sponte* or was provided by the parties, remains a citation – and this is what is studied here.[373]

An empirical analysis of the authorities that are, in fact, cited, regardless of the motives underlying these citations, is thus at the very least a first step in better understanding the three aspects of the citation practice studied in the following chapters. This approach can shed light: (i) on the cited authorities themselves, what makes them citable and authoritative independently of any given case; (ii) on what different parties might deem legitimate in legal argumentation and why (resulting in distinct citation practices);[374] and (iii) on the systemic consequences attached to this citation practice(s).

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371 See Duxbury, *supra* note 356, at 8-9: "The basic premise of citation analysis is that documents cited frequently are likely to be more influential than those which are cited less frequently, and therefore the impact of a particular document can be estimated by counting the number of occasions on which it has been cited. Citation, in short, might be treated as a proxy for influence." See also C. Perelman and L. Olbrechts-Tyteca, *Traité de l'Argumentation, la nouvelle réthorique* (UB Libre 1958), at 116, for the idea that writers infuse their choice of arguments with "presence" (whatever this means): "By the very fact of selecting certain elements and presenting them to the audience, their importance and pertinency to the discussion are implied. Indeed, such a choice endows those elements with a presence, which is an essential factor in argumentation."

372 And indeed, international law participants usually think citations are important. Witness how the UN keeps track of the international decisions that have cited the ILC Articles on Responsibility, for instance: see, e.g., Report of the Secretary General, A/68/72 (30 April 2013).

373 As put by James Fowler and Sangick Jeon, "[e]ach judicial citation contained in an opinion is essentially a latent judgment about the case cited", such that the very presence of an authority in a later case indicates some extent of that authority's importance for the party citing it: see Fowler and Jeon, *supra* note 205.
It is true that an authority cited but distinguished/contradicted by a party or a tribunal, for instance, could indicate greater authoritativeness (as this authority would then truly operate as an "argumentative burden" that needs to be lifted). It is to be doubted, however, that the results of the analyses undertaken would differ if this dimension were taken into account.

374 F. Schauer, *Thinking like a lawyer* (Harvard University Press 2009), at 81: "[…] a legal citation has an important double aspect. A citation to a particular source is not only a statement by the one citing it that this is a good source, but is also a statement by the citer (especially if a court) that sources *of this type* are legitimate." (emphasis in the original)

This approach and level of generality is therefore not defeated by the existence of citations to authorities that are distinguished or contradicted by a party or a decision-maker. Although they tend to attract the most attention, such citations in the Dataset are in any case dwarfed by the number of citations that merely support a statement without more, as the typical citation is found in a footnote on top of other citations and receive little engagement from the citing party.[375] This has also been the conclusion of other scholars who studied citations,[376] including those that manually collected citations in international jurisprudence: Nathan Miller reviewed nearly 184 citations to external precedents and found that only 11 of them distinguished or contradicted the cited authority, i.e., around 5%.[377] Stewart Manley, who manually annotated more than 1,000 citations from the International Criminal Court mentioned no citation that did not, in one way or another, support the Court's reasoning.[378]

Consequently, these investigations are not concerned with the "influence" of a particular authority on the outcome of a given case.[379] All analyses below are questions of average and trends, and of shedding light on why some authorities *in general* are cited or not; how citations patterns can differ *on average*; and what are the broader consequences of such citation *practice overall*. Indeed, focusing on average is, ultimately, the only way for an empirical endeavour of this kind to have any kind of scientific and scholastic relevance. Knowing why a particular judge or party cited anything in any given case is, as a rule, of limited interest beyond that particular case; knowing why a particular authority is *in general* preferred over others is a question worthy of academic interest.

E) Conclusion

Any empirical scholar would have wished a larger, cleaner, and more representative Dataset, without biases and which includes all relevant data to carry out statistical analyses. The reality is

375 Same finding with Helmersen, *supra* note 229, at 29, with respect to teachings in the jurisprudence of the ITLOS.

376 Hsiang and Nyarko, *supra* note 327, at 12-13.

377 Same conclusion for Miller, *supra* note 233, at 492, in the context of external citations: "By a margin of 173 to 11, however, tribunals are much more likely to refer to one another in a positive or neutral way than to distinguish or overrule." Miller also found that in the vast majority of instances, citations are meant to support or offer guidance to the citing party's reasoning.

378 *Ibid.*, at 198, where Manley only distinguishes between citations to a supporting precedent and citation to part of the procedural record. See also Black et al., *supra* note 209, at 901, finding that negative references to foreign law in the decisions of the US Supreme Court were a clear minority of all citations.

379 See Duxbury, *supra* note 356, at chapter 2, "The dynamics of influence" for the issues associated with this concept. See also Sivakumaran, *supra* note 192, at 3: "citation by courts and tribunals is indeed a useful measure of influence […] However, citation is not the same as influence; and lack of citation does not necessarily mean lack of influence." See also *ibid.*, at 26: "[…] a citation reveals the interaction between the judge and the writing."

however rarely so kind, and imperfect dataset combined with imperfect and probabilistic methods are what one has to work with.

Yet this is why the goals of empirical legal analysis are more modest: it seeks to (i) answer the need for more accurate data in a principled manner; and (ii) shed light on some issues otherwise identified by more qualitative research.[380] Ultimately, despite its limitations, this thesis adheres to Olsen's and Šadl's plea in favour of data analysis:

> [Q]uantitative methods, such as corpus linguistics and citation network analysis, ensure the reproducibility, generalizability, and empirical validity of doctrinal studies. They add to the transparency of legal methodology while substantially clarifying the legal method. They can provide empirical evidence to validate hunches and prove legal intuitions correct. Furthermore, they effectively address the limitations of traditional legal scholarship, including a lack of precision, subjectivity, a surplus of anecdotal evidence, and a tendency to succumb to herd behavior. Quantitative methods set objective benchmarks from which legal scholarship can, when required, criticize the practice of international courts for a lack of coherence of legal reasoning, for unjustified breaks with established case law, or for deviations from precedent which exceed judicial powers and competences; yet such methods also provide a necessary means of critically evaluating the research practice of the discipline itself.[381]

The next Chapters will now study the practice of citing precedents and teachings in international dispute settlement in keeping with the goals and principles of empirical legal analysis.

380 See, e.g., Rogers, *supra* note 343, at 257: "[t]o date, the role of precedent and legal doctrine has not been meaningfully accounted for in empirical research in investment arbitration".

381 See Šadl and Olsen, *supra* note 203, at 330. See also S.D. Franck, "Empirically Evaluating Claims About Investment Treaty Arbitration" (2007) 86 *North Carolina Law Review* 1, at 4, for whom empirical legal analysis aims at "test[ing] conventional wisdom [and] dispel[ling] myths".

Chapter III – Beyond persuasion: Reconceptualizing Authority

"*Non est enim potestas nisi a Deo*".[382] Although St. Paul mostly had political and governing authorities in mind, medieval thought deduced from his proposition that there was *nulla auctoritas nisi a Deo*: "no authority that does not proceed from God."[383] A statement that was unhelpful and question-begging when it came to distinguish proper from improper authorities, and yet was still an answer to the question of why an authority should be authoritative: because of its relation to God and His will.

A few centuries and epistemological leaps later, however, what "constitutes" authority? In the legal domain, what claim to authoritativeness can previous decisions and scholarly works command? As we saw in Chapter I, article 38 of the ICJ Statute remains relatively non-committal about these two supplementary sources, and yet precedents and teachings are omnipresent in international legal debates and cited frequently in judicial and arbitration decisions. How to explain that practice?

And, perhaps more crucially, how to explain that only *some* cases and authors are cited and held to be "authoritative", whereas others are not?[384]

Investigating the sources of "authoritativeness" is crucial to understand the practice of citing authorities in international law, as these source demonstrates that this practice does not proceed in a haphazard way that would defeat any kind of empirical inquiry. To the contrary, some authorities are cited more than other, and the question is why.

One answer has found favour in the literature: that these authorities are worth citing and relying upon *only insofar they are persuasive*. And yet, as seen in Chapter I, upon closer inspection

382 "[…] for there is no authority except that which God has established", Romans, 13:1 (New International Version).

383 A. Compagnon, *De l'autorité* (Odile Jacob 2008).

384 See J.C. Leitão, S. Lehmann and H.P. Olsen, "Quantifying Long-Term Impact of Court Decisions" (2019) 4 *Applied Network Science* 3, "[a] major question in law is how a court uses past decisions to legitimize new decisions" See also J. Paulsson, *Award and Awards*, Keynote Address for the BIICL 9th Investment Forum Public Conference (14 September 2007), at 1. Text available at https://www.biicl.org/files/3062_jan_paulsson_-_awards_and_awards.doc: "[w]hat is it that makes one award influential – and another best forgotten?"

the concept of "persuasive authority" is a contradiction in terms.[385] Authoritativeness cannot derive solely from persuasiveness.

This Chapter therefore develops an alternative answer to the same question. It contends that authorities are authoritative beyond persuasiveness because of a set of characteristics that are unrelated to their substantive content. **Section 1** below reviews why the standard account based on persuasiveness is flawed, or at least holds only for a definition of "persuasiveness" that goes further than the inherent persuasiveness of an authority. **Section 2** reviews the many factors that can influence the "authoritativeness" of an authority, such as the type of authority, the identity of the author, and other material and epistemic features.

1. Persuasiveness as a basis for authoritativeness

A) The standard account

Countless opinions in the literature and jurisprudence contend that authorities are only cited for their "persuasive value", or because they "persuasively" support a legal proposition. In this understanding,[386] the main and most important part of any cited authority is the legal reasoning of that authority that led it to adopt a legal position that is later relied on in a citation, or more accurately the "strength", or "weight",[387] of that legal reasoning.[388] The more "convincing" this reasoning, the more authoritative the authority should prove to be. "Persuasiveness", as the main determinant of authoritativeness, can therefore be opposed to other supposed factors.[389] In most accounts, the inquiry stops there: "persuasiveness" does not need to be described or analysed further. The assumption is that it is self-evident.

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385 A. von Bogdandy and I. Venzke, "The Spell of Precedents: Lawmaking by International Courts and Tribunals", in Cesare Romano, Karen Alter and Yuval Shany (eds.), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013), at 511.

386 An understanding that relies on a narrow meaning of "persuasive": see below for more on this point.

387 See C.J. Tams, "The Development of International Law by the International Court of Justice", in Gaetano Morelli Lecture Series (ed.) *Decisions of the ICJ as Sources of International Law?* (International and European Papers Publishing 2018), at 70: "More significantly no […] State [other than the states parties], is bound by the Court's decision; they all need to be persuaded by the strength and weight of the Court's reasoning".

388 See A. Pellet, "Decisions of the ICJ as Sources of International Law?", in Gaetano Morelli Lecture Series (International and European Papers Publishing 2018), at 38: "there are judgments and judgments. Central to the question is the persuasiveness of the legal reasoning".

389 See P. Palchetti, "The Authority of the Decisions of International Judicial or Quasi-judicial Bodies", in *Decisions of the ICJ as Sources of International Law?* (Gaetano Morelli Lecture Series ed, International and European Papers Publishing 2018), at 119: "Persuasiveness, rather than competence, should be the key for determining the authority of a finding of law."
See also G. Sacerdoti, "Precedent in The Settlement of International Economic Disputes: The WTO And Investment Arbitration Models", in Arthur W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Brill 2011) 225: "It is the persuasiveness of the reasoning in the previous case, besides the reputation of those who have previously decided, that will ultimately make a given decision a leading case, commanding respect and which will be followed."

International adjudicators likewise describe the role of precedents and other authorities in their reasoning pursuant to this understanding.[390] The tribunal in *Abaclat v. Argentina*, for instance, opined that decisions of international tribunals should be given consideration when "such consideration is appropriate in the light of a specific factual and legal context of the case and the *persuasiveness of the legal reasoning of these earlier decisions*".[391] Some ICJ judges have conveyed the same sentiment by embodying it in the Latin maxim "*tantum valet auctoritas quantum valet ratio*".[392]

Concluding their sociological account of international judges and arbitrators, Daniel Terris, Cesare Romano and Leigh Swigart observed that "what ultimately seems to matter is only that the reasoning that led the other tribunal to a given conclusion is legally sound and persuasive".[393] According to one international judge quoted on this very question, it is not certain "that there is much great practical difference between a decision that is binding, and one that is not binding but persuasive."[394]

This standard account has two important implications: first, it is useful as an answer to the question of the binding character of precedents in international law.[395] Faced with two true yet seemingly conflicting accounts of international law – (i) there is no *stare decisis* and past decisions are not binding; and (ii) international legal argumentation relies on past decisions[396] –, the focus on

390 B. Jia, *International Case Law in the Development of International Law* (Brill Nijhoff 2017), at §163, concluding a review of several international courts' position on precedent and concluding, in the general understanding, reliance on these precedents is based, "mainly in the persuasiveness of the jurisprudence". As indicated below, Jia is however sceptical that this is the case in practice.

391 *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/15, Decision on Jurisdiction and Admissibility (4 August 2011), at 292. (emphasis added.)

392 The maxim can roughly be translated as "as is [quality of the] reasoning, so is the authority"; see *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, 1950 I.C.J. 65, Dissenting Opinion by Judge Winiarski, at 91-92: "Opinions [of the PCIJ] are not formally binding on States nor on the organ which requests them, they do not have the authority of res judicata; but the Court must, in view of its high mission, attribute to them great legal value and a moral authority. This being the case and if *tantum valet auctoritas quantum valet ratio*, the Court, as a judicial organ, will surround itself with every guarantee to ensure thorough and impartial examination of the question."
See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, Separate Opinion of Judge de Castro, at 173-174, opining that the value of precedents and opinions only proceeds from the "validity of the reasoning" (although the original French "valeur" would probably be better translated by "value," or "worth" than by "validity").

393 D. Terris, C. Romano and L. Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Oxford University Press, 2007), at 121.

394 *Ibid*, albeit in the context of discussing reliance on external precedents. In the same context, see M.Q. Zang, "Shall We Talk? Judicial Communication between the CJEU and WTO Dispute Settlement" (2017) 28 *European Journal of International Law* 273, at 290.

395 See, e.g., the debates regarding the authoritativeness of IUSCT awards, in which the persuasiveness theory has appeared more than once: D. Caron, "The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution" (1990) 84 *American Journal of International Law* 104, at 105: "the precedential value of an international decision should turn upon its persuasiveness to the next panel […]."; M. Pellonpää, "The Process of Decision-Making", in David D. Caron and John R. Crook (eds.) *The Iran-US Claims Tribunal and the Process of International Claims Resolution* (Transnational Publishers 2000), at 238.

396 H.G. Cohen, "International Precedent and the Practice of International Law", in Michael Helfand (ed.), *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism* (Cambridge University Press 2015), at 173, talking of the practice of citing precedent "butt[ing] up against an uncomfortable doctrinal reality" (i.e., that precedent is not binding).

persuasiveness offers a convenient approach to reconcile the two accounts.[397] That approach explains away references to precedents as the mere recitation of convincing reasoning.[398]

A second implication of this standard account is that it partakes in, and strengthens, the commonly-held position that international adjudication is divorced from any kind of law-making activity.[399] A focus on persuasiveness deflates the charge[400] that adjudicators legislate commonly through a process of repeated citations to authorities: if authorities are only persuasive, then in citing precedents and scholarship judges are not legislating, but merely applying the law persuasively laid out in an external material.[401] Conversely, if judgments and awards are cited only based on their persuasiveness, then in deciding today's case adjudicators are not expected to legislate (i.e., to create a legal solution that is not only persuasive but also authoritative).[402] A call to persuasiveness, in short, is a call to the greater rationality of everyone; it is a plea that *anyone* would reach the same conclusion, which trivialises the role and importance of citations and authorities.

397 M. Jacob, "Precedents: Lawmaking Through International Adjudication" (2011) 12 *German Law Journal* 1005, at 1008. Jacob seemingly offers another way out of this conflict, however, by pointing out that the absence of binding power does not entail lack of influence. This is true, but only puts the onus on a better account of "influence".

398 G. Sacerdoti, "A Comment on Henry Gao, 'Dictum on Dicta: Obiter Dicta in WTO Disputes'" (2018) 17 *World Trade Review* 535, at 5380. Likewise, Reinisch, following an observation that tribunals all assume "no stare decisis" in the ICSID system, observes that "Investment law 'precedents' are followed, not because of any intrinsic binding value, but rather as a result of their 'persuasive' force. It is the strength of the argument expressed in an award or decision that will command adherence." See A. Reinisch, "The Role of Precedent in ICSID Arbitration" (2008) 495 *Austrian Arbitration Yearbook* 495, at V.

399 Pellet, *supra* note 388, at 40, citing H. Lauterpacht, *The Development of International Law by the International Court* (Cambridge University Press 1934).

400 See, for instance, the opinion of arbitrator Pedro Nikken in *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Award (30 July 2010), Separate Opinion of Pedro Nikken, at §24, arguing that the tribunal's interpretation of the Fair and Equitable Treatment ("FET") standard was "based on recent arbitral jurisprudence", and opining that this jurisprudence was not a proper source of law, as well as flawed in its particulars. (The irony is, as always, that Mr. Nikken's Opinion is replete with citations to other cases he deemed more correct.) *General Dynamics v. Iran*, Award No. 123-283-3 (16 April 1984), 9 Iran-U.S.C.T.R. 153, Dissenting Opinion of Hamid Bahrami, at 169.
See also G. Guillaume, "The Use of Precedent by International Judges and Arbitrators" (2011) 2 *Journal of International Dispute Settlement* 5, at 23.

401 See I. Venzke, "Judicial Authority and Styles of Reasoning: Self-Presentation between Legalism and Deliberation", in Johanna Jemelniak, Laura Nielsen and Henrik Palmer Olsen (eds.), *Establishing Judicial Authority in International Economic Law* (Cambridge University Press 2016), at 426.

402 See also N. Ridi, "The Shape and Structure of the 'Usable Past': An Empirical Analysis of the Use of Precedent in International Adjudication" (2019) 10 *Journal of International Dispute Settlement* 200, at 243-244, for a finding that international judgments and awards, when they cite precedents, are characterized with a language that displays strong analytical features and a neutral sentiment score, "suggesting, […] that reliance on precedent is associated confident [sic], but not boastful, tone that furthers the 'rhetoric of inevitability' that adjudicators seek to promote."

B) Questioning the standard account

This trivialisation however generates a great deal of ambiguity and tension when scholars are working with notions of authority, persuasiveness and law-making.[403]

A first confusion resides in the conflation between the distinct persuasiveness of (i) an argument/reasoning that cites authorities, and of (ii) those very authorities. The "persuasiveness of the legal reasoning" or "the strength of the argument" of (ii) does not however entirely determine the persuasiveness of (i). As seen in Chapter I, citing authorities can bolster the persuasiveness of a reasoning *regardless* of the persuasiveness of the authorities cited, as a reasoning is often more persuasive by the sheer fact that it cites something, (which could be) *anything*.

The second, related confusion proceeds from the varying aspects of what can "persuade". While "the strength of the legal reasoning" can be an important plank in what makes a legal authority authoritative, it does not mean that this is the only, let alone the most important plank. Persuasiveness of legal reasoning may be a necessary condition to authoritativeness, but it does not follow that it is a sufficient one.

"Persuasiveness", besides, is susceptible to several definitions of various breadths. The narrowest definition focuses on substantial persuasiveness – i.e., the cogency of the reasoning, a first-order reason for persuasiveness. Broader definitions encompass second-order reasons for persuasiveness,[404] and accept that a reasoning can be "persuasive" not only because it is convincing (a reader would be likely to agree with the conclusion given the premises), but also because of features external to it: the authority's source (who can be trusted), the process leading to the production of the authority (that ensured the right views were adopted), the amounts at stake (which means that special care was given to the reasoning), etc. These "marks of authority"[405] and others potential features of a broader understanding of persuasiveness are studied further below.

403 See, e.g., A. Bjorklund, Remarks on the panel "The Role of International Tribunals in Managing Coherence and Diversity in International Law" (2011) 105 *American Society of International Law Proceedings*, at 175: "Of course, a third question is what kind of authority and legitimacy the other tribunal has. At least at present, we think of perhaps the European Court of Human Rights, the WTO Appellate Body, certainly the ICJ, as having a great deal of legitimacy and authority. That makes their rulings, if you will, presumptively persuasive, something worth looking at, but I think looking at that in a careful manner is good, as well." It is far from clear how the concepts of "legitimacy", "authority", or the "presumption of persuasiveness" relate to each other.

404 N. Ridi, "'Mirages of an Intellectual Dreamland'? Ratio, Obiter, and the Textualization of International Precedent" (2019) 10 *Journal of International Dispute Settlement* 361.

405 F. Zarbiyev, "Saying Credibly What the Law Is: On Marks of Authority in International Law" (2018) 9 *Journal of International Dispute Settlement* 291, at 298.

The standard account ignores these two sources of confusion to present an image of international legal adjudication unified by the (universally compelling, rationality-based) idea of persuasion. This is a clear "Motte-and-Bailey" argument:[406] until questioned, the standard account assigns a great importance to the narrowest understanding of persuasiveness (i.e., inherent, or substantial persuasiveness), only to rely on the broader meaning of the term when pressed.

Relatedly, this focus on persuasiveness is often riddled with readily-apparent contradictions. Judge Shahabuddeen's impressive study of the role of precedent at the ICJ unwittingly provides several examples. For instance, while generally subscribing to the idea that persuasiveness explains the citations to some authorities more than others, Judge Shahabuddeen also considers that the unanimity of a decision should be material for its authoritativeness,[407] while judgments in chambers might be less authoritative.[408] (As demonstrated below, both these observations are not empirically verified.) Judge Shahabuddeen further noted that a failure to cite sometimes does not go unnoticed by parties in ICJ proceedings,[409] which is also inconsistent with the view that the only thing that matters is persuasiveness. With respect to individual opinions, Judge Shahabuddeen both opines that the name or standing of the cited judge is "not material"[410] to an authority, and acknowledges that a handful of judges are particularly authoritative.

If the prestige of a particular judge were irrelevant, we would expect a random distribution of citations to individual judges (under the assumption that they are all equally persuasive, an assumption that is not unreasonable given the high quality of the international bench).[411] Instead, some authors have clearly left a deeper mark in international jurisprudence. Seven different individual opinions by Sir Hersch Lauterpacht are cited 71 times in the Dataset, while Sir Gerald Fitzmaurice comes close with 8 different opinions cited 64 times. And this is without counting their

406 In epistemology, a motte-and-bailey argument refers to a proposition that is susceptible of two meanings: a highly-defensible one (the motte), and a meaning desirable to the argument's proponents, but that is difficult to defend (the bailey). When pushed to explain what they mean, the proponents of that kind of argument will generally insist that they intended the "motte" meaning of the argument all along, while pushing for the "bailey" meaning until it is contested. For further analysis, see N. Shackel, "Motte and Bailey Doctrines" (5 September 2014) *Practical Ethics*, available at http://blog.practicalethics.ox.ac.uk/2014/09/motte-and-bailey-doctrines/.

407 M. Shahabuddeen, *Precedent in the World Court* (Cambridge University Press 2008), at 144. He writes that "[t]here is at least the glimmering of a disposition on the part of the Court itself to attach more persuasiveness to a unanimous decision than to a majority one." "Authoritativeness" is probably the more appropriate term here, and not "persuasiveness".

408 *Ibid.*, at 171.

409 *Ibid.*, at 142. See also H.G. Cohen, "Theorizing Precedent in International Law", in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds.), *Interpretation in International Law* (Oxford University Press 2015), at 284.

410 Shahabuddeen, *supra* note 407, at 142.

411 That is, weighted by the number of "citable" authorities they produced.

respective scholarly publications: the 21 doctrinal works authored by Lauterpacht in the Dataset attracted more than 350 citations; Fitzmaurice's 18 different writings more than 200 citations.

More fundamentally, the focus on persuasiveness is notably unable to explain why *anything* is cited at all: if citations are trivial (they only refer to a reasoning that is persuasive), then why not laying down that reasoning *in extenso* (slightly adapted to the needs of the case at stake)[412] without mention of its source? Why incur the costs[413] of locating, referencing, and writing down authorities when this has no importance aside from the reasoning contained in that authority – especially when, as seen in Chapter IV, this reference can later be a ground for challenge? In other words, there would be no point in citing a precise authority (except perhaps to avoid plagiarism) if that authority's substantial persuasiveness was its only relevant feature. Citations are far from the optimal medium to bolster an argument, given that a reader might not take the trouble of checking what the cited authority actually stands for.

Far from merely repeating bits of persuasive reasoning, arguments in international disputes do cite authorities and explicitly assign an origin to a given legal argument. This practice is at odds with a view of authorities being based purely on persuasiveness for at least three reasons.

First, citations to authorities in the Dataset obey distinctive patterns, whereas some authorities are much more cited than others, something we would not necessarily expect were citations based entirely on persuasiveness.[414] Save if only the ICJ, say, were capable of producing persuasive reasoning, this focus on persuasiveness fails to explain: why ICJ cases are disproportionally cited on any given point – and not other authorities; or why some authorities are not cited, despite their probable persuasiveness – for instance, between two international courts;[415] or even why most citations are not explained or engaged with: readers are usually left to find out for themselves what was so persuasive in the cited authority, if they can even locate it.

412 And yet they cite those sources: see G. Lamond, "Persuasive Authority in the Law" (2010) 17 *The Harvard Review of Philosophy* 19, at 28.

413 Citations entail costs: see W. Landes, R. Posner, "Legal Precedent: a theoretical and empirical analysis" (1976) 19 *Journal of Law and Economics* 2, at 252. See also F. Schauer, *Thinking like a lawyer* (Harvard University Press 2009), at 67: "[…] when we are genuinely persuaded by substantive reasons, we have no need for authoritative pronouncements."

414 *Ibid.*, at 70. See also Sir G. Fitzmaurice, "Some Problems Regarding the Formal Sources of International Law" (1958) *Symbolae Verzijl* 153, at 171.

415 Zang, *supra* note 394, at 275, saying that adjudicators, although "open up to judicial externality", are "reluctant to do so." See in general Chapter VII below.

Second, the standard account is inconsistent with the common practice of distinguishing *ratio* from *obiter* in international precedents,[416] as a legal proposition's substantive persuasiveness should be left intact regardless of its role in deciding a case. More fundamentally, a focus on persuasiveness fails to explain why a major part of the activity of courts and tribunals, and the parties before them, is to debate the relevance of various authorities – often on grounds unrelated to the merits of their reasoning.

Third, "persuasiveness" is likely impacted by time: the persuasiveness of older authorities should decrease as the context of their reasoning fades from view, while newer authorities should be informed by, and build upon previous persuasive material. In short, as seen by Lauterpacht, a precedent's value is "in the long run ... no greater [than] the inherent value of the legal substance embodied in it"[417] – which implies that authorities should (relatively) depreciate with time: either (i) their content is increasingly accepted, and they require less citing; and/or (ii) new and updated authorities will take their place. And yet, some authorities on the contrary show no clear depreciation, and most adjudicators tends to cite increasingly older precedents and teachings.[418]

This is not to say that the persuasiveness is irrelevant. It is, on the contrary, and as recognised by the entire literature, an essential ingredient in any authority. Judge Tanaka saw this division clearly in his opinion in the *Barcelona Traction* case, as he contrasted the "formal authority" (i.e., authoritativeness) of the Court's decisions (which he derived from the requirement of consistency in international law) with their substantive (i.e., persuasiveness) authority. While Judge Tanaka feared that the former would often weigh heavier than the latter,[419] a proper assessment of this question requires to put the standard account aside, and review what makes authorities authoritative on top of their inherent persuasiveness.

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416 Ridi, *supra* note 404.

417 H. Lauterpacht, "The So-Called Anglo-American and Continental Schools of Thought in International Law" (1931) 12 *British Yearbook of International Law* 31, at 52.

418 Ridi, *supra* note 402, at 210.

419 *Barcelona Traction Light and Power Company, Limited (Belgium v. Spain)*, Preliminary Objections, Judgment, 1964 I.C.J. 6, Dissenting Opinion of Judge Tanaka, at 65. Note that Makane M'Bengue argues that Judge Tanaka's premonition in this respect has come to pass and that "[c]onsistency has today become a pretext for international courts and tribunals to focus more on the form than the substance of the case law." See M.M. M'Bengue, "Precedent", in Jean d'Aspremont and Sahib Singh (eds.), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar Publishing 2018), at 712.

2. The determinants of authoritativeness

What, lies at the source of authoritativeness? What makes one authority more authoritative than another, even an equally situated one?

The existing literature is unhelpful in this respect, unclear as it is with respect to the reasons behind the success of some authority and the obscurity of others.[420] "[T]here are awards and awards, some destined to become ever brighter beacons, others to flicker and die near-instant deaths," said Jan Paulsson,[421] who offered little as to how to distinguish between flickers and beacons. Likewise, it is common to hear of "leading cases,"[422] or of influential works of scholarship in international law,[423] with no clear account as to how any authority has acquired that status. And the rare authors who have looked at the question[424] have never confronted their intuitions with the empirical reality of the practice of international courts and tribunals.

This empirical reality was captured, to an extent, in the Dataset. The following section reviews in turn the impact on authoritativeness of: (A) the type of authority (judgments and awards are not on the same level as scholarship); (B) the identity of the authority-maker (institutional or individual); (C) the process underlying an authority; (D) questions of consensus and consistency; and (E) questions of culture and availability.[425]

A) The type of authority

The two main types of authorities studied in this thesis are precedents and teachings. While both types of authorities are used and cited because they embody legal pronouncements,[426] they nonetheless differ in important respects. These differences explain why they do not always appeal to the same extent to the same parties or adjudicators.

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420 S. Sivakumaran, "The Influence of Teachings of Publicists on the Development of International Law" (2017) 66 *International & Comparative Law Quarterly* 1, at 8.

421 J. Paulsson, "The Role of Precedent in Investment Arbitration", in Katia Yannaca-Small (ed.), *Arbitration under International Investment Agreements. A Guide to the Key Issues* (Oxford University Press 2010), at §4.29.

422 See, e.g., E. Bjorge and C. Miles, *Landmark Cases in Public International Law* (Hart Publishing 2017), at 4.

423 H. Thirlway, *The Sources of International Law* (Oxford University Press 2010), at 126-127.

424 Marc Jacob, for instance cited a "plethora of factors" that could have an impact on the future authority of a precedent, "such as the hierarchical rank of the court, whether the prior decision was made by a full bench or not, the reputation of that court, the precedent's age, the soundness of the reasoning employed, the presence or absence of dissent, its reception by the larger epistemic community, changes in social and legal reality, and more." See Jacob, *supra* note 397, at 1016.

425 The analysis undertaken below echoes, but does not fully overlap with, that of Thomas Frank in researching the determinants of legitimacy in international rules: see the summary of his findings in H.G. Cohen, "Fragmentation", in d'Aspremont and Singh, *supra* note 419, at 653.

426 J. Kammerhofer, "Law-making by scholars", in Catherine Brölmann (ed.), *Research Handbook on the Theory and Practice of International Law-Making* (Edward Elgar 2016), at 308.

Precedents

The first striking observation from the Dataset is that, everything else being equal, precedents are generally preferred to equivalent scholarship.[427] This is especially the case for citations found in decisions, as opposed to individual opinions or the pleadings of the parties. As seen in further details below, there is something in a precedent that makes it more valuable to the reasoning of an adjudicator – something that the view of one or several scholars, however sound, will not be able to match.

Accordingly, a first, unmistakable aspect of precedents is that they are much more likely to be cited than scholarship – especially in majority decisions as opposed to individual opinions and pleadings. This is true when looking across fora: citations to precedents average around 96% of all citations, with only 4% of citations to scholarship.

	Dissenting Opinion	Decision	Separate Opinion	Pleadings	Pleadings (in decision)
Advisory Opinion	4.57	0.67	4.80	1.77	0.00
Teachings	24.46	3.88	26.15	22.19	3.98
Dissenting Opinion	2.79	0.09	2.52	0.42	0.00
Decision	59.65	91.63	52.88	70.65	92.22
Order	2.09	2.53	5.85	2.79	2.86
Provisional Measures	3.57	1.08	4.27	1.70	0.93
Separate Opinion	2.49	0.08	2.67	0.36	0.00

Table 3: Percent of citations to different categories by type of document

***Reading key**: 4.57% of all citations in dissenting opinions are citations to Advisory opinions.*

There are important discrepancies, however. For instance, precedents are cited more than authorities in pleadings, but this ratio is even greater in the resulting decisions by courts and tribunals – that often relegate teachings as authorities to pleadings and individual opinions. Before

427 See, notably, the quote by Sir Gerald Fitzmaurice, at p. 37 above.
For an illustration, see UN Assembly General, 73rd Session, Report of the ILC on the works of its 70th Session, Intervention of François Alabrune (24 October 2018), questionin on the ILC's suggestion to determine how imperative a norm is by reference to international jurisprudence and teachings.

the ICJ, for instance and as seen in Table 4 below, a third of all authorities cited in pleadings are teachings, a proportion broadly similar to that found in individual opinions, but which collapses to nearly nothing when considering only decisions by the full Court.

	Opinions		Decisions		Pleadings	
	Precedents	*Teachings*	*Precedents*	*Teachings*	*Precedents*	*Teachings*
ICJ	68	32	99	1	70	30
INV	91	9	90	10	85	15
ITLOS	86	14	100	0	67	32
IUSCT	75	25	93	7	94	6
WTO	/	/	99	1	98	2

Table 4: Percent of all citations, precedents and teachings

Reading key: at the ICJ, 68% of all citations in individual opinions are to precedents and 32% to teachings

As mentioned in Chapter II above, advisory opinions at the ICJ and the ITLOS were counted as "Precedents", although the differences between these opinions and judgments on contested cases might put into doubt their qualities as an authority for future cases.[428] Yet, to the extent they too rule on points of law as the outcome of a deliberating process, advisory opinions do not differ from judgments.[429] As a matter of fact, each ICJ advisory opinion has been cited 83 times on average in the Dataset, as opposed to 93 times for ICJ judgments. Some advisory opinions have indeed acquired tremendous authority in some respects,[430] and are cited beyond the ICJ's ow jurisprudence.

A previous analysis of the ICJ's network of citations found that "advisory opinions are more connected to each other than to the rest of the ICJ network of precedents (a conclusion that suggests the development of the law on its advisory jurisdiction), but are also, in aggregate, far from isolated from the rest of the network".[431] This is confirmed in Figure 3, which gathers all ICJ decisions (coloured per types) around the most cited in the middle of the graph: orange nodes (advisory opinions) form a distinct cluster, which situates most of them in the vicinity of each other. This

428 Sir F. Berman, "Authority in International Law" (2018) *KFG Working Paper Series*, no. 22, at 17: "for all their weighty authority in general and in particular, even judicial decisions, simply by virtue of their essential character as reasoned conclusions deriving from open analysis and argument, are out there for comment and examination, and have to earn their ranking in the marketplace of ideas. In relation to the ICJ, one can see this particularly strongly in the case of Advisory Opinions."

429 de Castro, *supra* note 392, at 174.

430 J. d'Aspremont, *International Law as a Belief System* (Cambridge University Press 2015), at 42.

431 Ridi, *supra* note 402, at 222.

indicates a degree of specialisation based on more frequent cross-citations, likely due to the Court's citing on matters relevant for its advisory function. At the same time, these nodes are nonetheless far from severed from the rest of the network – which indicates that they remain a relevant authority for judgments and opinions of the Court.

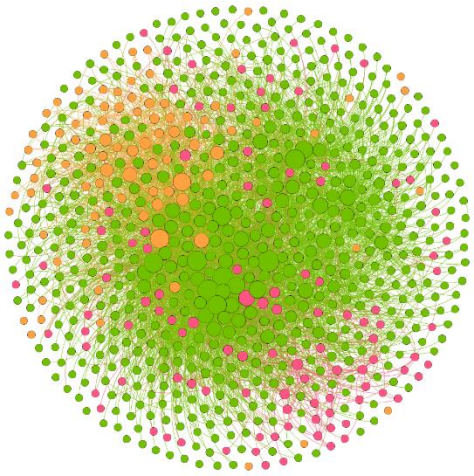

Figure 3: Network of ICJ decisions, per type[432]

Teachings

Table 3 above indicates that courts and tribunals, even in majority decisions, do not resort uniquely to precedents: teachings sometimes find their way to the reasoning of adjudicators and are frequently cited as an authority for a legal proposition. In the *Paquete Habana* case, the US Supreme Court underlined the usefulness of scholarship in international law:

> [W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilised nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[433]

432 Nodes are coloured per type of decision: Advisory opinion in orange, orders in Pink, and decision on jurisdiction or on the merits in Green. Advisory opinions form a cluster on the figure's top left, indicating that they cite each other more often than other types of decisions (if citations had been random, the orange nodes would be dispersed throughout the figure.

433 *The Paquete Habana*, 175 US 677 (1900), p. 701 (Grey J.).

This quote dates from the early 20th century. As explained in Chapter I, however, the status of teachings in international law has seen a distinct shift since then, as the importance and predominance of scholarship was slowly eclipsed by the growing number of international judgments and awards. These decisions are credited for filling the gap in international law that scholarship filled before,[434] and to bring light to an international legal field that was in the past "surrounded by large areas of vagueness and obscurity."[435]

This distinct shift in the status of scholarship is readily observable in the Dataset: Figure 4 below illustrates that the proportion of citations to teachings in the Dataset has dramatically decreased over the past 70 years. For some judges, scholarship now is a second-rate source,[436] to which they would rarely cite.[437] As seen from Table 4 above, this results in that only a portion of the total writing cited in pleadings finds their way to a final decision, as judges in majority decisions are now often reluctant to cite scholars directly.[438]

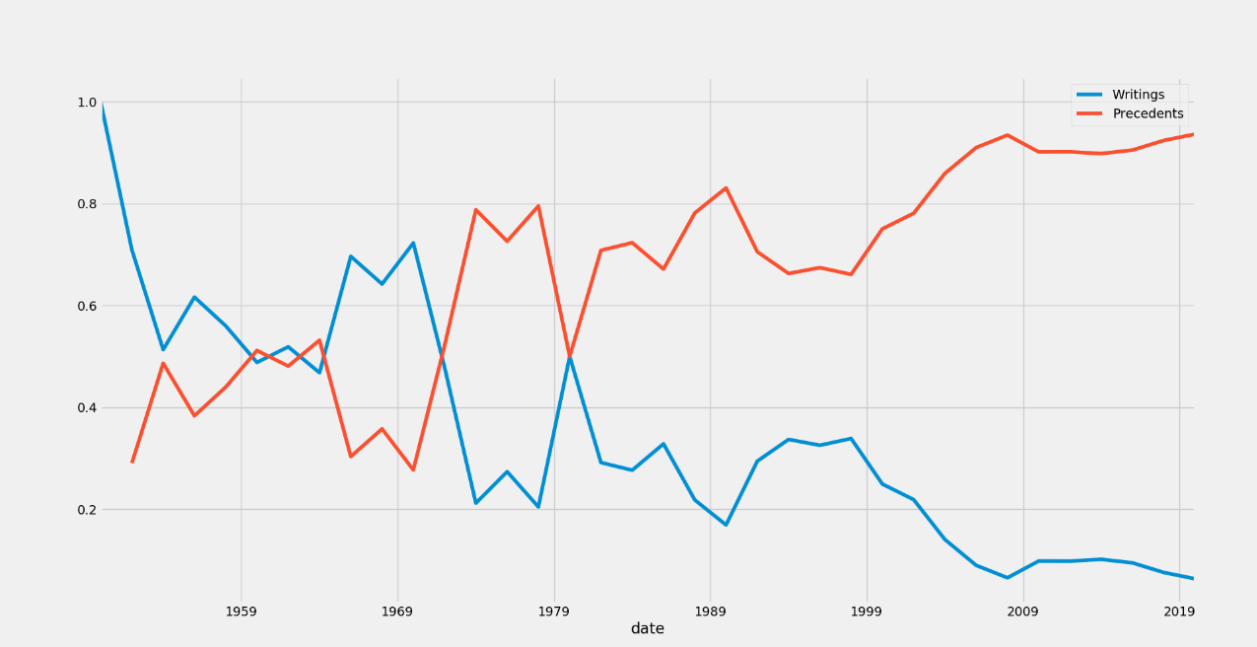

Figure 4: Percent of all citations to teachings and precedents, per date

434 See G. Hernández, "The Responsibility of the International Legal Academic", in Jean d'Aspremont, Tarcisio Gazzini, André Nollkaemper and Wouter Werner (eds.), *International Law as a Profession* (Cambridge University Press 2017), at 174. Yet see Kammerhofer, *supra* note 426, at 307, casting doubt over this narrative.

435 See Berman, *supra* note 428, at 12.

436 See N. Stappert, "A New Influence of Legal Scholars? The Use of Academic Writings at International Criminal Courts and Tribunals" (2018) *Leiden Journal of International Law* 1, at 966.

437 A good example can be found in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Merits, Judgment, 2002 I.C.J. 3, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, at §44.

438 See Hernández, *supra* note 434, at 174, note 75.

Given these limitations, why cite teachings at all? On the basis of interviews with international judges sitting on criminal courts, Nora Stappert identified three reasons to use doctrinal sources in international decisions: (i) when there is a lacuna in the law; (ii) to provide new analyses on unclear aspects of the law; (iii) and as a starting point to a reasoning.[439] This rough framework is echoed in other accounts: Fuad Zarbiyev notes that WTO panels and the AB cite scholarship on topics they are not experts in – general international law, for instance.[440]

This leaves some room for citations to scholarship but does not indicate which scholarship in particular should be (or is) cited in any given circumstance. As noted in Chapter I, article 38 of the ICJ Statute in this respect tries to restrict the field of "citable" scholarship to the consensual best. Scholars working on the question have similarly tried to draw distinctions between teachings: Sivakumaran distinguished between scholars empowered to make the law and others;[441] Oppenheim between "writers at large and writers of authority".[442]

This reflects to some extent the actual practice of citing scholarship, which in the Dataset takes the shape of a power law distribution, whereas the most cited works are disproportionally more cited than less-cited ones.[443] And yet, it is exceedingly rare that parties or courts actually try to pin down why a particular scholar or article is worth citing under the criteria laid down by Article 38[444] – or indeed why they are worth citing at all.

This is not exactly remedied by the common practice of courts and tribunals to "throwaway adjectives"[445] to qualify a particular author or a particular work – although that practice indicates that, compared to precedents, "teachings" seemingly need more justification when they are cited. Witness, for instance, the award in *Vivendi v. Argentina* (II):

439 Stappert, *supra* note 436, at 974-975.

440 Zarbiyev, *supra* note 405, at 303. The Dataset however indicates that the WTO also cites many works of scholarship in international trade matters.

441 Sivakumaran, *supra* note 420, at 5.

442 L. Oppenheim, "The Science of International Law: Its Task and Method" (1908) 2 *American Journal of International Law* 313, at 345. Oppenheim's identification of the writers of authority is however tautological: see *ibid*: "Now, who are the authoritative writers? They are those whose works have gained great influence; […]"

443 Hernández, *supra* note 434, at 175.

444 Berman, *supra* note 428, at 13: "I don't think I have ever once seen an attempt by the party concerned to explain why this particular author (or this particular piece of writing) should be given special credence by the tribunal."

445 *Ibid.*, at 13: "The most that one gets – and then only sometimes – [in explaining why scholars are worth citing] is the throwaway adjective 'leading,' 'highly respected,' 'authoritative.'"

> As Dr. F.A. Mann, one of the twentieth century's leading authorities on the interaction between municipal law and public international law wrote in 1981: […].[446]

The same phenomenon is replicated in countless international judgments and awards. In *SAS v. Bolivia*, for instance, Campbell McLachlan is described as "a prominent author," and grouped up with other "well-known authors" cited by the parties.[447] Likewise in individual opinion: Judge Lauterpacht's separate opinion in the *Petitions* Advisory case introduced James L. Brierly as "a writer of authority noted for his restraint."[448] And while referring to Manley Hudson in a joint dissenting opinion in the *Aerial* case, Judges Lauterpacht, Koo and Spender mentioned that Mr. Hudson "is regarded as the most authoritative commentator on the Statute, who was a Judge of the Permanent Court and who was present on behalf of that Court both in the Committee of Jurists at Washington and in the relevant Committee of the Conference of San Francisco".[449]

Pleadings of the parties show the same inclination. Nigeria's Rejoinder in the *Land and Maritime Boundary* case, for instance, relied on Oppenheim's *International Law*, introduced as "Oppenheim, of which the senior editor is Jennings. Jennings is a distinguished authority and a former President of the International Court."[450] The investor in *ADF v. USA* invoked likewise attempted to place its position under the patronage of Sir Jennings's prestige by listing his achievements.[451] It is unclear how these achievements would contribute to the intrinsic persuasiveness of his theses.

Throwing away adjectives never truly explains how a writer became authoritative or worth citing. This is not an irrational practice, however, as citers hope that in "this way, the reader is assured that the individual whose work is being relied upon is someone whose views really can be taken seriously."[452] And yet, it is also plausible that the most authoritative authors do not need such

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446 *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (20 August 2007), at §7.4.8 (my emphasis). Later in the same award, a further reference to a work by Christie is introduced as such: "[a]s Professor Christie explained in his *famous* article in the British Yearbook of International Law *more than 40 years ago*, […].": see *ibid.*, at §7.5.20. (emphasis added)

447 *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Award (30 August 2018), at §§213-214.

448 *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa,* Advisory Opinion, 1955 I.C.J. 67, Separate Opinion of Judge Lauterpacht, at 90.

449 *Aerial Incident of 27 July 1955* (Israel v. Bulgaria), Judgment (26 May 1959), 1959 I.C.J. 127, Joint Dissenting Opinion by Judges Sir Hersch Lauterpacht, Wellington Koo and Sir Percy Spender, at 174.

450 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Rejoinder of the Federal Republic of Nigeria (4 January 2001), at §3.44.

451 *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Investor's Reply to US Counter-Memorial on Competence and Liability (28 January 2002), at §261: "Sir Robert, need one remind, is former Judge and President of the International Court of Justice at the Hague and former President of the Institut de Droit International. In 1993, Sir Robert received the Manley Hudson Gold Medal from the American Society of International Law."

452 Sivakumaran, *supra* note 420, at 11.

extended introductions: everyone knows (or should know) that they are authoritative sources. Thus, Christoph Schreuer's *Commentary of the ICSID Convention* [453] is frequently cited without introduction in investment arbitration (in which his is by far the most cited work[454]); the same goes for Rosenne's *Law and Practice*[455] in proceedings before the ICJ.

It is not only in authors that we find variations in authoritativeness: the medium of the authority surprisingly matters a great deal. A substantial part[456] of the different teachings cited in the Dataset were tagged depending on whether they referred to (i) a book; (ii) a journal article; or if they were (iii) a document from UN (including the works of the ILC); or (iv) from the Hague Academy.

While "books" amounted for half of all tagged teachings (in itself, an interesting datum, given the much wider universe of citable articles), they accounted for 70% of all citations. Likewise, works stemming from the Hague Academy (usually found in book-length format) also account for a greater number of citations than their small number would lead us to expect, a testimony of the enduring influence of this forum for international practitioners.

This should not be overly surprising, given that books (typically) contain more material and therefore more "citable" content. This content, especially in textbooks, is also usually more balanced as the various sides of an argument are generally spelled out. The most cited works will also be more familiar to more readers and have thus a "pervasive influence".[457] Typically drawing from a large set of sources, they embody (or at least are expected to embody, to some extent) "the "conventional wisdom" of the day.[458] Finally, while books usually take longer to write and, as a consequence, are more likely to be out of date, they are also (in theory) subject to a more rigorous editing and "quality control" than articles.[459]

453 C. Schreuer, L. Malintoppi, A. Reinisch and A. Sinclair (eds.), *The ICSID Convention: A Commentary* (2nd ed., Cambridge University Press 2009); 3rd ed. forthcoming.

454 Sacerdoti, *supra* note 398, at note 61.

455 S. Rosenne, *Law and Practice of the International Court: 1920-2015* (Brill Nijhoff 2016).

456 Given the total number of different teachings cited (more than 5,400 unique references), it was not possible to tag them all, and a semi-automatic script was used instead that tagged half of these authorities with a high degree of confidence on the basis of clues and citing style. These tagged authorities however represent more than half of all citations to teachings in the Dataset.

457 Sivakumaran, *supra* note 420, at 30, and the quotes provided to the effect that textbooks and legal education influence future practitioners.

458 D.J. Bederman, "Review Essay, International Law Casebooks: Tradition, Revision, and Pedagogy" (2004) 98 *American Journal of International Law* 200; see also A. Roberts, *Is International Law International?* (Oxford University Press 2017), at 32.

459 F. Baetens and V. Prislan, "The Dissemination of International Scholarship: The Future of Books and Book Reviews" (2014) 27 *Leiden Journal of International Law* 559, at 560.

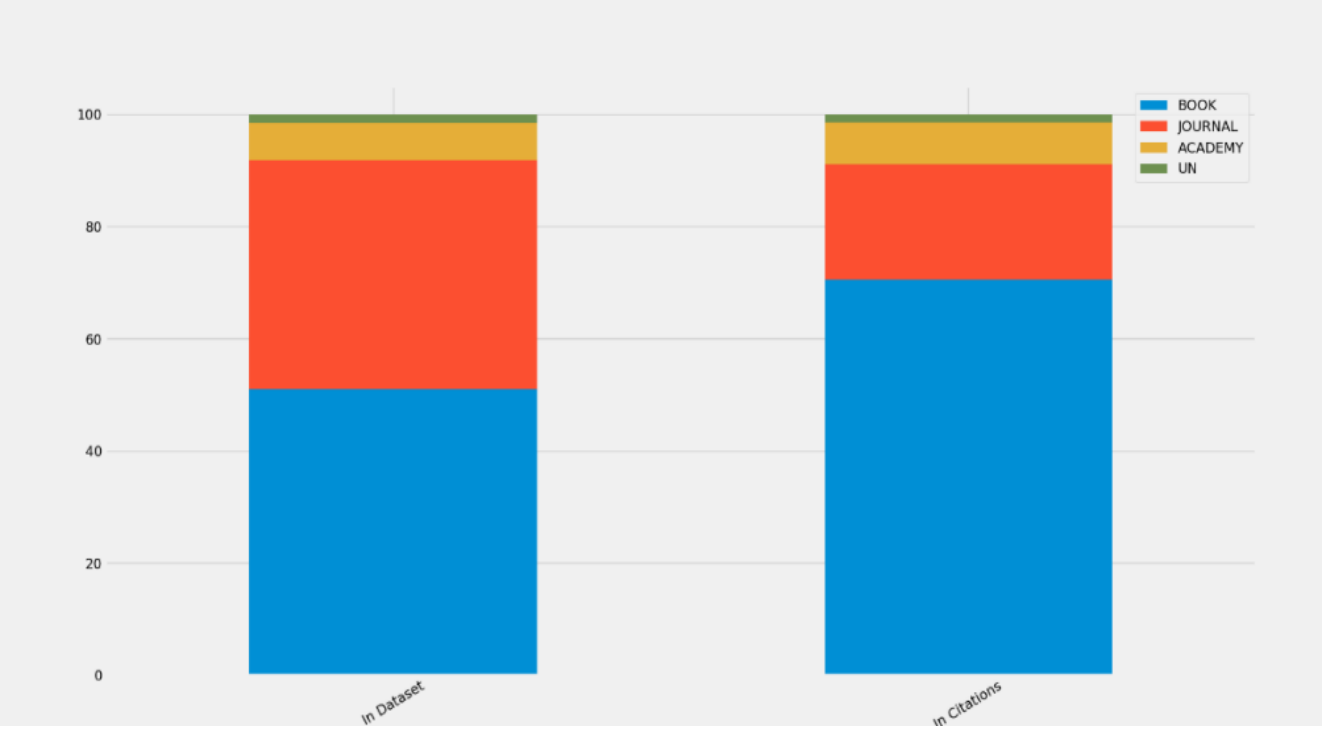

Table 5: Proportion of teachings, in Dataset (left) and in citations (right), per type

***Reading key**: Whereas books amount to around 50% of the unique authorities cited in the Dataset, they amount to nearly 75% of all citations*

Remarkably, the differences between the most cited teachings in pleadings and in decisions is not particularly marked, as adjudicators and parties seemingly draw support for their arguments from the same sources. Table 6 below lists the most cited teachings (in absolute numbers) in the Dataset, by type of forum, and distinguishing between citations found in pleadings[460] or in decisions and opinions. Works that belong to the Top 5 in both categories are shaded green, and are nearly a majority.

These sources are often canonical works,[461] and most likely of a relatively general character – or at least focused on questions of general international law (witness, for instance, how WTO

460 Including pleadings as summarised in judgments and awards.

461 Important works also typically endure. Nearly all names of past influential international law scholars listed by Louis Sohn in 1995 are still cited nowadays, although they are rarely in the most cited works nowadays: see L.B. Sohn, "Sources of International Law" (1995) 25 *Georgia Journal of International & Comparative Law* 399, at 400, citing Vattel, Moore, Hackworth, Whiteman, Phillimore, Hall, Westlake, Oppenheim, Bonfils, Fauchille, Scelle and Rousseau. Of all these, only Charles Rousseau still figures as a top-cited authority – yet likely because it was for long the main French international law textbook and, like most French legal textbooks, went through many editions.

panels make use of sources regarding treaty interpretation). Some of them are found in different fora, evidencing their general application even in a field as diverse as international law.

	Decisions and Opinions		Pleadings	
	Title	*#*	*Title*	*#*
ICJ	Rosenne, *Law and Practice*	148	Lauterpacht, *Oppenheim's International Law*	125
	Hudson, *The Permanent Court of International Justice, 1920-1942*	48	Rosenne, *Law and Practice*	82
	Trindade, *International Law for Humankind - Towards a New Jus Gentium*	41	Brownlie, *Principles of Public International Law* (76)	76
	Lauterpacht, *Oppenheim's International Law*	37	O'Connell, *International Law* (75)	75
	Lauterpacht, *The Development of International Law by the International Court*	37	Rousseau, *Droit International Public* (73)	73
INV	Schreuer, Malintoppi, Reinisch, Sinclair, *The ICSID Convention*	378	Schreuer, Malintoppi, Reinisch, Sinclair, *The ICSID Convention*	283
	Crawford, *The International Law Commission's Articles on State Responsibility*	90	Paulsson, *Denial of Justice in International Law*	227
	Cheng, *General Principles of Law as Applied by International Courts and Tribunals*	52	Cheng, *General Principles of Law as Applied by International Courts and Tribunals*	199
	Brownlie, *Principles of Public International Law*	51	Brownlie, *Principles of Public International Law*	195
	Paulsson, *Denial of Justice in International Law*	39	Muchlinski, Ortino, Schreuer, *Principles of International Investment Law*	163
ITLOS	Rosenne, *Law and Practice*	5	Jennings & Watts, *Oppenheim's International Law*	18
	Colombos, *International Law of the Sea*	4	Alexander, International Maritime Boundaries	17
	O'Connell, *International Law*	3	Brownlie, *Principles of Public International Law*	17
	Lowe, *The Law of the Sea*	3	Lowe, *The Law of the Sea*	15
	Sztucki, *Interim Measures in the Hague Court: An Attempt at a Scrutiny*	3	Wolfrum, *The Max Planck Encyclopaedia of Public International Law*	12
IUSCT	Sandifer, *Evidence Before International Tribunals*	41	Dumbauld, *Interim Measures of Protection in International Controversies*	2
	Corbin, *Contracts*	33	Elkind, *The Aegean Sea Case and Article 41 of the Statute of the International Court of Justice*	1
	Cheng, *General Principles of Law as Applied by International Courts and Tribunals*	22	Sanders, *Commentary on UNCITRAL Arbitration Rules*	1
	Simpson & Fox, *International Arbitration*	21	Cheng, *General Principles of Law as Applied by International Courts and Tribunals*	1
	Brownlie, *Principles of Public International Law*	21	Fridman, *The Law of Agency*	1
WTO	Sinclair, *The Vienna Convention on the Law of Treaties*	52	Brownlie, *Principles of Public International Law*	25

	Jackson, *World Trade and the Law of the GATT*	27	Gervais, *The TRIPS Agreement: Drafting History and Analysis*	25
	Jennings & Watts, *Oppenheim's International Law*	26	Sinclair, *The Vienna Convention on the Law of Treaties*	18
	Yasseen, *L'interprétation des traites d'après la Convention de Vienne*	21	You, *Article 138 of the Rules of the ITLOS, Revisited*	14
	Brownlie, *Principles of Public International Law*	19	Jackson, *World Trade and the Law of the GATT*	14

Table 6: Most cited teachings in decisions (left) and pleadings (right), top five, per forum

The dynamic between the two

Albeit *prima facie* of a different nature, cases and scholarships work similarly as authorities, such that the distinctions between them should not be exaggerated. While both amount to legal opinions, they are "distinguished only by their origin and by their generating process."[462]

As we shall see further below, however, "origin" and "generating process" matter a great deal when it comes to what becomes authoritative and what does not. This might be key to understand why, as is generally accepted, "[j]udicial decisions […] have more weight than teachings."[463]

This predominance of precedents over scholarship is not to be expected *a priori*. Scholarship could on the contrary have had greater weight, as teachings (i) have a broader scope of application (i.e., they are not tethered to a particular case);[464] and (ii) legal scholars are (arguably) primarily accountable to "ideal entities such as the scientific community, the truth, the public",[465] and not to the parties that appointed or sought recourse from them. Once again, if intrinsic persuasiveness (and therefore, truth) was all there is about authorities, then doctrinal authorities could, or even should, be more relied upon than precedents bound to a particular factual situation.[466]

The fact that precedents are nonetheless preferred by international courts and tribunals suggests there is something about the authoritativeness of decided cases that goes beyond persuasiveness, although this "something else" is hard to pin down. Possible reasons include the greater strength of precedents with respect to the process that created them (see below), or their greater "actuality and […] concrete character".[467] This preference might also be only relative, as a reflection of scholarship's own shortcomings (i.e., suspicions of self-interested reasonings, conflicts of interest, etc.).

Be that as it may, it is interesting that precedents and scholarship are sometimes cited *at the same time*, typically in the same paragraph and on the same issue. This practice might just be an

462 Berman, *supra* note 428, at 17; see also Thirlway, *supra* note 423, at 118.

463 S.T. Helmersen, "The Application of Teachings by the International Tribunal for the Law of the Sea" (2020) 11 *Journal of International Dispute Settlement*, at 31.

464 Of course, the point of citing a precedent is to extract a general rule from its application in a particular case; but the very fact that it had been applied in a particular case is a source of endless ammunitions for those who want to distinguish the scope and weight of the general rule.

465 A. Peters, "Realizing Utopia as a Scholarly Endeavour" (2013) 25 *European Journal of International Law* 533, at 540.

466 But see another, less rosy view of scholarship as found in Paulsson, *supra* note 421, at §4.14.

467 Fitzmaurice, *supra* note 414. See also the *Procès-Verbaux of the Advisory Committee of Jurists* (1920), at 336, where Lapradelle is quoted saying that he "thought that jurisprudence was more important than doctrine, since the judges in pronouncing sentence had a practical end in view."

attempt to prove unanimity (or at least large consensus) around an issue (a criterion studied below). It might also be intended to add a further gloss on a finding of law in a precedent, through the interpretation of a learned scholar.[468] Yet, some examples also show that the point is sometimes more broadly to benefit from "authoritativeness by association", and to bolster both categories of authorities' respective authoritativeness.[469]

A typical example of this practice can be found in the pleadings of Nicaragua before the ICJ in the *Armed Activities* case. In support of its contention that the Court had jurisdiction, Nicaragua notably cited an article by "[Manley] Hudson, whose authority in these matters was noted by the dissenters in *Aerial Incident* […]."[470] The state then proceeded to cite the Joint dissenting Opinion by Judges Sir Hersch Lauterpacht, Wellington Koo and Sir Percy Spender, including the extended introduction vouching the authoritativeness of Mr. Hudson quoted above.[471]

This practice remains however relatively infrequent in the data: out of 106,000 different citing paragraphs, only around 3,300 (~3.1%) cite both to precedents and to teachings (hereinafter, "Dual Paras"). Around 90,000 cite only to precedents and another 12,000, only to scholarship (in both cases, labelled as "Simple Paras"). The practice is somewhat more popular with investment tribunals (and parties before it) and with the IUSCT.

%	Opinions		Decisions		Pleadings	
	Simple	*Dual*	*Simple*	*Dual*	*Simple*	*Dual*
ICJ	90	10	99	1	92	8
INV	89	11	90	10	87	13
ITLOS	92	8	100	0	92	8
IUSCT	73	27	94	6	89	11
WTO	/	/	99	1	99	1

Table 7: Percent of paras citing to both teachings and precedents

468 This gloss can even be critical of the precedent: see one example given in Helmersen, *supra* note 463, at 30.

469 Jacob, *supra* note 397, at 1025.

470 *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Memorial of Nicaragua (30 June 1984), at §50, citing M. Hudson, "The Twenty-Fifth Year of the World Court" (1947) 41 *American Journal of International Law* 1, at 10.
Along the same lines, see also *South West Africa* (Ethiopia v. South Africa; Liberia v. South Africa), Counter-Memorial filed by the Government of the Republic of South Africa (10 January 2964), at 96, citing the Australian domestic case *Ffrost v. Stevenson* (1937) 58 Commonwealth Law Reports 528, and then noting that it had been cited by judge McNair in *International Status of South West Africa*, Advisory Opinion, 1950 I.C.J. 128, Separate Opinion by Sir Arnold McNair, at 151.

471 See *supra*, note 449.

***Reading key**: 90% of all citing paragraphs in ICJ individual opinions cite only to either teachings or precedents; the remaining 10% cite to both at the same time*

The type of authorities cited in these paragraphs is instructive. Based on a proxy for an authority's authoritativeness (i.e., their PageRank score), it is possible to check whether the total "authority score"[472] of precedents and teachings found in Dual Paras differed from those in Single Paras. The results are as follows:

- Precedents in Dual Paras are substantially less "authoritative" than precedents found in Single Paras; and
- Teachings in Dual Paras are more authoritative than teachings found in Single Paras.

Together, this dual finding indicates that weaker precedents need to be accompanied by stronger teachings to benefit from their authoritativeness.

B) Identity of the author

The identity of the authority's author is a second element that holds important weight in an authority's authoritativeness.[473] This identity is crucial to an authority's standing, as anonymous submissions are unlikely to bear any weight in a reasoning or a legal argumentation.[474] As the etymological vicinity of the terms indicates, authorship is closely related to, and partakes in the authoritativeness of an authority.

There are two kinds of authorship that are relevant in this respect: institutional and individual. As explained below, they likely differ in their effects on authoritativeness, and have a dynamic of their own.

472 That is, the cumulated score of all authorities found in this paragraph. If a Dual Para cites a precedent that is otherwise cited 50 times and an authority that is unique in the Dataset, then its authority score is 51.

473 See, e.g., N. Jansen, *The Making of Legal Authority: Non-Legislative Codifications in Historical and Comparative Perspective* (Oxford University Press 2010), at 105.

474 Contrary examples of course do exist: the Federalist Papers for instance were first published anonymously and helped shift the debate between Federalists and anti-Federalists: see D. Adair, "The Authorship of the Disputed Federalist Papers" (1944) 1 *The William and Mary Quarterly* 97, at 99, noting however that "the identity of the three authors was not an especially well-kept secret." By the time they became authoritative in future constitutional debates, however, the identity of the Papers' authors was widely acknowledged, although there are still some debates regarding the precise authorship of individual papers.

Institutional identity

Starting with institutional identity, it is trite to say that different courts and tribunals, and different academic contexts, will have varying authority in future cases and contexts.[475]

The point is further studied below in Chapter VII for external citations by courts – but it is valid as well for scholarship and teachings. Sivakumaran observes, for instance, that "[a]n individual might make the very same point in two different capacities – for example, as an individual publicist and as a state-empowered entity – but it is the statement in the capacity as a state-empowered entity that tends to be taken up and preferred."[476]

Pointing out that some authorities are more authoritative because they originate from an authoritative institution still begs the question of what makes this institution authoritative in the first place, however. In this respect, the ICJ's approach to the jurisprudence of the Human Rights Committee ("HRC") in the *Diallo* case offers a good illustration of what the Court deems authoritative:

> Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty.[477]

The Court opined that the HRC should be followed because of its expertise and the quasi-judicial process underlying its opinions. (As noted in Chapter VII below, this holding was concomitantly an attempt by the Court to lay boundaries as to what non-ICJ authorities it considers as authoritative.) In a similar manner, the World Court has been strongly deferent to the ICTY's findings of facts in the cases regarding the *Bosnian Genocide*. International courts and tribunals seemingly rely increasingly on expertise in technical fields, as witnessed by the reliance of investment tribunals on damages textbooks.[478]

The high level of *process* leading to the HRC's interpretations of the Covenant was also a reason underlying the ICJ's reliance on its interpretations. In this respect, virtually the only non-precedent authority cited in decisions at the ICJ is the work of the process-heavy International Law

475 For instance, permanent courts are meant to be more authoritative than *ad hoc* tribunals: see A. Ross, *A Textbook of International Law* (London 1947), at 86-87.
476 Sivakumaran, *supra* note 420, at 32.
477 *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, 2010 I.C.J. 639, at 664.
478 Zarbiyev, *supra* note 405, at 303.

Commission, whose members – like international judges – are chosen by states. Finally, impartiality and neutrality are presumably important in strengthening the authoritativeness of an institution; some authors opine that the authoritativeness of the Red Cross Committee, for instance, proceeds from exactly these attributes.[479]

Remarkably, the features noted above (expertise, process, neutrality) are all reviewed in the following sections as explaining the authoritativeness of authorities themselves.[480] This is not a coincidence: a virtuous circle is likely at play in this context, whereby the authoritativeness of an institution infuses the authoritativeness of its output, which in turn impacts the authoritativeness (and reputation) of its original institution.

Individual identity

Individual identity is no less important in identifying the sources of authoritativeness. Tellingly, works from institutions (such as the International Law Commission) are often cited specifying the particular author at work, especially when this author is already well-known.[481] This importance is further evidenced by the frequent controversies over the exact author of a given authority (this controversy would be inconsequential if its legal reasoning was the main feature of an authority).[482] It also relates to the growing challenges associated with the questions of diversity and representation on international benches.[483]

Yet, what exactly makes an individual author authoritative is hard to pin down. Oft-invoked notions of "prestige"[484] are notably self-referential: prestigious individuals are those that are

479 *Ibid.*, at 301, citing the Committee's "perceived 'neutrality, impartiality and independence'".

480 "Process" and expertise are reviewed below in sub-section C; "neutrality" proceeds from the same intuition as the feature of "externality" reviewed in subsection E.

481 For instance, in the Dataset, several works by the ILC are cited together with their (final) special rapporteur: the Articles on Responsibility by James Crawford; Dugard's work on Diplomatic Protection; etc.

482 Witness for instance the controversy over tribunal secretaries writing up portion of the awards in investment and commercial arbitration. There was a time, however, when arbitrators deplored that secretaries did not participate in drafting: G. Lagergren, "The Formative Years of the Iran-United States Claims Tribunal" (1997) 66 *Nordic Journal of International Law* 23, at 27.
See also R. Higgins, "Remarks of Rosalie Higgins" (2011) 105 *American Society of International Law Proceedings*, at 218, describing the ICJ judges writing their own decisions and opinions as the "point of pride at the Court."

483 In the IUSCT context, for instance, the legacy of the tribunal had been cast into doubt due to the prevalence of western nationals on the tribunal: for the charge and a reply, see C.N. Brower and J.D. Brueschke, *The Iran-United States Claims Tribunal* (Martinus Nijhoff 1998).
See also V. Shikhelman, "Diversity and Decision-Making in International Judicial Institutions: the United Nations Human Rights Committee as a Case Study" (2018) 36 *Berkeley Journal of International Law* 60, finding however little evidence that diverse benches differ in terms of decision-making. Likewise, there is little evidence in the Dataset that the nationality or gender of authors matter a great deal in terms of citations to the authorities they authored.

484 Prosper Weil, for instance, wrote that "[t]here are those awards that are a source of law, insofar as they have authority, they were rendered by prestigious arbitrators, [...] and they inspire the follow-up in the future, other awards." P. Weil, "Comments by Prosper Weil", in Emmanuel Gaillard and Yas Banifatemi (eds.), *Precedent in International Arbitration* (Juris Publishing 2008), at 152. See also Guillaume, *supra* note 400, at 14.

prestigious. As with "leading cases" and authorities, commentators rarely try to explain what makes any author a member of the group Great Men and Women of International Law. Sivakumaran describes well how the authoritativeness of an individual author impacts the quality of his or her output – yet fails to go further than limited concepts such as "expertise" or "reputation".

> [T]he expertise of an individual publicist and the quality of his or her teachings are of particular importance. The eminence of an individual publicist, usually based on his or her expertise, but also on associated factors such as title and reputation, can also affect the weight to be given to the work. In this way, the user can rest assured that the propositions stated in the work are reliable.[485]

The difficulty of identifying a "prestigious" publicist does not prevent the existence of a consensus as to the main members of that group. Hersch Lauterpacht, for instance, is invariably presented as one of those great past authorities. Illustrative is Rosenne's view in this respect, for whom Lauterpacht's opinions are:

> cited – in diplomatic texts, in the literature, and in the debates in the United Nations – as much as the majority opinions themselves, and it is very likely that the time will surely come when, many of the collective judicial pronouncements having passed inevitably into the reservoir of international legal precedents, it will be to Lauterpacht that the student, the lawyer, the social scientist, the statesman, and the philosopher – aye, the international judge too ! – will turn to ascertain not only what the law was during the years 1955-1959, but why it was so.[486]

To some extent, the boundaries of this consensus can be seen in the frequent examples of name-dropping in international dispute settlement.[487] One such example can be seen in the award in *El Paso v. Argentina*, in which the tribunal decided between two branches of a jurisprudential split by citing not only the "important precedents" that persuaded it, but also the names of the arbitrators who had presided over these precedents.[488] Some awards or decisions take a step further

485 Sivakumaran, *supra* note 420, at 11.

486 S. Rosenne, "Sir Hersch Lauterpacht's Concept of the Task of an International Judge" (1961) 55 *American Journal of International Law* 861.

487 See, e.g., *Canfor Corporation v. United States of America*, US Rejoinder Submission on Place of Arbitration and Bifurcation (11 December 2003), at 2: "It is noteworthy that the members of the tribunals subscribing to this view include recognized arbitration experts such as Professor Dr. Karl-Heinz Bockstiegel, Judge Charles Brower, L. Yves Fortier QC, Justice Kenneth Keith, Marc Lalonde, William Rowley QC, and V.V. Veeder QC, among many others."

488 *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction (27 April 2006), at §82, holding that it would follow "the important precedents set by Tribunals presided over by Judge Feliciano, Judge Guillaume and Professor Orrego Vicuna."

and are mindful of listing the members of every tribunal they are citing to.[489] This is a practice also followed by some parties (or, more accurately, their counsel), who certainly hope that name-dropping prestigious authors will increase the authority of the citations to their decisions.[490]

While it is hard to explain what makes an individual author "prestigious" and/or "authoritative", just as with institutional authority, however, the beginning of an answer can be gleaned from the features – studied below – that impact the authoritativeness of authorities themselves.

Subsection C below highlights the importance of "hard work" (for lack of a better term): the idea that authoritativeness proceeds from exhaustiveness and thoroughness. And indeed, there is some weight to the idea that the authoritativeness of an author is related not only to his or her quality, but also to his or her *quantity*. The most prestigious authors often have a long and distinguished career in international law; they have produced a large and wide output on various subjects (or an even larger output on a specialised topic); and have cumulated different functions and positions over the years.[491]

Notably, being engaged both in the scholarship and the practice of international dispute settlement puts you in prime position to acquire authoritativeness. In discussing what makes some investment arbitration awards more authoritative than other, Paulsson described the impact of arbitrators that are also "premier rank as international lawyers" and among the "most frequently appointed members to international investment tribunals panels". He likewise highlighted how these individuals have had a career in other prestigious redoubts of international law, and thus "surely qualify" as publicists under article 38.[492]

(Remarkably, this multi-tasking is increasingly susceptible nowadays to be described (and castigated) as impermissible double-hatting (at least when it takes place at the same time).[493] Some

489 *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Decision on Application for Annulment (6 December 2018); see also most citations in *Sedco, Inc. v. National Iranian Oil Company and The Islamic Republic of Iran*, Award No. ITL 59-129-3, Interlocutory Award (27 March 1986), reprinted in 9 Iran-U.S.C.T.R. 248.

490 See, e.g., three submissions by Arnold & Porter, LLP in as many distinct cases: *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Respondent's Rejoinder on the Merits (21 October 2011); *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Letter from Chile (18 December 2013); *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Respondent's Counter-Memorial (14 September 2018).

491 Sivakumaran, *supra* note 420, at 32.

492 Paulsson, *supra* note 421, at §4.33.

493 For a thorough analysis of the question in investment arbitration, see notably M. Langford, D. Behn, and R.H. Lie, "The Revolving Door in International Investment Arbitration" (2017) 20 *Journal of International Economic Law* 301, at 322.

adjudicators have consequently reportedly refrained from carrying out the different roles, at least contemporaneously,[494] while the ICJ has banned its judges from serving on investment tribunals.[495] Only the future will indicate to what extent this practice should impact their individual authoritativeness.)

The Dataset supports this intuition, as the most cited publicists also top the ranks of the most cited individual judges and arbitrators: those are the Lauterpachts, McNairs, and Cançado Trindades.[496] Out of the 20 individual judges whose opinions are the most cited at the ICJ, 15 are also cited at least once as authors of teachings. Conversely, out of the 20 most cited publicists, only 4 are not also present in the Dataset as an adjudicator in at least one dispute; most of them have also appeared at some juncture as counsel before the ICJ.[497] Straddling the boundaries between the bench and academia therefore seems to yield added authoritativeness.

The dynamic between the two

Both identities are important: writing in a less prestigious journal might amount to a loss of authority, even for a very authoritative author, or might increase the chances of a teaching being overlooked. Likewise, the springboard of a high-authoritativeness institution can give resonance to the voice and opinion of individuals until then relatively unknown.

Just like precedents and scholarship, therefore, there is a dynamic between individual and institutional identity, whereby one can shore up the other.[498] Presumably, an institution gains by being staffed with authoritative individuals. For instance, Judge *ad hoc* Ammoun at the ICJ once cited a judgment from the (rarely-cited) United Nations Administrative Tribunal, and – tellingly –

494 E.Y. Kim and P.C. Mavroidis, "Dissenting Opinions in the WTO Appellate Body: Drivers of their Issuance & Implications for the Institutional Jurisprudence" (2018) 51 *Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2018/51*, at note 8.

495 See L. Leão Soares Pereira, "Restrictions in appointing sitting International Court of Justice judges in arbitration proceeding" (5 May 2019) *LASIL*, available at https://www.lasil.org/post/restrictions-in-appointing-sitting-international-court-of-justice-judges-in-arbitration-proceeding. *Speech by H.E. Mr. Abdulqawi A. Yusuf, President of the International Court of Justice, on the Occasion of the Seventy-Third Session of the United Nations General Assembly* (25 October 2018).

496 Although in the latter case it is mostly due to his own habit of citing himself, a phenomenon further studied below at p. 188.

497 For instance, of the top 30 most cited individual authors of teachings, 17 are listed at least once as appearing in an ICJ dispute. The three most common counsel, advocates and agents before the Court, namely Pellet (79 appearances), Brownlie (48) and Crawford (41), are all within the top 15 of the most cited authors of teachings.

498 See H. Mistry, "'The Different Sets of Ideas at the Back of Our Heads': Dissent and Authority at the International Court of Justice" (2019) 32 *Leiden Journal of International Law* 293, at 305, arguing that in the context of international courts the individuality of individual judges matters a great deal.

found it necessary to specify that George Scelle, an authoritative publicist, was a member of that tribunal.[499]

These intuitions are partly backed up by the data, but not in every context. At the ICJ and at the ITLOS, the presence of highly authoritative writers on a bench (as determined by the total citation to teachings they participated in, either as sole or co-author) is indeed correlated with the number of citations later targeting a precedent – yet only weakly, with an R-squared score of around 0.4.[500] Both correlations are next to inexistent, however, for investment arbitration.[501] In other words, awards of investment arbitrators who also publish and are cited in the Dataset do not attract more citations.

The cumulated experience of judges sitting on the World Court's bench (as a number of appearances in previous cases, or over all cases),[502] meanwhile, correlates weakly with the authoritativeness of the Court's precedents, and similar results obtain at the WTO or at the ITLOS. Again, this does not hold for investment arbitration, as the cumulated number of appointments of arbitrators in a given tribunal was barely correlated with the authority of that tribunal's decision for the future.[503] This indicates that, contrary to intuition,[504] the individual authority of arbitrators does not necessarily influence the authority of their awards.

Finally, the number of authors of a given writing, or the number of adjudicators on a bench, likewise, has also little influence on the number of subsequent citations to a particular authority. Whereas some authors have opined that judgments and decisions made by Chambers at the ICJ should be less authoritative,[505] the Dataset fails to bear that out. Despite being strongly imbalanced (216 decisions adopted in Full Court and only 9 in Chambers), the two sets of decisions have the same profile in terms of citations to these decisions, PageRank, or other measures of authoritativeness.[506]

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499 *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, Advisory Opinion, 1973 I.C.J. 246, Dissenting Opinion of Vice-President Ammoun, at 250.

500 The correlations are always statistically significant.

501 There were too few citations to teachings by judges at the WTO or the IUSCT for the analyses to be instructive.

502 I calculated two measures: "judge_bench", reflecting the cumulated experience (in terms of appearances in the full Dataset) of the judges deciding any given case; and "judge_experience", summing up only the appearance of judges in the Dataset *up to the point* of any decision.

503 The correlation was ever-so-slightly better when looking only at the *chair's* number of appointments, as opposed to the co-arbitrators. Even then, however, it might be related to the fact that important cases are more likely to be chaired by important arbitrators.

504 See the quotes from Jan Paulsson, *supra* note 492.

505 See Guillaume, *supra* note 400, at 10.

506 This is confirmed by the averages of these sets of decisions, reviewed through a t-test or a Mann-Whitney test. Both tests checks whether the average of 2 independent samples differ in a statistically significant way; the differ in the expected distribution of the samples, with t-test being more robust over normally-distributed samples.

C) Process, hard work, and dispositiveness

This Chapter started by casting doubt on the weight of "persuasiveness" as a feature of authoritativeness, and the two previous subsections accordingly reviewed features unrelated to the *individual content* of an authority. Yet, as explained below, the substance of this individual content can also be relevant for authoritativeness in ways *unrelated to* its persuasiveness.

Process

First, it is often said that an authority's content should be more authoritative (again, unrelated to its persuasiveness) if it is the outcome of a "process" designed to weigh competing views. Process in this respect provides authorities with a sort of *prima facie* authoritativeness, by guaranteeing that content's overall soundness. Authorities that are not the outcome of such a process, meanwhile, should be held as less authoritative.[507]

This is relatively common view in the literature. For instance, Fuad Zarbiyev explains that international precedents are authoritative "due to the independence, impartiality and adversarial nature of judicial and quasi-judicial proceedings, statements of international law offered in such proceedings tend to be equated with international law itself."[508] The fact that courts have benefitted from exhaustive pleadings and were likely well briefed on an issue counts as an epistemic reason to accept the authoritativeness of that court's precedents.[509] A decision that has taken stock of as much criticism as possible and has thus been informed of the "true complexity of the debate"[510] should therefore, in theory, be more authoritative.

The same point is underlying Alain Pellet's observation that individual opinions, albeit mere "teachings" under article 38 of the ICJ Stature, are:

> exceptionally authoritative – not only because of the eminence of the Judges (accepting that, as a matter of postulated definition, all are eminent…) but also – and even more – because they have reached their position after having benefited from a

507 See Shahabuddeen, *supra* note 407, at 138: "The question of the precedential weight to be assigned to a decision made without argument is tied up with the associated question of the permissibility or propriety of such a decision."
508 See Zarbiyev, *supra* note 405, at 300.
509 Ridi, *supra* note 404, at 370.
510 Paulsson, *supra* note 421, at §4.15.

> double adversarial debate (between the Parties on the one hand and inside the Court, with (or against?) their colleagues, on the other hand) […].[511]

The importance of this process is clearly visible for ICJ advisory opinions,[512] but is a feature that also informs the authoritativeness of scholarship, as authors have noted that following a specific process is often what makes influential "teachings".[513] These considerations find an echo (and take a particular salience) when confronted with the renewed definitions of "authority" mentioned at the close of Chapter I above: if "legitimacy" in international law is the outcome of "a process of interaction of different bodies (domestic, transnational, international) rather than to a single, commanding institution",[514] then the authorities that have followed such a process should acquire a particular authority.

One crucial aspect of this process is the growing international law duty to give reasons and to explain the sources of a decision (see Chapter IV below).[515] In this vein, Guy Canivet associates a judgment's authoritativeness with its "pedagogical" aspects; the authoritative judgment is the one that explains what it is doing and how it goes from point A to point B.[516]

This emphasis on process as a mark of authority finds support in jurisprudence. As mentioned above, in the *Diallo* case the ICJ broke with a decades-long (mostly) consistent reluctance to cite non-ICJ authorities. The Court's decision to rely on the view of the United Nations Human Rights Committee ("HRC") hinged upon its finding that the HRC was an "independent" body especially concerned with the "supervision" of the ICCPR.[517] This finds a clear echo in the HRC insisting that its General Comments are an "authoritative determination" of the Covenant, because they are "arrived at in a judicial spirit".[518]

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511 Pellet, *supra* note 388, at 22. See also Thirlway, *supra* note 423, at 119, opining that individual and dissenting opinions should be granted more weight (than scholarship) because "they set out conclusions reached after considering the arguments presented by the parties on each side".

512 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, 1950 I.C.J. 65, Dissenting Opinion by Judge Winiarski, at 89.

513 Sivakumaran, *supra* note 420, at 10.

514 N. Krisch, "Liquid Authority in Global Governance" (2017) 9 *International Theory* 237, at 251.

515 See, for arbitration, A. Stone Sweet and F. Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017), at 120.

516 G. Canivet, "L'autorité du jugement", in Antoine Compagnon (ed.), *De l'autorité* (Odile Jacob 2008), at 26.

517 See *Ahmadou Sadio Diallo*, *supra* note 477, at 663.

518 See General Comment No. 33, *The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, CCPR/C/GC/33 (25 June 2009), at §§11 and 13. See also I. Venzke, "Semantic Authority", in d'Aspremont and Singh, *supra* note 419, at 823, citing an *amicus curiae* submission from the HRC before a US Court, in which the Committee explained the sources of its authoritativeness, and cited notably its "over 55 years of experience", as well as its receiving twice the Nobel Peace Prize.

In some form of infinite of *mise en abîme*, the process leading to the creation of a new authority also depends on what (past) authorities are used and relied upon by that (new) authority. The ILC is a clear example of a doctrinal author whose work has acquired authoritativeness thanks to a conjunction of features, and notably the high level of process that goes into its reports. This authoritativeness, however, can be challenged if the Commission does not rely, in turn, on authoritative sources. When the ILC presented its report on *jus cogens*, for instance, the French representative opined that:

> L'autorité des travaux de la Commission du droit international repose sur ses méthodes de travail, qui implique une analyse précise et complète de la pratique internationale, dans toutes ses formes et manifestations. Or il ressort de l'examen des travaux sur le jus cogens que le Rapporteur spécial sur le sujet tend à appuyer ses propositions essentiellement sur des références doctrinales plutôt que sur la pratique internationale pertinente.[519]

Assessing the empirical importance of these considerations however requires a good proxy to assess the level of "process" that went into a precedent. The word length of pleadings and submissions, for instance could be such a proxy. Yet, this measure for each forum[520] fails to predict a judgment's authority in terms of future citation or PageRank score. Under-argued cases are as likely to be cited or influential as over-argued cases (the most authoritative judgments, most often, proceed from cases with an average level of argumentation as assessed from the length of pleadings).

Nor does the time length of a case influence its authoritativeness much. There is no such relationship for ICJ or ITLOS cases, and only a very weak (R^2 of around 0.2) relationship between length of proceedings and authoritativeness for ICSID decisions.[521] Likewise, the number of procedural developments leading to an ICSID decision, or the number of days of public hearings for ICJ or ITLOS decisions, does not correlate with any measure of authority either.

There are other indications that the role of process should not be over-emphasised. As noted above, the distinction between scholarship and precedents is sometimes blurry.[522] The latter is however consistently more authoritative, maybe because it is more likely to result from a

519 See UN Assembly General, 73rd Session, Report of the ILC on the works of its 70th Session, Intervention of François Alabrune (24 October 2018). Mr. Alabrune then confessed that "[a]dmittedly, international practice on this topic is limited", but saw there an extra reason for caution in dealing with this subject.

520 As mentioned in Chapter II, however, pleadings data is exhaustive only for the ICJ and the ITLOS.

521 Only ICSID decisions were reviewed for the purposes of this section, as ICSID's practice of detailing the procedural developments of the cases it administers offers a rich dataset to evaluate the role of process in these cases.

522 See Thirlway, *supra* note 423, at 118.

sophisticated process. However, while individual opinions are akin to scholarship in this respect,[523] they are not cited or relied upon more than teachings.

If the process that led to the creation of a precedent has any impact on that authority's influence, then, it is difficult to find evidence in the data. While this does not prove or disprove this hypothesis (as mentioned, teachings associated with stringent processes are indeed among the most authoritative), it is also possible that the proceedings of international courts and tribunals are not sophisticated enough to diminish the importance of this factor between two precedents, everything else being equal.

"Hard work"

The idea that the more work was necessary to create an authority, the more authoritative it is, is closely related. The teachings of individual publicists are sometimes cited not only on their own merits but also based on the publicist's "broader reputation".[524] As noted above, the most authoritative of them have particularly active public lives. For precedents, meanwhile, Lauterpacht said of arbitral jurisprudence that:

> International arbitral law has produced a body of precedent which is full of instruction and authority. Numerous arbitral awards have made a distinct contribution to international law by reason of *their scope, their elaboration, and the conscientiousness with which they have examined the issue before them*.[525]

This of course echoes the *Paquete Habana* dictum cited above, which gave weight "[…] to the works of jurists and commentators who by years of labour, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat."[526]

The idea remains that authorities should be granted deference in part because they pull together different threads of the law in a coherent whole.[527] The hard work deemed to be embodied in authorities also responds to the possible laziness of the citer, as in Louis Sohn's description of the work of government legal advisors:

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523 See *supra* note 511, and the associated quote from Alain Pellet.
524 Sivakumaran, *supra* note 420, at 32.
525 H. Lauterpacht, *supra* note 399, at 17 (emphasis added).
526 *The Paquete Habana*, 175 US 677 (1900), p. 701 (Grey J.).
527 Sivakumaran, *supra* note 420, at 14.

> These authors did the research; we do not have time to do any new research, as the decision-makers want instant response.[528]

Just like "process", "hard work" is difficult to test. One indicium in favour of the role of hard work is, once again, that the works of the International Law Commission are among the most authoritative; they are virtually the only teachings cited in majority judgments at the ICJ. The ILC reports, in turn, are typically exhaustive and the result of a long and careful process.[529] If only for this reason, the ILC's hard work in pre-digesting international law literature makes it worth citing.[530]

The ILC's enhanced authoritativeness might also be due, as noted above, to the identity of its members (and the fact that they are appointed by states like international adjudicators). Yet, it is interesting to note that one of the main authorities cited by investment tribunals are the reports compiled by UNCTAD (on the fair and equitable treatment standard or the law on expropriation, for instance). These reports likewise are the result of the gruelling task of digesting international jurisprudence, yet have less prestigious authors then the ILC.

The Dataset also displays a clear correlation between the number of works penned by an author (as long as they are listed in the Dataset) and the number of citations to this author – but these two variables are not independent. And as found above (in **Section A** above), among teachings, books – which presumably require more "hard work" than standalone articles[531] – are cited more than other types of scholarship.

"Dispositiveness" and obiter dicta

The authoritativeness of a pronouncement is also allegedly stronger if that pronouncement was necessary in reaching the outcome of a decision (part of the ratio) – as opposed to being of a pure academic character (obiter dicta). Under this view, *obiter dicta* are less authoritative. This is the proposition that the rule as used matters, and not the rule as stated.[532]

For Jan Paulsson, this feature of authoritativeness finds its source in the author's personal responsibility (and thus, relates to the idea of "hard work" identified above):

528 Sohn, *supra* note 461, at 400.
529 But see above, note 519.
530 Berman, *supra* note 428, at 16.
531 Baetens and Prislan, *supra* note 459, at 560.
532 Ridi, *supra* note 404, at 366.

> Arbitrators' opinions are no more or less interesting than opinions of commentators. What we really want to know are the reasons which they said led them to the outcome for which they have taken personal responsibility. That is where, one reasonably surmises, they exhibit particular care.[533]

This is also related to questions of process. For instance, Sir Percy Spender opined that individual opinions that go beyond the questions treated by the Court – and thus were not subject to the debate between the parties – lose their judicial character and their authoritativeness.[534] For instance, in ConocoPhillips's ICC arbitration against Petróleos de Venezuela S.A., the arbitrators fully departed from an earlier ICC award between the same parties on an issue that, the arbitrators held, had not been debated between the parties and was therefore not authoritative.[535]

If *obiter dicta* are not authoritative due to a lack of process, conversely process matters less than for the ratio. This intuition was neatly illustrated by the decision of the annulment committee in *Caratube v. Kazakhstan*. The investor in that case challenged a footnote of the award, in which the tribunal allegedly decided a question on which the parties had not been heard. The committee, however, declined to annul this part of the award, after finding that the challenged footnote was an *obiter dictum*. As such, the committee concluded, it "ha[d] no precedential value and d[id] not have any effect as *res iudicata* […] it had no conclusive effect for the dispositive section of the Award, nor did it affect the Tribunal's reasoning."[536]

As seen above, the idea that only "the rule as used" matters, from which the distinction between obiter and dicta proceeds, indicates that persuasiveness is not the only determinant of authoritativeness, since persuasiveness should not depend on whether a legal proposition was dispositive or not.[537] Accordingly, parties and adjudicators routinely use *dicta* in the same manner as other authorities. As noted by Henry Gao, "[i]n many cases, various dicta have been picked up by later courts and elevated to 'a position hardly distinguishable from that of a direct adjudication'."[538]

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533 Paulsson, *supra* note 384, at 11.

534 *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment, 1966 I.C.J. 6, Declaration of President Sir Percy Spender, at §32.

535 *Phillips Petroleum Company Venezuela Limited, Conocophillips Petrozuata B.V. v. Petroleos De Venezuela, S.A., Corpoguanipa, S.A., PDVSA Petroleo, S.A.*, ICC Case No. 20549/ASM/JPA (C-20550/ASM), Final Award (24 Avril 2018), at §1006. This kind of argument is related to the lack of authority of *per incuriam* decisions.

536 See *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP (21 February 2014), at §§297-299. Both parties agreed that the part of the award discussed here by the Committee was an obiter dictum.

537 See, e.g., Kammerhofer, *supra* note 426, at 308.

538 See H. Gao, "Dictum on Dicta: Obiter Dicta in WTO Disputes" (2018) 17 *World Trade Review* 509, at 515.

The key to these conflicting accounts likely is that what is *obiter* for one adjudicator can be important for another. Ultimately, indeed, there are no clear-cut distinctions between dispositive findings and *obiter dicta*.[539] Gao continues that, in the jurisprudence, the notion of *obiter* is mostly an "ambiguous and unhelpful tombstone" under which subsequent courts seek to bury the annoying findings of earlier ones. It is an argumentative trick – not a genuine reflection of the reality, and as such should have an unpredictable effect on the authoritativeness of individual authorities.[540]

The Dataset contained around 50 citations that labelled a specific paragraph from an authority as being *obiter*. Half of these were also cited at least one other time in the Dataset *without* any mention that this paragraph was an *obiter dictum*.[541] For instance, in *Wintershall v. Argentina*, the tribunal recounted the opinion of Christoph Schreuer, expert for the claimant, that a holding of the *Enron v. Argentina*[542] tribunal was *obiter* in holding that amicable settlement clauses in BITs amount to a jurisdictional requirement.[543] This did not prevent the tribunal in *Tulip v. Turkey* to later cite and endorse the exact same paragraph without any hint that the arbitrators considered it *obiter*.[544]

D) Consensus and consistency

Consistency

That consistency is often held as a good reason to follow precedents further confirms that there is more to authorities than mere persuasiveness. If an authority needs to be followed for consistency reasons, if "in exercising its choice [of a judicial solution], [the ICJ] must ensure consistency with its own past case law in order to provide predictability",[545] then the persuasiveness of a precedent is not the end of the story. It can only be relevant in two respects: (i) by coincidence

539 As acknowledged, indeed, by Paulsson himself: see *supra* note 421, at §4.37.

540 See Gao, *supra* note 538, at 515.

541 The assumption is that paragraphs in decisions embody one main idea (that is later cited in support of a similar proposition). This assumption is of course challengeable.

542 Precisely *Enron Corp. & Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 January 2004), at §88.

543 See *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 December 2008), at §133 and §144.

544 See *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue (5 March 2013), at §§65-70.
See also Uruguay's heavy reliance on this paragraph in *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Uruguay's Memorial on Jurisdiction (24 September 2001), at §62.

545 *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment, 2004 I.C.J. 279, Joint declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al Khasawneh, Buergenthal and Elaraby, at 330, also opining that "[c]onsistency is the essence of judicial reasoning."

(in that the authority with which consistency is required is also persuasive); and (ii) as an upper limit on what should be followed for consistency reasons.

In practice, however, parties typically focus on consistency and often leave persuasiveness inchoate. Consistency is indeed a powerful argument: in the *Armed Activities* case, for instance, Congo asked the Court to rule in its favour "in accordance with both the doctrine and unanimous, settled international jurisprudence […]".[546] Some scholars consider the ICJ's decision on the binding character of provisional measures in *LaGrand* to be unpersuasive.[547] Regardless, this decision has been granted great authority because of its convenience,[548] but also because of the difficulty to break rank with past jurisprudence. The *LaGrand* judgment at the ICJ even paved the way for what some insist is even less persuasive reasoning in the framework of the ICSID Convention.[549]

With respect to precedents, consistency is of course related to the powerful idea that precedents should be followed because "like cases should be decided alike".[550] This is the primary factor behind what some scholars have dubbed the "spell of precedents".[551] The opinion of the tribunal in *AES v. Argentina* is exemplary in this respect:

> the Tribunal would nevertheless reject the excessive assertion which would consist in pretending that, due to the specificity of each case and the identity of each decision on jurisdiction or award, absolutely no consideration might be given to other decisions on jurisdiction or awards delivered by other tribunals in similar cases. […] In particular, if the basis of jurisdiction for these other tribunals and/or the underlying legal dispute in analysis present either a high level of similarity or, even more, an identity with those met in the present case, this Tribunal does not consider that it is

546 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Order of 10 July 2002, at 32.

547 *LaGrand* (Germany v. United States of America), Judgment, 2001 I.C.J. 466, at §§98-102 and §109.

548 See Pellet, *supra* note 388, at 52-53, opining that the *LaGrand* decision is "a very controversial interpretation of a treaty provision, irreconcilable with its wording," as well as "inconvenient" in practice, and yet undoubtedly part of positive international law.

549 See, e.g., the opinion of Marcelo Kohen in *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38, Award (24 November 2014), Statement of Dissent by Marcelo Kohen, opining that ICSID tribunals have wrongly concluded that they could "order" and not "recommend" provisional measures. The opinion of Mr. Kohen is not available online but is summarised in D. Charlotin and L. Peterson, "Alghanim v. Jordan Part One: at Provisional Measures Phase, Arbitrators Disagree whether Jordan should be Enjoined from Enforcing Tax Debt – but later Agree to Dismiss all Jurisdictional Objections" (28 December 2017) *Investment Arbitration Reporter*.

550 See S. Schill, "Sources of International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, Soft Law", in Jean d'Aspremont and Sebastien Besson (eds.), *The Oxford Handbook on the Sources of International Law* (Oxford University Press 2017), at 1105.
This is aptly put by M'Bengue, *supra* note 419, at 710 in the idea that that international law should be guided, in regard to international jurisprudence, with a "rule of three": "consistency, certitude and continuity."

551 See von Bogdandy and Venzke, *supra* note 385, at 511; some other factors they cite – "the symbolism of judges' robes, the atmosphere of the court room, […] the language of the law [,… a] belief in the independence and fairness of international adjudication as well as the appeal of the outcome" – are further studied below.

> barred, as a matter of principle, from considering the position taken or the opinion expressed by these other tribunals.[552]

Yet, consistency is also valued with respect to teachings. Consider a remarkable footnote by the *Mercer v. Canada* tribunal: after noting that Canada had cited "Schreuer, The ICSID Convention (1st ed.)", the tribunal was mindful to observe, in brackets, that it "has checked the second edition of this work which has a passage to similar effect on Article 49(2) of the ICSID Convention, see p. 853ff".[553] In other words, a reasoning is all the stronger if it has been consistently held.[554] In a similar fashion, in the *Land and Maritime Boundary* case, Nigeria objected to Cameroon's reliance on teachings by Sir Jennings, as the state argued that Cameroon's citation referred to an old, idiosyncratic view of Jennings, while other, newer material from him was more relevant.[555]

Consensus

The latter example also illustrates that, relatedly, authorities are more authoritative if they reflect a consensus and are not idiosyncratic.[556]

This is why some authors see a "cumulative effect" in the authority of precedents that come to the same conclusions in succession.[557] In the same vein, Oppenheim held that the criterion to choose between conflicting teachings is to opt for "the[se authorities that are] are unanimous".[558] (At an extreme, however, this idea can fall back on a crude number game.[559]) As aptly put by Guy Canivet, "the interpretative authority of a judgment is determined by its insertion in a whole […],

552 *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction (April 26, 2005), at §25.

553 *Mercer International Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Supplementary Decision (10 December 2018), at note 8. A third edition is forthcoming.

554 See also T. Wälde, "Confidential Awards as Precedent in Arbitration: Dynamics and Implication of Award Publication", in Emmanuel Gaillard and Yas Banifatemi (eds.), *Precedent in International Arbitration* (Juris Publishing 2008), at 124.

555 See *supra*, note 450.

556 The notion of consensus has found particularly fertile applications in the jurisprudence of the European Court of Human Rights: see D. Peat, *Comparative Reasoning in International Courts and Tribunals* (Cambridge University Press 2019), at 140.

557 Paulsson, *supra* note 384, at 3.

558 Oppenheim, *supra* note 442, at 347. See also Helmersen, *supra* note 463, at 38.

559 T. Schultz and N. Ridi, "Arbitration Literature", in Thomas Schultz and Federico Ortino (eds.), *Oxford Handbook of International Arbitration* (Oxford University Press 2019), comparing legal scholarship to religious battles: "The same happens to legal thinking, which changes not only like paradigms, but also like religion. Central ideas in a field can also be imposed by brute force. Our central idea is better than yours because I am stronger. I can push it by inundating thee field with publications by our gang mates, organizing conferences around our central idea, launching journals that take our approach, by telling our students (in a broad sense) that mine is the only correct way of thinking, exclusively marks the proprieties. Our school eventually prevails over yours."
See also *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Annulment (14 December 2018), at 174, in which the committee noted that the tribunal's position on MFN was not unanimous in the jurisprudence, yet nonetheless supported by a "considerable body of jurisprudence."

in an order that it contributes to create, as well as by this judgment's potential to alter or correct this order."[560]

In the jurisprudence, extra authoritativeness is also assigned to views that gather the consensus of both the jurisprudence and the scholarship.[561] Article 38 of the ICJ Statute actually hints at this "consensus premium" in assigning value to the teachings of publicists "from the various nations", suggesting that the geographical breadth of authorities weigh in their authoritativeness.[562] This echoes Louis Renault's opinion that:

> Lorsqu'une question controversée aura été tranchée de la même façon par plusieurs tribunaux d'arbitrage, on comprend quelle autorité aura une solution donnée à diverses reprises dans des conditions de complète indépendance par des juges d'une grande valeur appartenant à divers pays. On ne pourra reprocher à une pareille solution d'être inspirée par des vues étroites, des préjugés ou des intérêts nationaux. Elle entrera dans le corps du droit international a titre de raison écrite comme répondant à la justice et aux intérêts généraux de l'humanité.[563]

By contrast, splits in the literature (or in the jurisprudence) will elicit caution,[564] as courts and tribunals often acknowledge.[565] Casting an authority as an outlier is accordingly a powerful argument against that authority's overall authoritativeness,[566] especially when it cannot otherwise be distinguished. In *B-Mex v. Mexico*, for instance, the state challenged the investor's reliance on the award in *Ethyl Corp v. Canada*[567] *inter alia* because:

- It was the first notice of intent, and the first case decided under NAFTA (inexperience);
- The case was settled (which comes back to dispositiveness);
- It was never subject to review by NAFTA domestic courts (lack of endorsement and therefore of consensus); and

560 Canivet, *supra* note 516, at 28.
561 See, e.g., *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, 2012 I.T.L.O.S. 4, at 197, Separate Opinion of Judge Gao, at §18.
562 See Sivakumaran, *supra* note 420, at 9.
563 As quoted by Shahabuddeen, *supra* note 407, at 44.
564 Or at least deserve a mention: see *LaGrand Case* (Germany v United States of America), Provisional Measures, Order, 1999 I.C.J. 9, at 501, mentioning "extensive controversy in the literature".
565 See *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment, 1969 I.C.J. 3, at §41, citing the "rather vague and general terminology employed in the literature of the subject [of absolute proximity]." See also *Lighthouses Arbitration between France and Greece*, Award (24 July 1956), XII RIAA 155, mentioning "l'état chaotique de la doctrine" on state succession.
566 See, e.g., *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award (2 May 2008), Dissenting Opinion of Gary Born, at 49.
567 *Ethyl Corporation v. The Government of Canada*, UNCITRAL, Award on Jurisdiction (24 June 1998).

- It has been explicitly criticised by NAFTA parties in later pleadings (lack of consensus).[568]

Likewise, in *Karkey v. Pakistan*, the investor challenged Pakistan's reliance on the "newly issued" *Içkale v. Turkmenistan* award by stressing how isolated that award was at the time:

> Karkey submits that this reading is contrary to the weight of prior investment jurisprudence, and Pakistan itself admits that the Içkale award 'is the only investment treaty award' that has adopted Pakistan's restrictive reading of the MFN clause.[569]

The same concerns underpinned the debate over the relevance of IUSCT awards for later courts and tribunals: Samuel Asante, one of the main critics of the Iran-US Tribunal's output, notably opined that the Tribunal's awards on expropriation were not persuasive because (i) they were few; and (ii) they were not implemented, usually because a settlement later occurred.[570] It is telling that attempts to de-emphasise the idea of consensus and consistency, or to deflate the charge that unique authorities should be discounted, often fall back on persuasiveness. For instance, Charles Brower and Jason Brueschke replied to Asante's charges with respect to the IUSCT jurisprudence by opining that:

> One would suppose that a dearth of decisions on a particular point would enhance rather than diminish the value of each such precedent and that the fact of compromise at the enforcement or execution stage, often dictated by acutely practical considerations likewise would not detract from the substantive value of a principled decisions.[571]

Finally, consistency and consensus are also related to the question of process mentioned in the previous subsection. For instance, processes that allow third parties to intervene in the proceedings of courts and tribunals have been praised for ensuring some kind of "community control" on judges[572] – and thus ensuring some measure of consistency and consensus.

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568 *See B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Reply on Jurisdictional Objections (1 December 2017), at 110. See also *ibid.*, at 118.

569 *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award (22 August 2017), at §197.

570 His views are summarized in Brower and Brueschke, *supra* note 483, at 653.

571 *Ibid.*
The absence of consensus sometimes becomes an argument in itself, which can grant adjudicators greater discretion to choose between several options. For instance, in *Enkev Beheer v. Poland*, the tribunal observed that it had cited a range of authorities "at some length to demonstrate that the issue of interpretation dividing the Parties is not straightforward, with even more that could be said by each Party in support of its case." See *Enkev Beheer B.V. v. Republic of Poland*, PCA Case No. 2013-01, First Partial Award (29 April 2014), at §373.

572 See Sacerdoti, *supra* note 403, at 180.

Unanimity and compromise

Relatedly, if consensus with the broader international community is an important factor, the authoritativeness of precedents can also hinge on how consensually they were adopted. In other words, if judgments are supposed to be proof of a *communis opinio juris*, then the existence of dissents and concurring opinions might undermine the authority of a majority opinion,[573] regardless of its persuasiveness.

The assumption is thus that consensus and unanimity impact a decision's eventual authoritativeness.[574] For instance, Chief Justice Warren of the US Supreme Court reportedly battled to make sure that the upcoming judgment in *Brown v. Board of Education of Topeka*[575] was the fruit of a consensus, and that other justices refrain from appending individual opinions.[576] In the *South West Africa* case, invited to depart from its 1950 Advisory Opinion,[577] the Court replied that "[t]he *unanimous* holding of the Court in 1950 . . . continues to reflect the Court's opinion today. Nothing has since occurred which would warrant the Court reconsidering it."[578]

This has led commentators to surmise that, "[t]hough the opinion of the majority certainly was the opinion of the Court in the case in hand, a change of jurisprudence might more readily be made and the case over-ruled if the Court had been fundamentally divided."[579] Judges typically assign some weight to cases decided unanimously.[580] It is not necessarily an issue in this respect that this consensus might be based on a compromise. Reasoning on the future legacy of the IUSCT, Matti Pellonpää wondered whether the tribunal's awards might be less authoritative because they were frequently based on a compromise between the arbitrators. He tentatively opined that, to the

573 See Lagergren, *supra* note 482, at 31.

574 Ralston also reported that one commissioner of the Jay Treaty Fisheries Commission proposed that only unanimous awards should be granted formal authority, but this view failed to convince his fellow commissioners: see J. H. Ralston, *The Law and Procedure of International Tribunals* (Stanford University 1926), at 109-110.

575 347 US 483 (1954).

576 R. Kluger, *Simple Justice* (Knopf 1976), at 657.

577 *International status of South-West Africa*, Advisory Opinion (11 July 1950), 1950 I.C.J. 128.

578 *South West Africa (Liberia v. South Africa)*, Judgment, 1962 I.C.J. 319, at 334. (emphasis added)
In view on this emphasis on unanimity, the fact that this decision was decided by eight to seven votes, and the whole case later dismissed by the "narrowest and most adventitious of majorities", of course appears as highly ironic: see R. Falk, "The South West Africa Cases: An Appraisal" (1967) 21 *International Organization* 1, at 1.

579 See R.P. Anand, "The Role of Individual and Dissenting Opinions in International Adjudication" (1965) 14 *International & Comparative Law Quarterly* 788, at 797.

580 See, e.g., Higgins, *supra* note 482, at 218, noting that on delimitation cases it is "really important for the Court to have a very good majority." See also Guillaume, *supra* note 400, at 10: "All […] judgments, however, do not have the same value […], judgments or advisory opinions adopted as a full Court, unanimously or by a very large majority – as well as oft-cited decisions – naturally carry more weight than isolated judgments, adopted by Chambers, or decided by a narrow majority." As noted above, Gilbert Guillaume's opinion as to the authority of judgments in chambers is also not borne out by the data.

contrary, "in very controversial legal issues, a somewhat cautious approach reflecting the need to reach compromises may be more conducive to a stable development of case law […]."[581]

Yet, the literature also records an entirely opposite theory, according to which non-unanimous, non-compromise decisions are, in fact, more authoritative. The idea is that those decisions, precisely because they have benefitted from the dissent of some decisionmakers, are better reasoned and leave a deeper mark in the jurisprudence. For instance, again with respect to IUSCT awards, Baker and Davis opined that "the need to reply to the criticisms of the concurring arbitrator may have forced the chairmen to give more reasoned support for their awards than they might otherwise have been inclined to do, thereby improving the overall quality of the awards".[582] (As noted in Chapter V below, at the IUSCT at least, majority decisions tend to be more authoritative than unanimous ones.)

The practice, however, does not confirm either side of the debate. At the ICJ, for instance, the most divided decisions generally attracted fewer citations further down the line. Yet, decisions taken by the largest majorities, or even by unanimous benches, fare similarly. As seen in Figure 5 below, it is mostly decisions with fair, but not overwhelming majorities that are cited more frequently. In investment arbitration, meanwhile, awards adopted by majorities are on average less cited and less authoritative (lower PageRank score) than unanimous awards, but the difference in means is not statistically significant.

581 M. Pellonpää, *supra* note 395, at 238.

582 S.A. Baker and M.D. Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran-United States Claims Tribunal* (Kluwer Law and Taxation 1992), at 165. Charles Brower and Charles Rosenberg reach the same conclusion with respect to investment arbitration: see C.N. Brower and C.B. Rosenberg, "The Death of the Two-Headed Nightingale: Why the Paulsson-van Den Berg Presumption That Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded" (2013) 29 *Arbitration international* 7, at 33-34.

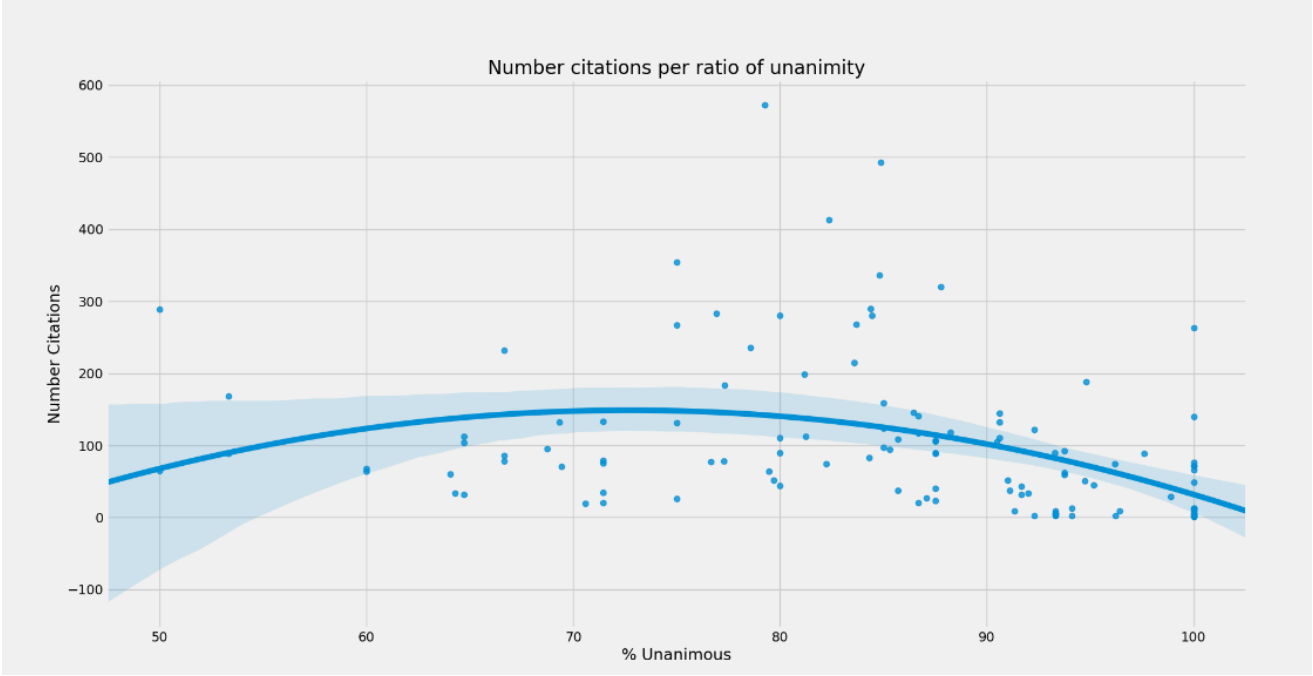

Figure 5: Number of citations per ratio of unanimity[583]

Annulled and unadopted authorities

Does an authority stop to be an authority when it is annulled, or otherwise nullified?

Once again, annulment would be immaterial if persuasiveness were key, as it leaves unaffected an authority's reasoning, especially if the annulment proceeds from a basis unrelated to that reasoning. At most, annulment shows that a reasoning might not be persuasive to everyone. And yet, there are many examples of parties assigning some weight to the fact that a given authority has been set aside.

One telling example occurred in the *Petrolane et al. v. Iran* case before the IUSCT. In proceedings aimed at correcting the award in that case, Iran was protesting that the chamber should not have cited the *Phillips Petroleum* award,[584] which had been rendered moot by the parties' subsequent settlement agreement in that case. (Iran also protested that only an English version of the award existed, as the settlement intervened before a Persian translation was ready.) The chamber dismissed the requested correction, pointing out that:

583 The 2nd-order regression line is fitted to the data points and indicate that the number of citations seems to vary with the unanimity ratio of the decisions being cited.

584 *Phillips Petroleum Co. Iran v. Iran et al.*, Award No. 425-39-2 (29 June 1989) reprinted in 21 Iran-U.S.C.T.R. 79.

> While the parties in their subsequent settlement agreed that they would deem that Award null and void upon the issuance of an Award on Agreed Terms giving effect to their Settlement Agreement, that cannot alter the fact that Award was rendered in English and stated the conclusions and reasoning of the Tribunal. As such, the subsequent citation of that Award cannot be considered erroneous.[585]

On closer inspection, this reasoning is a *non sequitur* – or, at the very least, the Chamber awkwardly left most of its reasoning implicit. Presumably, what was meant here is a variation of the persuasiveness theory: the "conclusions and reasoning of the Tribunal" have been aired out, "in English", and thus should live or die on their own merits.

Parties are nonetheless usually aware that annulled authorities face an uphill struggle. In *FYRM v. Greece*, for instance, the Hellenic Republic took time to explain why the authority it was relying on – the *Klöckner v. Cameroon* (I) award – was valid, albeit annulled, pointing out that it had been annulled for reasons unrelated to the point that Greece was seeking to rely on.[586]

This caution is warranted, as the jurisprudence indicates that courts and tribunals are ready to discount the authoritativeness of annulled authorities.[587] Discussing a statement from the *Metalclad v. Mexico*[588] award on the interpretation of the Fair and Equitable Treatment standard, the tribunal in *Accession Mezzanine v. Hungary* for instance observed that:

> 176. There is little force in this statement [from the Metalclad tribunal] as persuasive authority because it amounts to a conclusion that what is a breach of the fair and equitable standard must also be an expropriation. The Tribunal cannot accept this to be a correct statement of the law. There is no further analysis in the award as to whether the particular requirements of an expropriation have been satisfied […].
>
> 177. The Tribunal also notes that the *Metalclad* tribunal's decision on the Article 1105 claim, and its decision that its findings in respect of the fair and equitable treatment standard also resulted in an expropriation under Article 1110 (as quoted above), were

585 *Petrolane et al. v. Iran*, Decision No. Dec. 101-131-2 (November 25, 1991), reprinted in 27 Iran-U.S.C.T.R. 264., at §4. Brower and Brueschke, *supra* note 483, at 251, note that the "award in *Phillips Petroleum* not only remains persuasive but is fully precedential", and observe that it was later cited in the ILC's 2001 Draft Articles on State Responsibility.

586 *Application of the Interim Accord of 13 September 1995* (the former Yugoslav Republic of Macedonia v. Greece), Greece's Counter-Memorial (19 January 2010), at §8.24.

587 See, e.g., in the *ConocoPhillips v. Venezuela* ICSID award, the claimants' reliance on the *Mobil v. Venezuela* award was qualified in a footnote, seemingly by the tribunal: "On this point, the Claimants refer to paras. 224 and 225 of the [Mobil] Award […]. These paragraphs, among others, have been annulled by the Decision on Annulment, dated 9 March 2017, para. 196(3) […]." See *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Award of the tribunal (8 March 2019), at note 13.

588 See *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000), at §§176-177.

> annulled upon a subsequent challenge to the Supreme Court of British Columbia. The basis for that annulment was, in the estimation of the Tribunal, controversial, however, it is a factor that must at least be acknowledged in an assessment of the *Metalclad* award.[589]

Likewise, in *Generation Ukraine v. Ukraine*, the tribunal chided the claimant's counsel for citing two awards without mentioning that they had been annulled; the tribunal opined that this was a "limitation on the pertinence of those awards".[590] (What this limitation amounted to, however, was not specified.)

The data on this point is murky, however, and it is difficult to draw clear conclusions given the limited population of "annulled" decisions (the main international courts and tribunals are final courts without appeal).

However, investment awards that have been annulled[591] seem to be as authoritative in later jurisprudence (in terms of their average PageRank score and citation counts) as awards that never saw a request for annulment. Awards that have been only *partly* (as opposed to fully) annulled score much better on both metrics, but the difference with non-annulled awards remain statistically non-significant.[592] On the other hand, when compared only to the average of awards that withstood annulment (as opposed to all awards), partly annulled awards differ in a statistically significant way.[593] This is hard to reconcile (partly annulled awards are seemingly more authoritative than those who withstood annulment entirely), yet likely due to the limited population of partly annulled awards.[594]

The picture is markedly clearer for the WTO. The authoritativeness of unadopted panel reports (of which there were ten) is lower than that of adopted panel reports. Although in *Japan – Alcoholic Beverages II*,[595] the Appellate Body acknowledged that "a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant", in

589 *Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. V. Hungary*, ICSID Case No. ARB/12/3, Award (17 April 2015), at §176-177.

590 *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (16 September 2003), at §24.7.

591 6 fully and 10 partly.

592 The p-value is 0.3.

593 The p-value is below 0.01. The difference between awards that saw a request for annulment and those that did not, in turn, is not statically significant, but nearly there (p-value of 0.2)

594 The authoritativeness of these awards is thus likely due to other intrinsic characteristics, such as their older age on average, or the fact that most of them have been widely publicised. They indeed include such blockbuster cases as *Amco Asia v. Indonesia*, the first *Vivendi v. Argentina* award, *CMS v. Argentina, Tidewater v. Venezuela, Occidental v. Ecuador*, etc.

595 *Japan – Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Appellate Body Report (1 November 1996), at 14.

fact unadopted panel reports are significantly less cited (15 citations in average as opposed to around 130), and have a lower mean PageRank score.

E) Language, availability, externality and age

The previous sections reviewed features inherent in authorities that, in some way, still relate to their merits and the quality of their holdings. Yet, authoritativeness can also be influenced by considerations further removed from the merits. As argued below, features such as the language, age or availability of an authority can have a crucial impact on its authoritativeness and use in future decisions.

Language

English has become the *lingua franca* of international law,[596] which gives authorities in that language an advantage when it comes to their influence on the ground. English was not always dominant, though, for it only displaced French as the dominant language of international law over the course of the 20th century[597] (though arguably French still vies with English for influence in some fora).[598] As a result, some older French decisions remain authoritative and part of the corpus of well-known international law decisions. But this remains an exception.

Consider for instance the decision on jurisdiction in *Consortium RFCC v. Morocco*.[599] This case proceeded before the exact same tribunal as the case in *Salini v. Morocco*[600]; the findings in both cases are similar, and identical on the topic of what constitutes an investment under the ICSID Convention. The tribunal even released its decision in the *Consortium RFCC* case a few weeks *earlier* than in the *Salini* case. Yet, the "*Salini* test" is now a staple of investment arbitration, while there is no "*Consortium RFCC* test". It is likely that the difference originates in the fact that, by 2003, the *Salini* decision had already been translated and disseminated (in the International Legal Materials and then in the ICSID Reports),[601] while the *Consortium RFCC* decision never was.

596 Roberts, *supra* note 458, at 4.
597 The IUSCT offers a good illustration of how French was gradually effaced by English: see G.H. Aldrich, "The Selection of Arbitrator", in Caron and Crook, *supra* note 395, at 68.
598 See Roberts, *supra* note 458, at 10.
599 *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision on jurisdiction (16 July 2001).
600 *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (31 July 2001).
601 It is also likely relevant that the decision was translated by Emmanuel Gaillard, a well-known and central protagonist in the development of investment arbitration.

Likewise, writings and teaching of publicists are now mostly expected to be in English or published in English-speaking journals.[602] Holding out against this growing norm has an impact on the reach of some scholars' views: the insistence of Russian scholars not to speak English at the UN reportedly lessened the reach of their ideas, notably compared to their German and Japanese peers.[603]

This is to be expected. On a sociological level, international lawyers are now accustomed to the English language,[604] and non-English sources cannot be accessed and/or read by everyone. In a context where availability matters (see below), this should discount their authoritativeness. Citing something in the original language will prevent the source being checked as easily as if it were cited in a common language; suspicions arise that these citations are misleading. What cannot be expected to be understood by all readers in the expected audience should, all things being equal, be expected to be cited fewer times.

The Dataset confirms that authorities that were not originally written in English are more frequently discounted. In the investment arbitration sphere, decisions that are cited at least once but that were not originally written in English are cited nearly three times less, and have a sharply lower PageRank score, than English-only decisions. There is, in this respect, little difference on this measure between French and Spanish-decisions, which are equally shunned compared to English-only decisions.

Availability

The concern for language is related to the idea that authorities should be available for inspection in order to be authoritative.[605]

Thus, if investment arbitration awards rely more on past precedents than commercial arbitration awards, this might be because "investment treaty awards are regularly published (online and in print journals) and intensively discussed not only by parties to future investment treaty arbitrations, but also analysed in IIL scholarship."[606] No wonder then that arbitral centres are now

602 Sivakumaran, *supra* note 420, at 21.
603 L. Mälksoo, *Russian Approaches to International Law* (Oxford University Press 2015), at 92.
604 As Anthea Roberts put it: "One's access to the 'international' often depends on whether one can understand, speak, and read [English], which vests tremendous advantage in native English speakers, together with their concepts and approaches." Roberts, *supra* note 458, at 4; see also at 168, about why US and UK case law is much more cited in foreign textbooks.
605 Jansen, *supra* note 473, at 110.
606 Schill, *supra* note 550, at 1104. See also Sacerdoti, *supra* note 398, with respect to commercial arbitration: "the absence of comprehensive information on awards being rendered that renders recourse to precedent problematic."

trying to publish awards and decisions, as they expect that these authorities will "furnish focal points around which arbitrators will coordinate, and help to socialize new entrants."[607]

The authoritative value of confidential authorities is likewise reduced. A lack of publicity entails a possible surprise on the part of all parties to the proceedings in which the until-then-unknown authority is cited, especially when the decision's holdings are not representative of the expected consensus.[608] Authorities that have not been previously available have not been checked, verified and discussed by third parties, as opposed to authorities that were, and adjudicators – in particular – are likely not familiar with them.[609] It is thus not a coincidence if certain supposedly confidential international arbitral awards are sometimes suspiciously disclosed or leaked, to be later used as authorities by future tribunals. And indeed, timing and availability of relevant authorities are likely to be an important factor in the outcomes of international disputes.[610]

Availability is thus important because it is often felt that a decision's reasoning should be available to be tested. (The same concerns have driven the increasing efforts to make sure that international adjudicators reason their decisions, as explained in the next Chapter.) The importance of availability indicates the limited role of the persuasiveness of a reasoning in determining authoritativeness: if only that reasoning mattered, then it would make no difference that an authority is only available to the parties and the tribunal.[611]

Tellingly, in the course of discussing the IUSCT's (majority) decision to publish awards, Howard Holtzmann opined that publication "contribute[d] to the effective function of the tribunal," notably because it allowed them to be cited "by the parties and in awards."[612] While the Iranian arbitrators originally objected to this decision, this did not prevent them to later challenge the majority for their reliance on unpublished awards in making a case.[613]

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607 Stone Sweet and Grisel, *supra* note 515, at 120.
On the idea of international law as a "focal point" to settle disputes, see, e.g., P.K. Huth, S.E. Croco and B.J. Appel, "Bringing Law to the Table: Legal Claims, Focal Points, and the Settlement of Territorial Disputes Since 1945" (2013) 57 *American Journal of Political Science* 1, at 90. See also Sivakumaran, *supra* note 420, at 29, describing teachings, such as the Tallinn manual, that "have emerged as the focal point around which discussions of the issue revolve."

608 Wälde, *supra* note 554, at 121.

609 See, e.g., Brierly, as quoted by Shahabuddeen, *supra* note 407, at 42.
See also Iran's challenge to the IUSCT citing the *Philipps Petroleum* award, as recounted above, at p. 127. Iran's criticisms stemmed in part from the fact that the award had not been published in Persian.

610 C. Rogers, "The Politics of International Investment Arbitrators" (2013) 12 *Santa Clara Journal International Law* 223, at 256.

611 Berman, *supra* note 428, at 14. There are examples of for a where it seems permissible to rely on unpublished authorities, but they are usually proceedings in which a limited number of stakeholders are involved and can rely on decisions available between themselves. Sports arbitration is such an example.

612 H. Holtzmann, "Drafting the Tribunal Rules", in Caron and Crook, *supra* note 395, at 83-84.

613 See *supra*, note 64 and the accompanying text.

Beyond their discounted authoritativeness, un-available authorities can even fail to enter the record. In *Participationes v. Gabon*, for instance, the state challenged the claimant-appointed arbitrator by pointing to his participation in a previous case, *Transgabonais v. Gabon*, whose award was (and still is) unpublished.[614] ICSID's Secretary General refused however to rely on the *Transgabonais* award, notably because Gabon did not produce it in the proceedings, but also because it has not been published at that point in time.[615]

As mentioned in Chapter II, unpublished authorities amount for an infinitesimal portion of the Dataset.[616] It is rare for a case to hinge upon one such authority – more often than not, unpublished authorities will be cited in circumstances where other authorities would equally suffice to make an argument. For instance, several investment tribunals in disputes against Spain have taken to cite the 2014 preliminary award in *PV Investors v. Spain*[617] years before that decision was ultimately published in 2020, likely because this was the first decision to rule on Spain's jurisdictional objections. Countless tribunals have reached the same conclusions since then. As a result, the unavailability of the *PV Investors* decision is not as problematic as it could be.

Externality

Authorities also benefit from being sufficiently external and remote from the case at hand. This is notably related to questions of impartiality and neutrality. Such an authority has no stake in the issue of the case at hand, something that will reinforce its authoritativeness (rather than its substantial persuasiveness), and strengthen arguments that rely on it.

(In this respect, the concern for externality notably relates to the concerns surrounding the practice of double-hatting, notably in investment arbitration. As the author of an authority can expect that it will later be relied upon, she can to some extent craft the authority's content to maximise this reliance. While most authors can rarely predict the circumstances in which such

614 *Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic*, ICSID Case No. ARB/04/5, Award (7 Mars 2008).

615 *Participaciones Inversiones Portuarias SARL v. Gabonese Republic*, ICSID Case No. ARB/08/17, Decision on the Proposal to Disqualify an Arbitrator (12 November 2009).

616 There are some examples in investment arbitration, where authorities are introduced by repeat players, either parties, law firms or arbitrators. For instance, in *Convial Callao S.A. and CCI – Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Decision on Provisional Measures (22 February 2011), a case chaired by Brigitte Stern, the tribunal cited an unpublished decision on provisional measures from the *Barmek v. Azerbaijan* – a case in which Mrs. Stern also officiated. Likewise, in *ConocoPhillips v. Venezuela, supra* note 587, the ICSID tribunal cited the unpublished award in *France Telecom v. Venezuela*, in which ConcoPhillips's counsel at Freshfields had participated.

617 *The PV Investors v. the Kingdom of Spain*, PCA Case No. 2012-14, Preliminary Award on Jurisdiction (13 October 2014).

reliance will arise, this is not the case in case where the author is a repeat player that participates in different cases and in different roles.[618])

This distinguishes authorities from, e.g., legal opinions submitted in some cases, whose status as teachings is debatable.[619] In the Dataset, these opinions are however sometimes cited in other, unrelated cases to which they are external.[620]

Age

Finally, authorities necessarily precede any kind of reliance on them. They are avatars of the past; reliance on authorities amounts to linking that past to the present,[621] with the hope that the former will hopefully constrain (to an extent) the latter.[622] There is no such thing as a "future" authority; court and tribunals, on the contrary, sometimes suspend proceedings to wait and rule only *after* a relevant authority has spoken.

Does it mean that older authorities are more authoritative? On the one hand, any system relying on authority might fall for the attraction of age. The Middle Age scholar and poet Walter Map observed with amusement that people would think of him as an authority after his passing, reflecting that people always prefer "old copper to new gold".[623] James Crawford saw Grotius's practice of citing the Bible as "giving international law the respectable patina of the ages."[624] Some investment tribunals are fond of citing old precedents from the beginning of the 20th century, even on matters (the "fundamental basis" of a claim for instance[625]) that are often addressed and further developed in more recent authorities.

In the Dataset, older authorities are indeed typically more cited and have a higher PageRank on average than newer authorities. This is unsurprising, as older authorities have been around for

618 The concerns about double-hatting cast doubt on the authority of the view, dictum or pronouncement that is impugned, not on its persuasiveness. See, generally, Langford, Behn and Lie, *supra* note 493, at 322.

619 See notably Berman, *supra* note 428, at 14.

620 See *Olin Holdings Ltd v. Libya*, ICC Case No. 20355/MCP, Award on Jurisdiction (28 June 2016), at note 146, which saw Libya relying on "quotes of Profs. Schreuer and Reinisch […] taken from their legal expert opinion in the *CME v. Czech Republic* case." These authorities can however be challenged as too case-specific – as the claimant did in that case.

621 See R. Kozel, *Settled versus Right – A Theory of Precedent* (Cambridge University Press 2017), at 8.

622 See this argument for literary studies in L. Scanlon, "Auctoritas and potestas: a model of analysis for medieval culture", in *Narrative, Authority and Power: The Medieval Exemplum and the Chaucerian Tradition* (Cambridge University Press 1994), at 37-54. See also Schauer, *supra* note 413, at 36: "Law characteristically faces backward."

623 W. Map, *De Nugis Curialium* (date unknown): "[…] quia tunc ut nunc vestutum cuprum preferetur auro novello."

624 J. Crawford, *Chance, Order, Change: The Course of International Law* (Brill Nijhoff 2013), at 31.
See also Cicero, "Orator 34.120", in Loeb Classical Library, Cicero, V (Harvard University Press 1962), at 394-395, for whom citations to the past increase the "authority and credibility" of the present argument: "Commemoratio autem antiquitatis exemplorumque prolatio summa cum delectatione et auctoritatem orationi affert, et fidem."

625 For which the *Woodruff Case*, Award (1903-1905), IX RIAA 213, for instance, is often cited in investment awards.

longer – and have had more opportunities to be cited. Yet this finding confirms that, in common with citation analyses conducted in other fora, authorities in international law are likely affected by the notion of "preferential attachment" – the idea that precedents that are already cited will get increasingly cited (i.e., a "rich-get-richer" phenomenon).[626]

Scholars have convincingly demonstrated that preferential attachment can explain a substantial part of the citations to certain precedents at the European Court of Human Rights.[627] Niccolò Ridi also found that the authoritativeness of older authorities do not necessarily depreciate, as the average age of cited authorities has steadily, if sometimes weakly, increased over the past two decades for all fora in the Dataset.[628] As suggested by Sondre Helmersen, "[t]ime can thus work as a filtering mechanism for quality."[629]

On the other hand, to the extent younger authorities better reflect the state of the law *today*, they should be more authoritative in any given case. The increasing "judicialization"[630] of international law in recent decades should also be expected to strengthen some of the features of authoritativeness identified above: better decisionmakers operating within authoritative settings; greater emphasis on the process informed by the accrued experience of international dispute settlement; a greater opportunity to look for consensus and consistency between decisions.[631] To the extent newer international decisions display these characteristics, we would expect them to be cited more.

There are signs that more recent authorities attract more citations in some contexts. Factoring out the effect of preferential attachment can be performed by calculating the "hypothetical citations" of each authority, by dividing the number of citations to a precedent in a forum by the number of *future* decisions of the same forum in the Dataset.[632] On this measure, at any given time younger precedents from the ICJ, the ITLOS and the IUSCT tended to be cited more, although the

626 Ridi, *supra* note 402, at 205. The underlying mechanisms for this rich-get-richer phenomenon are not altogether clear, although Posner may offer the beginning of answer in the lower costs associated with citing well-known authorities: see RA. Posner, "An economic analysis of the use of citations in the law" (2000) 2 *American Law and Economics Review* 381–406, at 389.

627 See Leitão, Lehmann and Olsen, *supra* note 384.

628 Ridi, *supra* note 402, at 208-211.

629 Helmersen, *supra* note 463, at 32.

630 See, e.g., A. Follesdal and G. Ulfstein (eds.), *The Judicialization of International Law* (Oxford University Press 2018).

631 Of course, the same phenomenon might have had the opposite effect, and notably with respect to consistency: these are the concerns regarding fragmentation, studied further below at Chapter VII.

632 For instance, the ICJ's judgment in *Corfu Channel* has been cited 289 times, but this is not surprising given that there are 2,223 documents (judgments, opinions and pleadings) that postdate it and had had a chance to cite this authority. By contrast, the judgment in *Maritime Dispute (Peru v. Chile)* was cited only once in the 147 documents that followed it chronologically. The first judgment thus had a higher "potential citation" score (of 289 / 2223 = 0.13) than the latter one (1 / 147 = 0.007).

correlations range from very weak (R^2 of 0.2 at the ICJ; 0.3 for the ITLOS) to weak (R^2 of 0.44 for IUSCT awards). There was no correlation for WTO decisions nor investment awards.

3. Conclusions

What, then, makes an authority authoritative? This chapter found that factors other than the persuasiveness of the authority's content and reasoning account for authoritativeness. While persuasiveness plays an important role, the empirical record indicates that several further considerations share the stage.

The empirical analysis in this Chapter confirms that the type of an authority, as a precedent or a teaching, likely has an impact on its authoritativeness, as does the identity of its author. Analyses also indicated that the amount of "work" or of process put into creating that authority may also have a role in its authoritativeness for future decision-makers.

Other intuitive considerations do not count as much as expected: the unanimity of judgments at the ICJ, for instance, is seemingly unrelated to the number of citations these judgments receive. It is unclear whether *obiter dicta* are any less authoritative than *rationes decidendi* – perhaps because the boundary between these two categories is unclear in practice. Other factors such as the age of an authority or its language, by contrast, seem to have an outsized importance for the authoritativeness of precedents and teachings.

This Chapter does not – and indeed cannot – constitute the final word on the question, as the interplay of multiple factors underlying authoritativeness can be studied along multiple dimensions. The findings above describe only averages: a counsel might successfully argue a point in a given case by noting that she relies on a unanimous judgment. Hopefully, this Chapter will prompt further research into the empirical determinants of the authoritativeness of authorities.

Chapter IV – Citing authorities in decisions

The preceding Chapter demonstrated that authorities are not cited purely for their persuasiveness; citations to authorities are plentiful and display recognizable patterns, across times and fora. Some authorities are cited more than others, depending on several features (the identity of its author; its age; its availability; the extent to which it reflects a consensus; etc.) that are unrelated to the substantive persuasiveness of that authority. On average, some of these features seem to correlate with authoritativeness.

This chapter and the following review in more depth the citation practices of international courts and tribunals. As mentioned in Chapter I, citing has a cost – and therefore, it is assumed, a benefit. The strategic use of authorities might however differ depending on how they are cited by adjudicators in decisions (this Chapter), in individual opinions (Chapter V), or by parties in their pleadings (Chapter VI).

In the background to this question, the Dataset indicates that citations are ubiquitous in international dispute settlement. Nearly 4/5 of the decisions collected in the Dataset (including orders and interlocutory decisions) contain at least one citation, a ratio that has been stable, if not increasing over time (see Figure 6 below). This is congruent with the observations made in the literature that citations – notably to precedents – play a central role in the jurisprudence of every forum present in the Dataset.[633]

This chapter first reviews why judges and arbitrators choose to cite (**Section 1**); it sheds light on the various motives, from the requirement of giving reason to the need to follow (or acknowledge) precedents, that prompt adjudicators to cite authorities. **Section 2** then reviews the features of these authorities when they are cited in majority judgments and awards, and notably the topics

633 See J. Paulsson, "The Role of Precedent in Investment Arbitration", in Katia Yannaca-Small (ed.), *Arbitration under International Investment Agreements. A Guide to the Key Issues* (Oxford University Press 2010), at §4; G. Sacerdoti, "Precedent in The Settlement of International Economic Disputes: The WTO And Investment Arbitration Models", in Arthur W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Brill 2011) 225, at 230.

most likely to prompt a citation. A **third section** attempts to measure the role of these authorities in the final decision.

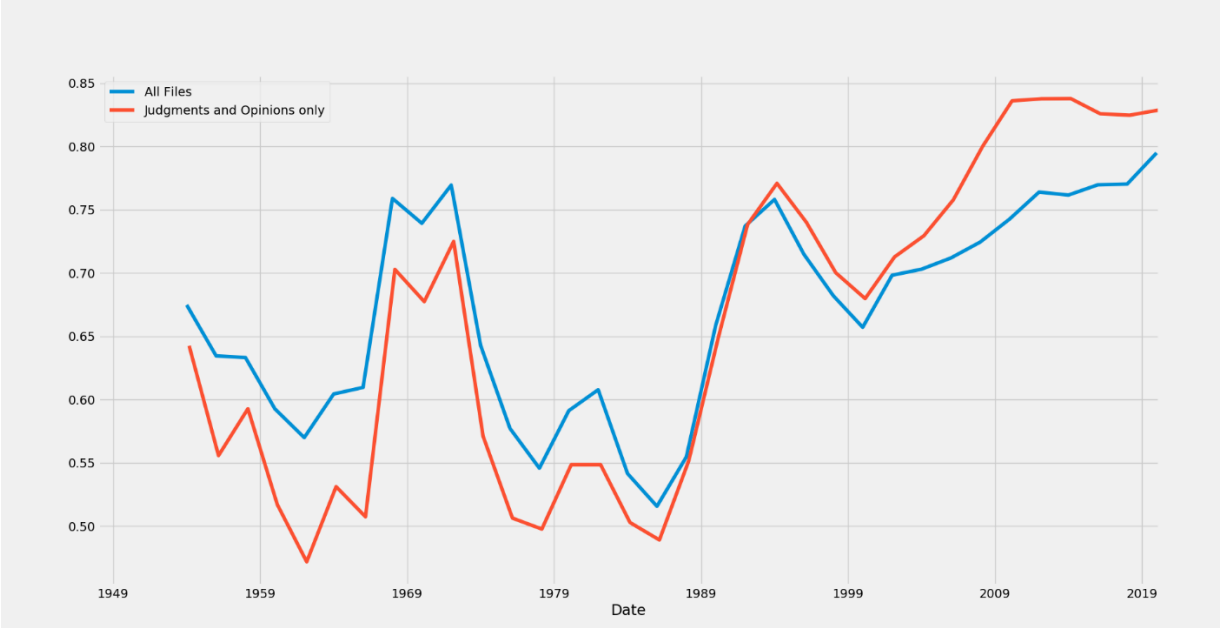

Figure 6: Percent of documents with citations in Dataset, 2-year moving average[634]

1. Citing as a practice

Chapter I surveyed the role of citations in legal argumentation. As explained at that juncture, citing has a cost, be it the mere fact of finding and checking the citation (effort cost), as well as the intellectual vulnerability associated with it (reputation cost).[635] This section now focuses more precisely on the reasons likely to explain the practice of citing in *decisions* – as opposed to other types of international legal material such as pleadings or individual opinions.

634 The peak at the juncture between the 1960s and the 1970s represents a busy period at the ICJ.

635 N. Ridi, "The Shape and Structure of the 'Usable Past': An Empirical Analysis of the Use of Precedent in International Adjudication" (2019) 10 *Journal of International Dispute Settlement* 200, at 202.

A) Judgment writing

Reason-giving

As a preliminary matter, it would be unnecessary to cite anything if international decisions did not take the form of a reasoned piece of writing and merely recorded the outcome of a dispute. Why do international courts and tribunals even write and reason their decisions?

The answer lies in the growing sentiment – if not now a duty – that international adjudicators should give reasons to support their decisions. A "typically modern idea",[636] reason-giving has taken root in domestic legal settings in the course of the 20th century – even in jurisdictions where giving reasons has not previously been part of the legal tradition, such as in France.[637] International courts and tribunals have followed course, and scholars opine that giving reasons is now required of any kind of international adjudication.[638]

This phenomenon can be observed in the ever-expanding length of international judgments and awards. (Although this expansion can, of course, also be partly explained by other causes such a possible growing complexity of international disputes.) Figure 7 below illustrates a slight upward trend for most of the fora studied in the Dataset, as the average number of words in decisions (counting only the sections that contain a court's reasoning) has increased in most years for all courts and tribunals – albeit to varying extents. If anything, adjudicators are now perhaps tempted to "overwrite" and overstate their case in some circumstances[639] – especially when their reasoning can be challenged by a higher body.[640]

636 M. Cohen, "When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach" (2015) 72 *Washington & Lee Law Review* 483, at 468.

637 Domestic courts are part of this trend: even the French civil law system, with its emphasis put on the legal syllogism and a paucity of express reasoning, has for years tinkered with the reasoning of its judgments, and the French Cour de cassation is increasingly adopting citation of precedents under the purpose of clarifying the motivation of judgments. See, e.g., an example of this new approach in Cass. Mixte, 24 February 2017, n° 15-20.411.

638 See an overview in J. Hepburn, "The Duty to Give Reasons for Administrative Decisions in International Law" (2012) 61 *The International and Comparative Law Quarterly* 641.

639 H. Gao, "Dictum on Dicta: Obiter Dicta in WTO Disputes" (2018) 17 *World Trade Review* 509, at 516.

640 *Ibid.*, at 529.

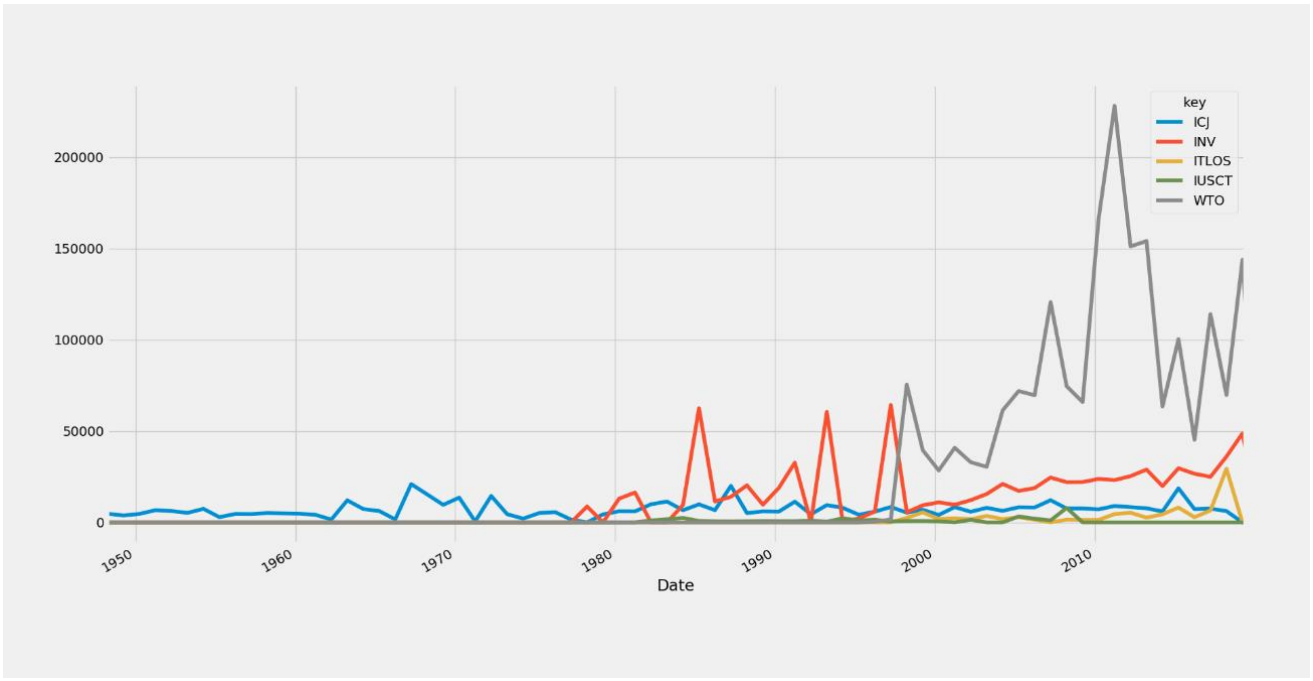

Figure 7: Average number of words (reasoning only) per decision per year[641]

Reason-giving, however, does not *per se* require citing authorities. As seen in Chapter III, if authorities mattered only to the extent they are persuasive, reason-giving would militate against citing, and in favour or restating an argument in full (since the citation adds nothing to its underlying persuasiveness). The tribunal in *Romak v. Uzbekistan*,[642] for instance, argued as much, holding that it was not "bound to follow or to cite previous arbitral decisions as authority for its reasoning or conclusions." (It is telling however that this tribunal cited more than its share of authorities.[643])

Yet, the emphasis on reason-giving proceeds notably from the assumption that written judgments are there to persuade.[644] And as noted above (in Chapter III), this emphasis on persuasion is a fruitful ground for using, citing and discussing authorities, even if this does not mean that authorities are cited because *themselves* are persuasive, independently of the reasoning they contain and embody.[645]

641 The peak around 2009 and 2011 for the WTO is notably due to the gargantuan panel and AB reports in the *Civil Aircraft* cases.
642 *Romak S. A. v. Uzbekistan*, PCA Case No. AA 280, Award (26 November 2009), at §171.
643 At around 85 citations, this award even cited more than twice as many authorities as the average investment award in the Dataset (35 citations on average).
644 For the argument in the US context, see, e.g., E. Volokh, "Chief Justice Robots" (2019) 68 *Duke Law Journal* 1135, at 1148 *et seq.*
645 As noted above in Chapter III, there is an important different between the persuasiveness-enhancing power of authorities and their own inherent persuasiveness.

In this respect, past cases and doctrine ease the task of giving reasons; they can be used as shortcuts,[646] or merely as building blocks in reasoning.[647] In short, "[i]t looks as if judicial dicta are simply too useful to be neglected",[648] evidencing that citations are an important tool in international courts and tribunal's sense of their judicial economy, and a material to use strategically in their efforts to persuade.[649]

The audience

Reason-giving, however, might not be only or even mainly directed at persuading: others have countered that judgments and awards are primarily aimed at placating an audience and rooting out sources of contestation.[650] While the two views are not mutually exclusive, this begs the question of the nature of international courts and tribunals' audience.

That audience likely drives an adjudicator's choice of type of reasoning and arguments: all audiences will not be persuaded by the same arguments, or grant the same weight to all authorities. The sociological viewpoint of the adjudicator,[651] and, in turn, his or her expected audience,[652] will inform the authoritativeness of the authorities cited.[653] In other words "[t]he boundaries of what is

646 See M. Jacob, "Precedents: Lawmaking Through International Adjudication" (2011) 12 *German Law Journal* 1005, at 1013: "precedents can save time and work." See also J. Odermatt, "The International Court of Justice and the Court of Justice of the European Union: Between Fragmentation and Universality of International Law", forthcoming in William A. Schabas and Shannonbrooke Murphy (eds.), *Research Handbook on the International Court of Justice* (Edward Elgar 2019): "the CJEU often uses the ICJ jurisprudence as a short cut route to discover international law rules, but rarely engages with the reasoning of the ICJ judgments."
For a recent and clear example of such a practice, see the decision in *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14, Decision on the Intra-EU Jurisdictional Objection (26 June 2019), in which the tribunal contended itself with citing and quoting from a previous decision by the same chair, in *CEF Energia BV v. Italian Republic*, SCC Case No. 158/2015, Award (16 January 2019).

647 See Jacob, *supra* note 646, at 1013.

648 C.J. Tams, "The Development of International Law by the International Court of Justice", in Gaetano Morelli Lecture Series (ed.) *Decisions of the ICJ as Sources of International Law?* (International and European Papers Publishing 2018), at 67.

649 See L. Boisson de Chazournes, "Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach: A Rejoinder – Fears and Anxieties" (2017) 28 *European Journal of International Law* 1275, at 43; Lupu, Y. and E. Voeten, "Precedent in international courts: A network analysis of case citations by the European court of human rights" (2012) 42 *British Journal of Political Science*, at 417.

650 I. Venzke, "Judicial Authority and Styles of Reasoning: Self-Presentation between Legalism and Deliberation", in Johanna Jemelniak, Laura Nielsen and Henrik Palmer Olsen (eds.), *Establishing Judicial Authority in International Economic Law* (Cambridge University Press 2016), at 241.

651 S. Schill, "Sources of International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, Soft Law", in Jean d'Aspremont and Sebastien Besson (eds.), *The Oxford Handbook on the Sources of International Law* (Oxford University Press 2017), at 1114.

652 See also B. Legum, "The Definitions of 'Precedent' in International Arbitration", in Emmanuel Gaillard and Yas Banifatemi (eds.), *Precedent in International Arbitration* (Juris Publishing 2008), at 8, defining precedent as "any decisional authority that is likely to justify the award *to the principal audience* for that award." (my emphasis)

653 F. Zarbiyev, "Saying Credibly What the Law Is: On Marks of Authority in International Law" (2018) 9 *Journal of International Dispute Settlement* 291, at 309.

permissible in legal argument and which styles of legal reasoning in fact support judicial authority or detract from it is contingent on the predilection of relevant audiences."[654]

What is then the audience of international judges and arbitrators? The answer[655] likely differs for the five fora studied in this thesis. It is also probable that international adjudicators have several audiences in mind when writing down their reasoning, and every decision can accept several levels of reading depending on these expected audiences.

A look at the jurisprudence however yields few explicit answers to this question. Arbitral tribunals have been typically clearer on this point than standing courts, at least to profess that they see their audience as relatively more limited. The *ad hoc* committee in *Amco Asia v. Indonesia* for instance opined that:

> An arbitral award addresses itself first and foremost to the parties before a tribunal. The parties thus are the readers to which the statements by an arbitral tribunal are presented in the first place. In the ICSID system, by refusing their consent to the publication of the award (cf. Art. 48, para. 5) the parties may even prevent the emergence of other readers. The parties moreover, may be expected to understand the award in its context. Uncontradicted pleadings and uncontested references to cases and authorities will enable them to fill what outside readers might deem to constitute lacunae in the reasoning of the award.[656]

By contrast, rulings from the WTO's Appellate Body are meant to reach a larger audience, given the "systemic interest" of every WTO member in the AB's findings.[657] Yet, even the AB's audience remains limited to the parties to the relevant treaties. By contrast, the ICJ reportedly considers that its audience extends to the entire assembly of states rather than the sole parties to the treaties at stake.[658] Accordingly, it should give special care to its pronouncements.[659]

The parties (actual or potential) to international disputes are not the only possible audience of international courts and tribunals, however. Adjudicators indeed often write their decisions with

654 Venzke, *supra* note 650, at 256.
655 C.P. Romano, "Deciphering the Grammar of the International Jurisprudential Dialogue" (2008) 41 *NYU Journal of International law and Politics* 755, at 763.
656 *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision of the *ad hoc* Committee (16 May 1986), at §40. The committee's relaxed latitude towards "lacunae" might not convince more recent committees.
657 See G. Sacerdoti, "A Comment on Henry Gao, 'Dictum on Dicta: Obiter Dicta in WTO Disputes'" (2018) 17 *World Trade Review* 535, at 537.
658 G. Hernández, *The International Court of Justice and the Judicial Function* (Oxford University Press 2014), at 124.
659 See R. Kolb, *The International Court of Justice* (Hart Publishing 2013), at 1011.

other judges and arbitrators in mind.[660] This is especially true of international law, a field where frequently the "commentators, the readership, and the object of study – all of it is one and the same."[661]

These different conceptions of these fora's audience might explain, among other things, the sharp differences in the average age of authorities they cite. ICJ judgments (but also its judges in their opinions) mostly cite cases and scholarship that are at least 20 years old on average. This reflects the Court's self-imposed practice to cite mostly from its own jurisprudence, yet does not explain the emphasis on older doctrinal teachings as well. It is telling that the ITLOS, another international and multilateral court, likewise cites relatively older authorities. Strategically, it would make sense for courts, interested in some kind of universality – general international law for the ICJ, the Law of the Sea for the ITLOS – to bind their decisions to authorities that have withstood the trials of time.

Meanwhile, investment tribunals and the WTO panels and AB cite much more recent authorities on average than the ICJ and ITLOS, a testimony to the fact that most precedents in this field emerged only over the last two decades, but also to the fact that the law in these two fields is much more fragmented among diverse states and their varying policies.

These discrepancies suggest a tentative typology of international courts and tribunals: (i) a first type, with a broader audience, will be more cautious to cite older, less-contested, and better-known authorities over newer ones; these adjudicators will be careful to inscribe their reasoning in a long line of cogent authorities. By contrast, (ii) a second type of adjudicators will be concerned primarily with the parties before them and with resolving their dispute; this second type will have less trouble citing more recent authorities and accommodate a fast-changing jurisprudence.

	Teachings	Precedents
ICJ	24.61	17.78
INV	14.06	6.69
ITLOS	20.75	18.79

660 In the US context, this quote from Justice Kagan illustrates it well: leaving the Solicitor General Office to become a Supreme Court Justice, she said, was akin to shifting "from persuading nine [Justices] to persuading eight." See P. Brown, "Associate Justice Elena Kagan Visits NYU Law" (5 Avril 2016) *NYU Law Commentator*, available at https://nyulawcommentator.org/2016/04/05/associate-justice-elena-kagan-visits-nyu-law.

661 See T. Schultz and N. Ridi, "Arbitration Literature", in Thomas Schultz and Federico Ortino (eds.), *Oxford Handbook of International Arbitration* (Oxford University Press 2019). Although they refer to investment arbitration, the point remains valid for public international law more generally.

IUSCT	14.30	4.11
WTO	17.95	6.62

Table 8: Average age of authorities cited in decisions

***Reading key**: teachings cited at the ICJ are 24.61 years old on average, and precedents 17.78 years old on average.*

Investment arbitration tribunals would exemplify this second type of adjudicative bodies. And yet, it is possible that the mutations of international law in the past two decades have resulted in all courts and tribunals broadening their expected audience and converging in terms of citing strategies, even those that profess to focus on parties and resolving disputes at hand. According to Ingo Venzke:

> […] international courts and tribunals have rendered more than 90 per cent of their decisions since 1990. That change in quantity has gone hand in hand with a shift in quality, turning international courts and tribunals from sporadic dispute settlers into multifunctional actors who contribute to the making of international law.[662]

This opinion finds echoes in Karen Alter's recommendation that "international judges must consider how their decisions will be understood not only by today's litigants, but also by potential future litigants and other legal actors who may be affected by their rulings."[663] In this new context where judicial pronouncements acquire such a potent force, courts and tribunals will likely adapt their reason-giving strategy, and thus their citation practice. In practical terms, this means that they will likely shift to a citation practice closer to the first type of international courts and tribunals.

The data bears this out, as the average of precedents has been growing for all fora in the Dataset, albeit at various rates, as seen in Figure 8 below. (This is accords with independent analyses of a similar dataset of citations.[664]) Interestingly, however, this concerns mostly precedents: the average age of teachings, by contrast, had sometimes decreased, notably in the pleadings of the parties. This might however only reflect the growth of international law scholarship,

662 See I. Venzke, "Semantic Authority", in Jean d'Aspremont and Sahib Singh (eds.), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar Publishing 2018), at 825.

663 See K. Alter, L. Helfer and M. Madsen, "How Context Shapes the Authority of International Courts" (2016) 79 *Law & Contemporary Problems* 1, at 4.

664 See N. Ridi, "The Shape and Structure of the 'Usable Past': An Empirical Analysis of the Use of Precedent in International Adjudication" (2019) 10 *Journal of International Dispute Settlement* 200, at 210.

which offers parties a broader, newer, and more diverse range of materials to cite and rely upon in disputes.[665]

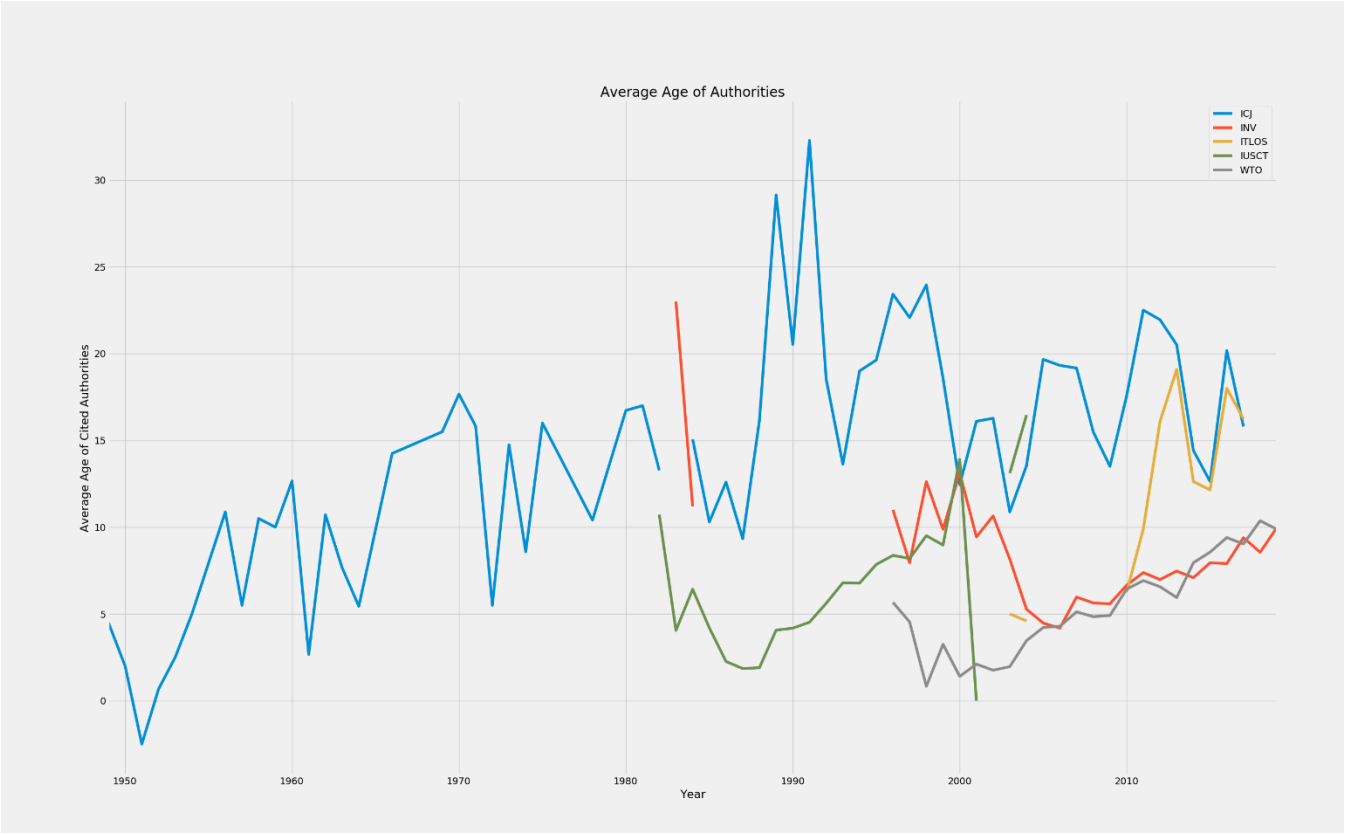

Figure 8: Average age of cited authorities, per year

Law as a shared language

Whatever they might be, the expectations of the audience of international bodies will be defined in terms of language. Law, the legal field, is indeed a phenomenon that is indissociable from the language used to express it: "there is in law no other way to argue and justify than through words."[666]

The choice of words and set of terms to use in giving reasons therefore acquires a particular salience, for, in order to be persuasive, adjudicators need to match or hew closely to the expectations of their audience. In Niklas Luhmann's theory of communication, "[a] legal system may receive information from external sources, and it will process that information in a way that enables the

665 The list of new publications collated by International Law Reporter evidence that international law scholarship has been growing in the past 10 years; see A. Roberts and D. Charlotin, "Data Analysis of International Law Reporter", draft on file with the authors.

666 M. Jacob, "Precedents: Lawmaking Through International Adjudication" (2011) 12 *German Law Journal* 1005, at 1025.

creation of legal meaning."[667] This is exactly what courts and tribunals will do in resolving a case: settling on a language that answers the parties' contentions, in a manner informed by these contentions and by the broader experience and knowledge of the adjudicators on the bench.

In other terms, "law is a matter of words; and it may be said that the choice of words to convey a legal point is in itself the decision of, or a decision on, that point."[668] Not all words will do; some will be more potent than other. To settle on a persuasive reasoning, adjudicators will therefore primarily "draw on the common stock of arguments and values shared by the judiciary."[669] Accordingly, the use of words and language in creating a new legal ruling is often more of a repetition than a creation.[670] For there is no point starting from scratch in every decision, adjudicators will tend to trust a language from the past as long as that language is uncontested and readily recognizable by the parties to the dispute.[671]

Hence the importance of authorities in this context, as ready receptacles of past language and law, cited and acknowledged by the adjudicator that relies upon this language.[672]. Empirical studies have shown that authorities are often not only cited but *quoted*, with the quoted text serving as "prefabricated, tested formulations [and] argumentative building blocks".[673] This is also why the most popular authorities tend to get cited more by the sheer virtue of their popularity: the most familiar an audience is with an authority (to the extent it is not widely contested), the more weight for its use in a later decision.[674]

Of course, sometimes international judges and arbitrators take a step further and reframe an uncontested concept in a more felicitous or clearer way, or adapt it to new circumstances.[675] In

667 As recounted in Boisson de Chazournes, *supra* note 649, at 37.

668 See H. Thirlway, "The Drafting of ICJ Decisions: Some Personal Recollections and Observations" (2006) 5 *Chinese journal of International Law* 15.

669 G. Lamond, "Persuasive Authority in the Law" (2010) 17 *The Harvard Review of Philosophy* 19, at 33.

670 It is thus not surprising that psychological studies indicate that repetition enhance persuasiveness. See the works cited in N. Ridi, "'Mirages of an Intellectual Dreamland'? Ratio, Obiter, and the Textualization of International Precedent" (2019) 10 *Journal of International Dispute Settlement* 361, at 391.

671 See *Merck Sharpe & Dohme (I.A.) Corporation v. The Republic of Ecuador*, PCA Case No. 2012-10, Award (25 January 2018), at §701: "the Tribunal was at pains to leave to the Respondent, Ecuador, a free choice of the measures to be used to achieve the objective laid down, using for this purpose a form of words coined by the International Court of Justice in the LaGrand case and subsequently employed on various occasions by the International Court itself and by other tribunals."

672 But see, for instance, courts inspired by the Civil Law system, as in French and Belgium, where jurisprudence evolves by repetition of similar languages without explicit citations to past cases using that language. M. Van Der Haegen, "The Influence of Belgium's Court of Cassation on the Lower Judiciary: Building a Legal Citation Network" (2016) 13 *Utrecht Law Review* 65, has for instance treated such repeated language as implicit citations in the Belgian jurisprudence.

673 See Ridi, *supra* note 670, at 388.

674 This emphasis on the past might however run the risk of turning citations to authorities in some sort of ritualistic incantations, a question further studied below.

675 Remember from Chapter I this observation by Fitzmaurice, according to whom a precedent might sometimes be cited "not in virtue of its inherent authority but because of the felicitous way in which it gives expression to a common thought." See *supra*, at p. 37.

some instances, they will even coin a new concept out of a legal datum.[676] Courts and tribunals also have an eye towards the future, and are (or should be[677]) mindful of how their pronouncements might be received by later judges and parties.[678] As further studied in Chapter VIII below, international adjudicators thereby participate in some form of law-making. They "make law through precedents because they are able to establish their statements about the law as authoritative reference points for later legal discourse."[679] In other words, a discourse based on citations itself becomes a cited reference in a discourse that might later get cited – and so goes the lifecycle of international law and adjudication.

We should expect the citation practice of courts and tribunals to reflect the two considerations indicated above: the need to reach and speak to different audiences (beyond the opposing parties to a dispute), and to do so on the basis of a commonly shared language.

B) A duty to cite?

Before this, however, another aspect of the question should be investigated. Authorities, indeed, are not merely cited as a by-process of writing judgments and awards; they are also often cited for considerations external to this process, under a sense that they *should* be cited.[680] Yet, expecting citing to be a duty entails dangers, as both under-citing and over-citing engender their own challenges.

Following Precedent?

Citing precedents typically involve interrogations regarding their binding character.[681]

676 See the transparent attempt at coining the concept of an "Azinian Principle", in *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38, Award of the Tribunal (14 December 2017), at §293. Just like "fetch" in the renowned movie *Mean Girls*, however, the "Azinian Principle" is unlikely to ever be a thing.

677 See above, note 663.

678 See A. von Bogdandy and I. Venzke, "The Spell of Precedents: Lawmaking by International Courts and Tribunals", in Cesare Romano, Karen Alter and Yuval Shany (eds.), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013), at 508.

679 *Ibid.*, at 511.

680 On this point, see also the M. Koskenniemi, *Report of the ILC Study Group on the Fragmentation of International Law, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (UN Doc A/CN.4/L.682), which described the systemic implications of legal reasoning in international law, and mentions a "*political obligation* on law-appliers to make their decisions cohere with the preferences and expectations of the community whose law they administer". Such political obligation, in turn, may require citations to the relevant authorities.

681 Although this is not discussed below, there is of course nothing necessary in this conflation: precedents could be followed without being acknowledged and cited, and citations could be (and sometimes indeed are) only made to indicate the adjudicator's awareness of them.

The extensive literature on the subject offers at least three conclusions. First, most agree on the lack of a *stare decisis* rule in international law, at least in a strict sense.[682] Second precedents matter to international litigation to a large extent, as should be obvious to every observer of international courts and tribunals. Notably, international litigants rely extensively on precedents,[683] and have even been observed initiating "test" cases to establish authoritative interpretations or precedents.[684] The fact that citations to precedents have been booming in international decisions is by now well-documented.[685]

Third, and crucially, the reasons generally adduced for citing precedent can vary, ranging from consistency[686] (and the associated benefit of predictability[687]) to due process,[688] to the opportunity to "shed light" on the issues at hand.[689] In other contexts, scholars have convincingly demonstrated that the number of citations to precedents correlates well with other doctrinal accounts of the importance of *stare decisis*.[690]

Given this, there are roughly speaking two positions regarding the relevance of precedents in international law. On the one hand, in line with the consensus that precedents are not binding, they might be plainly irrelevant *qua* precedents and matter only insofar as their persuasiveness will take them. This idea that was reviewed – and found wanting – in Chapter III above.

On the other hand, two kinds of "realist" positions are available: (i) precedents might be cited only as *post-hoc* justification for an already-arrived-at decision;[691] or (ii) precedents could inform (to some extent) the decisions of international courts and tribunals, as adjudicators will want to remain within the bounds of past decisions. These alternative realism arguments are not incompatible. It is plausible that precedents both inform a range of judicial possibilities (the argument of

682 M. Shahabuddeen, *Precedent in the World Court* (Cambridge University Press 2008), at 99.

683 J. Pauwelyn, "Minority Rules: Precedent and Participation before the WTO Appellate Body", in Johanna Jemelniak, Laura Nielsen and Henrik Palmer Olsen (eds.), *Establishing Judicial Authority in International Economic Law* (Cambridge University Press 2016), at 148-149.

684 M. Daku, K.J. Pelc, "Who Holds Influence over WTO Jurisprudence" (2017) 20 *Journal of International Economic Law* 233.

685 N. Ridi, "The Shape and Structure of the 'Usable Past': An Empirical Analysis of the Use of Precedent in International Adjudication" (2019) 10 *Journal of International Dispute Settlement* 200, at 208.

686 On this point, see Pauwelyn, *supra* note 683, at 146. See also von Bogdandy and Venzke, *supra* note 678, at 508: "courts will place their decisions within a stream of precedents not least because the appearance of consistency will increase their authority and legitimacy." As noted above, the tribunal in Romak notably disagreed with the idea that tribunals had a duty of consistency in international investment law: see *Romak v. Uzbekistan*, *supra* note 642, at §171.

687 See *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal (2 October 2006), at §293.

688 See next section.

689 See *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award (5 June 2012), at §§234-235.

690 J.H. Fowler and S. Jeon, "The authority of Supreme Court precedent" (2008) 30 *Social networks* 16.

691 See, e.g., Legum, *supra* note 652, at 8.

Chapter VIII below, albeit for all authorities), *and* are used as strategic arguments to build up a reasoning in support of one solution within this range.

This uncertainty as to the role of precedents in international law results in a rather tortured *status quo* that conveys contradictory signals to international litigants and adjudicators. The pattern (as has been noted[692]) is always the same: "precedents are not binding, yet we will consider them anyway to some extent".[693] There is an undeniable (and somewhat ironic) aesthetic to it: in *Cargill v. Poland*, for instance, the tribunal opined that "it is not bound by previous decisions", and then cited a former case in support of that statement.[694]

In truth parties often know that precedent matters and act on that assumption. Evidence from the IUSCT, for instance, shows that parties and arbitrators knew the precedential importance of the Tribunal's holdings,[695] as Iran often use settlement to nip in the bud possible adverse, and precedent-setting, awards.[696] While some voices downplay the role of precedents, Armin von Bogdandy and Ingo Venzke echo the feeling of numerous observers:

> The weight that the Appellate Body and other international courts and tribunals attach to their previous decisions almost makes a mockery out of the international law mantra that earlier judicial decisions have no legal effects beyond the parties to the dispute.[697]

As seen above in Chapter III, the Dataset illustrates well this importance of precedents in judgments and awards. Especially when compared with what parties or individual judges cite or discuss, decisions of courts and tribunals tend to rely mostly, if not exclusively, on precedents – and, as will be seen further below in Chapter VII, mostly on precedents made by themselves or their predecessors on a given international bench.

In this context, the fact that the most important precedents remain popular during the lifetime of the different fora is remarkable. In investment arbitration, for instance, the awards in

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692 Boisson de Chazournes, *supra* note 649, at 43-44.

693 See the same observation by Stephan Schill with respect to investment arbitration: "Even though arbitral tribunals do not become tired of emphasizing that arbitral precedent is not binding, they nevertheless attach importance to it up to a point where a *jurisprudence constante* becomes more authoritative as an argument than reference to a formal source of international law." See Schill, *supra* note 651, at 1104.

694 See *Cargill, Incorporated v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Final Award (29 February 2008), at §224, citing *AES v. Argentina*, *supra* note 552, at §§30-32.

695 *Phillips Petroleum v. Iran*, Award No. 425-39-2 (29 June 1989), reprinted in 21 Iran-U.S.C.T.R. 294, Statement by Judge Khalilian: "in light of the blatant defects therein, which I shall list herein-below [...] it will not be possible to rely upon this Award as precedent."

696 See P.D. Trooboff, "Settlements", in David D. Caron and John R. Crook (eds.) *The Iran-US Claims Tribunal and the Process of International Claims Resolution* (Transnational Publishers 2000), at 297.

697 See von Bogdandy and Venzke, *supra* note 678, at 509.

Mondev and *Tecmed* quickly became the most cited precedents and have remained so up to this day: when looking at the most popular precedent each quarter of a year, one of these two awards top the ranking of most-cited precedents 75% of the time. Likewise on a quarterly basis, the precedents in the *North Sea Continental Shelf* and *Military Activities in Nicaragua* have been the most cited authority in nearly half quarters in the ICJ's history. Importantly, both are cited on a large number of distinct topics.

These results indicate that once a precedent becomes authoritative and important, arguments of the participants in international disputes soon start to revolve around them and these authorities are cited on a distinctly higher number of unique topics than the average authority.

Due process

Citing might also be a question of due process: given the parties' extensive reliance on authorities (as further studied in Chapter VI below), courts and tribunals often feel bound to answer their contentions in this respect. These considerations take a particular salience in international law, where sovereigns expect (and often pay for) thorough decisions answering their legal positions.[698] (The flip side of this due process argument is the idea that a court or tribunal should not cite something unexpected without seeking the arguments of the parties in this respect – a point further discussed below.)

For Jan Paulsson, the duty to answer the parties' contentions primarily explains citations. In other words:

> to the extent that any party's case place central reliance on a proposition derived from previously decided cases, arbitrators are required to give consideration to them and to express their assessment of the persuasiveness of that reliance.[699]

These considerations however sit oddly with the fact that international courts and tribunals (in line, it seems, with some domestic courts[700]) mostly *ignore* the authorities cited by the parties. As indicated in Table 9 below, most fora (except the WTO) only cite between a quarter to a half of the authorities found in the parties' submissions, a proportion that rises slightly when counting

698 See H. Lauterpacht, *The Development of International Law by the International Court* (Cambridge University Press 1934), at 34.
699 Paulsson, *supra* note 633, at §4.10.
700 C. M. Oldfather, J. P. Bockhorst, and B. P. Dimmer, "Triangulating Judicial Responsiveness: Automated Content Analysis, Judicial Opinions, and the Methodology of Legal Scholarship" (2012) 64 *Florida Law Review* 1189, at 1238.

citations to precedents only (which, *ex hypothesi*, are likely harder to ignore than citations to teachings[701]).

	ICJ	INV	ITLOS	IUSCT	WTO
All Authorities (in brackets: only precedents)	9.0 (12.7)	42.8 (47.1)	10.4 (15.5)	35.5 (35.9)	61.3 (65.0)
Authorities cited by both parties	19.1 (25.1)	60.1 (61.8)	37.5 (40.2)	100.0 (100.0)	79.5 (80.6)
Authorities cited by Claimant	9.8 (13.7)	45.1 (47.8)	12.8 (20.4)	35.9 (35.9)	66.9 (69.5)
Authorities cited by Respondent	10.0 (15.1)	43.8 (47.8)	11.5 (16.3)	39.3 (39.9)	68.5 (70.9)

Table 9: Ratio of authorities cited in pleadings found in decisions

***Reading key**: only 9% of the authorities cited in pleadings (12.7% when counting only precedents) are cited in the resulting decision at the ICJ.*

This relatively low rate of reply to the authorities cited by the parties is not overly surprising. Indeed, the practice of international courts and tribunals is informed by judicial economy: there is no point, for instance, in discussing authorities that are not in debate between the parties, or that are only cited in passing. In cases where the parties have adopted a "kitchen-sink" approach to authorities, adjudicators should be expected to focus only on the most important ones.[702]

The Data backs up this intuition, as the most cited authorities in the arguments of the parties have a higher probability of being cited in the resulting decision. In other words, all things otherwise equal, courts and tribunals will cite in priority those authorities that were cited multiple times in the parties' arguments, as opposed to authorities that made but a fleeting appearance.

As seen above, the audience of international courts and tribunals go beyond the parties to a case; in these circumstances, a court that speaks to a broader audience might want to strategically orient its message around fewer authorities, and presumably these authorities that are the most well-known across its audience (as opposed, notably, to authorities that might be more specific to a

701 See N. Duxbury, *Jurists and Judges: An Essay on Influence* (Hart Publishing 2001), at 13.

702 On the other hands, the ratios in Table 9 are rising over time (the ICJ, e.g., cites a larger portion of the authorities found in pleadings now that it used to 50 years ago), consistent with a model in which decisions are more likely to discuss in extenso the arguments of the parties.

given case, but well-known only for the parties). The distinction identified above between courts mindful of their external audience and those likely more attuned to their role in settling a dispute can be seen in Table 9 as well.

Two related observations are interesting in this respect. First, all courts and tribunals seem mindful to cite a greater proportion of the authorities that are cited by both parties. Second, and as can be seen in Figure 9 below, the most-cited authorities in the parties' pleadings are more likely to figure in the ultimate decision of the adjudicators. The left-hand side of the graphs below represents the authority that is the N^{th} most cited authority in sets of pleadings; the graphs records (in the red curve) how often this N^{th} most-cited authority is then cited in the adjudicator's consequent decision.[703]

All curves display the same relationship with the authorities cited in the parties' pleadings: the most cited authorities in pleadings are more likely to be cited in the decision. Yet, in all cases, even the 1^{st} most-cited authority is not assured of finding its way into the decision, and for both the ICJ and Investment tribunals, the curves start to cross early on, with the 2^{nd} or 3^{rd} most-cited authorities. WTO panels, meanwhile, are seemingly more mindful of citing back the main cases relied upon by the parties more often than not.

703 Only decisions where at least one citation by the parties is known are recorded here. Given that the Dataset only accounts for a limited amount of the parties' pleadings (even at the ICJ, oral pleadings are not counted, for instance), these calculations should not be held as definitive – yet, the trend is likely to be accurate.

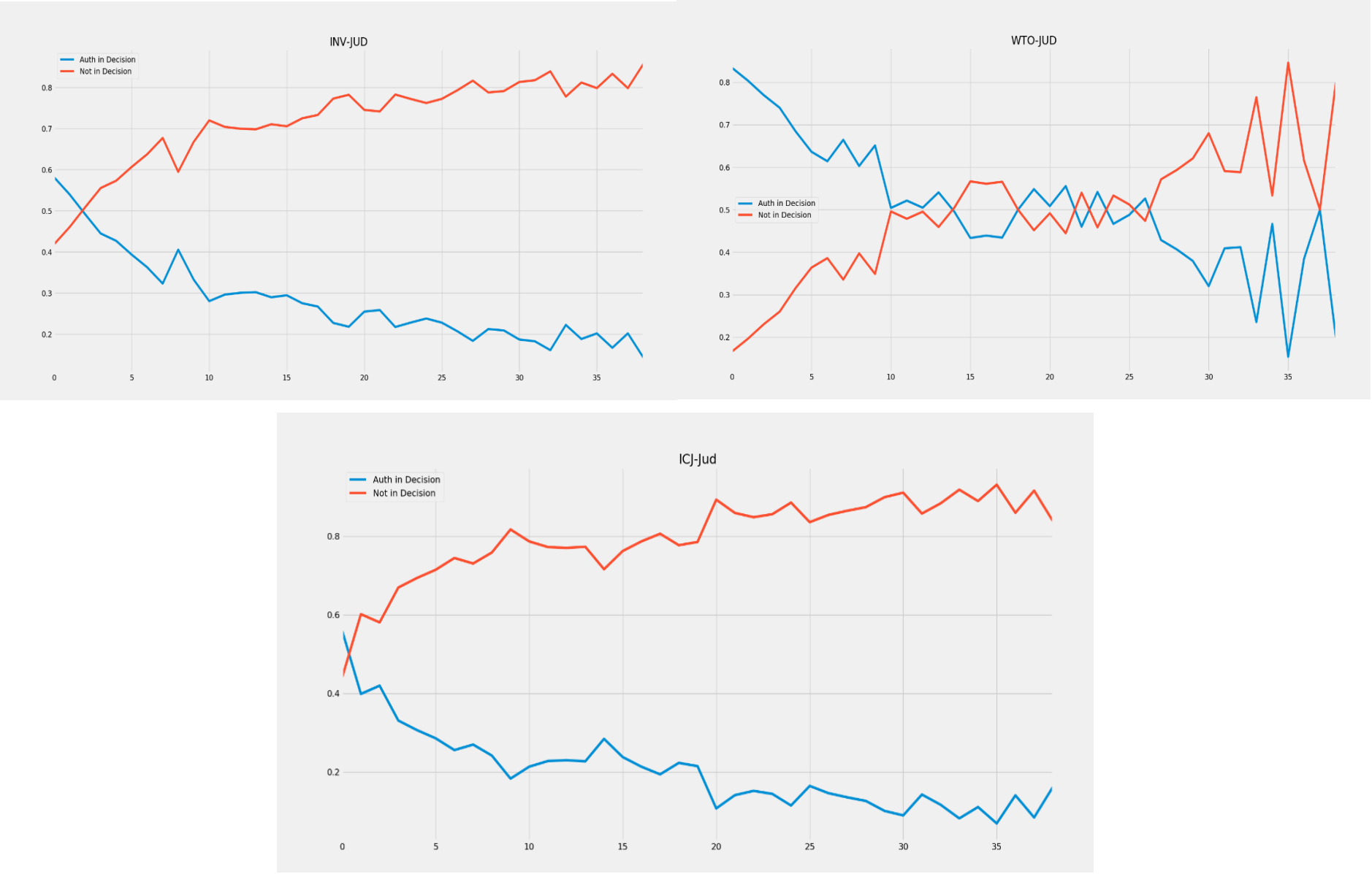

Figure 9: Most cited authorities in pleadings, as found in decisions

This is a par with the findings below that a large part of the citations in decisions are not cited *at all* in the submissions of the parties. Together, both observations indicate that due process might explain part of the authorities cited in decisions, but by no means all.

C) The danger in citing

Citations are rarely uncontroversial. In particular, parties are frequently suspicious than the reliance on authorities is only a fig-leaf concealing the adjudicator's ruling in accordance with his or her subjective views. The opinion of some adjudicators, such as the *ad hoc* committee in *Impregilo v. Argentina*, that a "tribunal is entitled to and often quotes from other decisions in deriving or in support of its own reasoning and quoting from rulings of other arbitral tribunals certainly constitutes a valid form of reasoning"[704], has frequently been tested.

At the individual case level, decisions have sometimes been challenged by disappointed parties on account of the citations they contain. For instance, in *Quiborax v. Bolivia*, an *ad hoc* committee was facing a plea by Colombia that the tribunal had preferred to rely on precedents rather than on the "clear text of the [BIT]".[705] This challenge was unsuccessful, but it is hardly unique.[706] The United States recently even asked a panel, in the context of an interim review, to delete a reference to the idea of a "well-established principle in WTO case law", arguing that it could be "misunderstood as indicating that prior panel and appellate reports have precedential value".[707]

The argument also rages, however, at the systemic level, where a system's reliance on authorities is often a ready argument to challenge it. The United States' request just mentioned takes part in general criticism of the use of precedents by WTO panels and the Appellate Body.[708] The current movement to reform the investor-state dispute settlement framework, meanwhile, has seen a number of criticisms directed at the practice of tribunals citing authorities relevant for different investment treaties.

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704 *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision of the *ad hoc* Committee on the Application for Annulment (24 January 2014), at §156.

705 *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Annulment (18 May 2018), at §43.

706 See, e.g., the quote by arbitrator Noori, in Chapter I *supra*, note 64.

707 See *China – Tariff Rate Quotes for Certain Agricultural Products*, WT/DS517/R, Report of the Panel (18 March 2019), at §6.20.

708 See, e.g., S. Lester, "The Origins of the 'Cogent Reasons' Approach to the Precedential Value of Appellate Body Reports" (24 June 2019) *International Economic Law and Policy Blog*, available at https://ielp.worldtradelaw.net/2019/06/the-origins-of-the-cogent-reasons-approach-to-the-precedential-value-of-appellate-body-reports.html.

Why refrain from citing?

All this adds to the cost of citing anything in a decision, and adjudicators will settle on a balance between what could and what should be cited in any given decision. Sometimes it is better not to cite.

A fair amount of these "non-citations" is not deliberate. The quality of the debate between the parties, for instance, will have an impact on what will be cited, as will the lack of diligence of the adjudicators (and their assistants). In this respect, it bears stating the obvious point that every adjudicator is different,[709] and their understanding of what is a relevant authority to cite, or even a relevant argument to make, will differ. At the ICJ, for instance, Judge Bustamante and Jessup sat on the same term (from 1961 to 1970) and heard the same cases. Judge Jessup, however, averaged 3.6 citations per 1,000 words, while his Peruvian colleague's opinions included only 0.17 citations per 1,000 words.[710]

As for *positive*, deliberate reasons not to cite authorities, two are particularly relevant.

First, judges and arbitrators are reluctant to cite authorities they disagree with. Indeed, as mentioned above in Chapter II, citations are most commonly included in a reasoning to support a part thereof. "Citing to say 'they got it wrong' is generally avoided, even severely frowned upon."[711] In the Dataset, rare are the citations that unambiguously seek to overturn or contradict an authority,[712] and even rarer when it comes to teachings of publicists (as teachings that a decision-maker disagrees with would just be ignored). This is consistent with the role of precedents as argumentative burden,[713] whereas teachings, unless they are particularly authoritative, rarely qualify as such a burden.

Second, judges and tribunals routinely refuse to cite an authority from outside the scope of what they consider proper authorities – oftentimes, in priority, their own jurisprudence. The prime example in this respect is the ICJ, which for a long time was reluctant to cite any non-ICJ

709 See N. Stappert, "A New Influence of Legal Scholars? The Use of Academic Writings at International Criminal Courts and Tribunals" [2018] *Leiden Journal of International Law* 1, at 975.

710 This is only counting the opinions they wrote entirely on their own. Judge Jessup wrote nearly 200,000 words during his term on the Bench, while Judge Bustamante wrote only around 79,000 words. Dame Rosalyn Higgins, who also wrote a similar amount, holds the record at close to 5.4 citations per 1,000 words. The extent to which these discrepancies depend on a Civil Law / Common Law divide is further studied below, in Chapter V.

711 See D. Terris, C. Romano and L. Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Oxford University Press, 2007), at 120-121.

712 This is congruent with other analyses: see Stappert, *supra* note 709, at 969.

713 Jacob, *supra* note 666, at 1015.

jurisprudence: "even though there are other international courts in existence today, the ICJ is regarded, and presumably regards itself, as the supreme public international law tribunal, as such would not wish to be seen to rely too heavily on the jurisprudence of other bodies."[714] (The *primus inter pares* status of the ICJ is further analysed below in Chapter VII; the conscious decision taken by courts and tribunals to cite certain categories of authorities and not others is the topic of Chapter VIII.)

The peril of under-citing

Not citing however leaves adjudicators vulnerable to at least two kinds of criticisms.

First, it offers a ready argument for future decisionmakers to contest the legal finding of a past ruling. Among the several reasons why the *Siag & Vecchi v. Egypt* tribunal was suspicious of the "continuous nationality" theory endorsed by the *Loewen* tribunal, for instance, was that "the Loewen Tribunal did not cite a single authority in support of any of its propositions with regard to continuous nationality."[715] Before the IUSCT, it was frequent for some dissenting arbitrators to complain that the majority did not cite anything in support of its holdings[716] – despite complaining at other times of the majority's practice of citing "wrong" precedents to justify its conclusions.

Relatedly, a lack of citations invites the suspicion that a ruling is (impermissibly) steeped not in law but in equity. This found a fine illustration in the decision of the first annulment committee in *Klöckner v. Cameroon*, who noted that the tribunal had failed to cite anything in support of a legal principle that proved key to the case's resolution.

> 71. Does the 'basic principle' referred to by the Award (p. 105) as one of 'French civil law' come from positive law, i.e., from the law's body of rules? It is impossible to answer this question by reading the Award, which contains no reference whatsoever to legislative texts, to judgments, or to scholarly opinions. In this respect the contrast is striking between Section 2 (on the 'duty of full disclosure') and Section 3 (on the *exceptio non adimpleti contractus*, […]). Section 3 contains a great number of references to scholarly opinion (*doctrine*) as well as, directly or indirectly, to case law

714 M. Mendelson, "The International Court of Justice and the Sources of International Law", in Vaughan Lowe and Malgosia Fitzmaurice (eds.), *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings* (Cambridge University Press 1996) 83.

715 *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction (1 June 2009), at §498.

716 *Petrolane et al. v. Iran et al.*, Award No. 518-131-2 (14 August 1991), reprinted in 27 Iran-U.S.C.T.R. 64, Dissenting and Concurring Opinion of Seyed Khalil Khalilian (18 March 1992), at §19: "The Award fails to cite any judicial precedents in support of the majority's position."; see also *Reza Nemazee and Luz Belen Nemazee v. Iran*, Award No. 487-4-3 (10 July 1990), reprinted in 25 Iran-U.S.C.T.R. 153, Separate Opinion of Judge Parviz Ansari, at §2.

(*jurisprudence*). One could therefore assume that in the case of Section 2, regarding the duty of frankness, the arbitrators either began a similar search for authorities but found it unproductive or, more likely, thought that a search for positive law was unnecessary.

[…]

75. In any event, in the absence of any information, evidence or citation in the Award, it would seem difficult to accept, and impossible to presume, that there is a general duty, under French civil law, or for that matter other systems of civil law, for a contracting party to make a 'full disclosure' to its partner.

[…]

77. Now, the Award's reasoning and the legal grounds on this topic (to the extent that they are not in any case mistaken because of the inadequate description of the duty of 'full disclosure') seem very much like a simple reference to equity, to 'universal' principles of justice and loyalty, such as amiable compositeurs might invoke.

This is not a sure method to annul an ICSID award, however. In another ICSID dispute, Venezuela likewise tried to annul an award on the basis that the tribunal failed to cite anything, only to be rebutted by the *ad hoc* committee for whom "[t]he fact that the Tribunal's reasoning does not contain references to cases or scholarly comments does not mean that that its reasoning is absent or contradictory."[717]

In other words, a lack of citation in itself is not a failure to reason or decide in accordance with the law. Yet given that this remains a common argument for disappointed parties, it does engender suspicions and should prompt courts and tribunals not to overlook this part of their reason-giving duties.

D) Iura novit curia

Evidently, decisions, judgments and awards do not spring from a vacuum. They have been informed by a set of considerations, of whom the parties' arguments are the most important.[718] What

717 See *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Decision on Application for Annulment (6 December 2018), at §349.
See also, along the same lines, *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment (5 April 2016), at §§312-313.

718 See T. Streinz, "Winners and Losers of the Plurality of International Courts and Tribunals: Afterword to Laurence Boisson de Chazournes' Foreword" (2017) 28 *European Journal of International Law* 1251, at 1255, mentioning the role clerks and *amici curiae* as well.

is being cited by a court or a tribunal is then inspired, in no small measure, by what has been pleaded before it.[719] Since judges and arbitrators expect parties to marshal authorities and evidence for their benefit, it is unsurprising that there is shared language between the two.[720]

Yet how does the *iura novit curia* principle, the idea that the Court, ultimately, knows the law and can apply it notwithstanding the parties' pleadings and submissions, fit in this framework?

There is a certain tension between the *iura novit curia* principle and some elements of due process:[721] no party would enjoy the "surprise" of learning that an adjudicator ruled relying on an authority they did not have the chance to discuss.[722] It has therefore been suggested that reliance on the *iura novit curia* principle should prompt decision-makers to seek the parties' input.[723] This is notably the solution adopted in the recent Prague Rules,[724] which allow tribunals to rely on legal authorities from outside the parties' corpus, provided they retain a chance to comment.[725] In practice, most courts and tribunals can be expected to remain within the debate set by the parties,[726] as is evidenced by the fact that this kind of departure is sometimes acknowledged.[727] Even the ICJ is said not to go beyond the arguments of the parties, in most circumstances at least.[728]

Arbitral tribunals are often held to be more constrained by the parties in this respect, with authors citing their *ad hoc* character;[729] their lack of institutional memory;[730] and the fact that they

719 *Ibid.*

720 A. Feldman, "All Copying Is Not Created Equal: Examining Supreme Court Opinions' Borrowed Language" (2016) 17 *Journal of Appellate Practice and Process* 21, at 60.

721 In some ways, this is related to the tension between managing the coherence of international law and resolving the dispute at hand, studied below at Chapter VII.

722 This should also be related to the idea that process matters in all this. As noted, compliance with international decisions is ensured by creating an atmosphere in which parties "[are] engaged in a cooperative venture, in which performance that seems for some reasons unsatisfactory represents a problem to be solved by mutual consultation and analysis, rather than an offence to be punished." See A. Chayes and A. Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press1995), at 26.

723 See A. Bjorklund, Remarks on the panel "The Role of International Tribunals in Managing Coherence and Diversity in International Law" (2011) 105 *American Society of International Law Proceedings*, at 180.

724 Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules), 2018, available at http://praguerules.com/upload/medialibrary/9dc/9dc31ba7799e26473d92961d926948c9.pdf.

725 See *Ibid.*, 'Article 7 – Iura Novit Curia', at §2.

726 *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award (31 March 2011), at §90.

727 *Compañíá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (20 August 2007), at note 402. See also *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Award (30 August 2018), Dissenting Opinion of Osvaldo Cesar Guglielmino: some ICJ opinions supported Mr. Guglielmino's argument, "[h]owever, since the Parties have not introduced such legal authorities on the record, I refrain from referring to them".

728 C. J. Tams, *supra* note 648, at 93, note 146.

729 Sacerdoti, *supra* note 633.

730 Distinctions in institutional settings can have an impact on this: see S. Rosenne, *Practice and Methods of International Law* (Oceana 1984), at 119, regarding the ICJ: "frequently it is the Registrar's responsibility to prepare full biographies relevant to the case."

must rely much more on the arguments of the parties.[731] Notwithstanding, arbitral tribunals keep some freedom[732] to pick authorities within the "legal framework"[733] of the parties' submissions. The opinion of the ad hoc committee in *Daimler v. Argentina* is representative in this context:

> This Committee is of the view that an arbitral tribunal is not limited to referring to or relying upon only the authorities cited by the parties. It can, *sua sponte*, rely on other publicly available authorities, even if they have not been cited by the parties, provided that the issue has been raised before the tribunal and the parties were provided an opportunity to address it. […]. Once such an opportunity was provided the Tribunal was not obliged to confine itself to only those authorities, which had been cited by the parties. No rule of law or procedure or requirement of due process prevented it from referring to or relying upon other authorities that were in the public domain. Such reliance did not violate any rule of natural justice including the right to be heard.[734]

Indeed, in most cases, even for arbitral tribunals, the authorities cited by the parties account for only between a fourth and a half of the authorities later cited in the decision.[735] While part of the discrepancy is certainly due to the gaps in data collection,[736] the magnitude of the phenomenon is unmistakable, especially at the ICJ and ITLOS (for whom the pleadings record is typically more exhaustive). These proportions hold even when counting only citations to precedents.

	ICJ	INV	ITLOS	IUSCT	WTO
All Authorities	43	40.6	19.4	13.6	36
Only Precedents	44.4	44.5	19.7	14.2	38.5

Table 10: Ratio of citations in decisions found in pleadings

731 Sir F. Berman, "Authority in International Law" (2018) *KFG Working Paper Series*, no. 22, at 9: "The maxim *jura novit curia* does not mean that an international court has discretionary freedom to base its decision on whatever legal analysis it chooses, whether or not that has been debated before it between the parties. That constraint can be seen to operate particularly strongly in arbitration, and an arbitral award could indeed find itself being formally challenged if the tribunal were to do so. But it applies before standing courts as well."

732 M. Scherer, "Drafting the Award", in Bernhard Berger and Michael Schneider (eds.), *Inside the Black Box: how Arbitral Tribunals Operate and Reach their Decisions* (Juris 2014), at 28-29.

733 See *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP (21 February 2014), at §§297-299. In rejecting the investor's challenge to an award with respect to an *obiter dictum* (which, Caratube contended, it had not been heard on), the committee opined that "the *obiter dictum* falls squarely within the legal framework established by Claimant in order to prove standing and jurisdiction."

734 *Daimler Financial Services A.G. v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment (7 January 2015), at §295. The tribunal's stressing that authorities should be "publicly available" echoes Chapter III, subsection E above.

735 This is only counting authorities from the fora studied in the Dataset, as well as teachings; parties in pleadings also sometimes cite authorities from other fora, which rarely figure in the ultimate decision and would have therefore only decreased these ratios.

736 Not all pleadings are available for all cases, and it is often harder to automatically detect citations in pleadings submissions.

***Reading key**: only 43% of the authorities in the ICJ's decisions were also cited by at least one party. In other words, 57% of the authorities cited by the Court in its decisions were, seemingly, not provided by one of the parties in their written submissions.*[737]

What Table 10 tells us, then, is that *iura novit curia* is an empirical reality in international dispute settlement. This does not mean, however, that courts and tribunals decide cases exclusively based on authorities not found in the parties' pleadings. Rather, a large part of the discrepancy is likely due to adjudicators citing more authorities than necessary, often on matters that are not particularly contentious, but in order, perhaps, to strengthen the coherence of their own jurisprudence by overciting it.[738] And indeed, the average PageRank of authorities that are cited *only in judgments* is distinctively lower than the average PageRank of authorities cited *also in pleadings*, indicating that the authorities unique to decisions are, on average, likely less important than the one discussed by the parties.

2. Features of authorities as cited in judgments

What can we say of the authorities that are cited in decisions, and how do they differ from those that populate the parties' pleadings and the judges and arbitrators' individual opinions?

A) Teachings in judgments

As mentioned in Chapter III, decisions are much less likely to cite teachings than precedents. What are, therefore, the distinctive features of the teachings that are cited in these decisions, and how do they generally differ from teachings relied on by the parties or cited in individual opinions?

First, the most-cited teachings in decisions tend also to be among the most-cited in individual opinions and in pleadings. Table 11 below retraces the clear overlap between the Top 15 teachings cited in the investment arbitration decisions and WTO reports (as measured by the number of unique documents citing to a writing, and not the absolute number of citations). Shaded in green

737 This table differs from Table 9 above in that Table 9 references the number of authorities in pleadings that will later be found cited in the decisions based on those pleadings; by contrast Table 10: Ratio of citations in decisions found in pleadings refers to the proportion of authorities in decisions that can also be found in the parties' submission.
For instance, the submissions by the parties might, together, cite 100 different authorities, only 12 of which will be found in the resulting legal decision; this would be captured by Table 9. However, these 12 authorities might nonetheless constitute 40% of the 30 authorities cited by the tribunal, as captured in Table 10: Ratio of citations in decisions found in pleadings.

738 This concords, for instance, with Pauwelyn's observation that the WTO's citation network is remarkably dense, with the Appellate Body in particular citing a broad range of its own precedents in any given decision: see Pauwelyn, *supra* note 683, at 144.

are those works that are most frequently cited in decisions *and* in opinions or pleadings. These works clearly account for a majority of all cited works.[739]

Decisions	Separate Opinions	Dissenting Opinions	Pleadings	Pleadings (in decisions)
Schreuer et al., The ICSID Convention	Newcombe & Paradell, Law and Practice	Schreuer et al., The ICSID Convention	Schreuer et al., The ICSID Convention	Schreuer et al., The ICSID Convention
Crawford, ILC Articles on Responsibility	Schreuer, FET in Arbitral Practice	Douglas, The Int'l Law of Inv. Claims	Brownlie, Principles	Schreuer & Dolzer, Principles
Cheng, General Principles of Law	Schreuer et al., The ICSID Convention	Schreuer & Dolzer, Principles	Cheng, General Principles of Law	Crawford, ILC Articles on Responsibility
Brownlie, Principles	McLachlan, Shore & Weiniger, Principles	McLachlan, Shore & Weiniger, Principles	Muchlinski, Ortino & Schreuer, Oxford Handbook	Brownlie, Principles
Schreuer & Dolzer, Principles	Schreuer, FET: Interactions	Broches, The ICSID Convention	Crawford, ILC Articles on Responsibility	Cheng, General Principles of Law
Paulsson, Denial of Justice	Vasciannie, FET in Law and Practice	Douglas, the MFN Clause	Paulsson, Denial of Justice	Ripinsky & Williams, Damages
Ripinsky & Williams, Damages	Laviec, Protection et Promotion des Investissements	UNCTAD, FET	Ripinsky & Williams, Damages	Newcombe & Paradell, Law and Practice
Douglas, The Int'l Law of Inv. Claims	Carreau, Droit International Public	World Bank, Guidelines on the treatment of FI	Newcombe & Paradell, Law and Practice	Paulsson, Denial of Justice
Dolzer & Stevens, BITs	Cassese, International Law	Sinclair, the Vienna Convention	Amador, Baxter & Sohn, R. of States	Douglas, The Int'l Law of Inv. Claims
McLachlan, Shore & Weiniger, Principles	Calvo, Le Droit International	Brownlie, Principles	Dolzer & Stevens, BITs	Born, International Arbitration
Marboe, Damages	Salcedo, El Derecho Internacional	Tudor, FET	Douglas, The Int'l Law of Inv. Claims	Caplan, the UNCITRAL Rules
Crawford, ILC Articles (2nd report)	Cheng, General Principles of Law	Davis, Business Law in Egypt	Redfern, Hunter, Law and Practice of Int'l Arbitration	Vandevelde, BITs
Newcombe & Paradell, Law and Practice	Paulsson, Denial of Justice	Newcombe & Paradell, Law and Practice	Freeman, Denial of Justice	McLachlan, Shore & Weiniger, Principles
Schreuer, FET in Arbitral Practice	Sornarajah, International Law on Foreign Inv.	Crawford, ILC Articles on Responsibility	Vandevelde, US Int'l Inv. Agreements	Mann, British Treaties for the Protection of Inv.
Broches, The ICSID Convention	Kohler, Arbitral Precedent	Marboe, Damages	Bjorklund, Hannaford & Kinnear, Inv. Disputes under NAFTA	Broches, The ICSID Convention

739 The lack of citations in decisions at the ICJ and ITLOS prevents the analyses to be extended to these fora. As mentioned below in Chapter V, however, teachings in individual opinions track relatively well writings cited in pleadings.

World Bank, Guidelines on the treatment of FI	Caplan, the UNCITRAL Rules	Jennings and Watts, Oppenheim's IL	Mann, British Treaties for the Protection of Inv.	UNCTAD, FET

Table 11: Most cited teachings per type, INV

Decisions	Pleadings	Pleadings (in decisions)
Brownlie, Principles	Brownlie, Principles	Brownlie, Principles
Sinclair, Vienna Convention	Sinclair, Vienna Convention	Sinclair, Vienna Convention
Jackson, World Trade and the Law of GATT	Jackson, World Trade and the Law of GATT	Jackson, World Trade and the Law of GATT
Gervais, The TRIPS Agreement	Gervais, The TRIPS Agreement	Gervais, The TRIPS Agreement
Kazazi, Burden of proof and related Issues	McNair, The Law of Treaties	Kazazi, Burden of proof and related Issues
Cheng, General Principles of Law	Crawford, ILC Articles on Responsibility	Cheng, General Principles of Law
Jackson, WTO Disputes Procedure	Cheng, General Principles of Law	Jackson, WTO Disputes Procedure
Dinh, Dallier & Pellet, Droit International Public	Jackson, WTO Disputes Procedure	McNair, The Law of Treaties
Fitzmaurice, Law and Procedure of the ICJ	Stewart, The GATT Uruguay Round	Stewart, The GATT Uruguay Round
McNair, The Law of Treaties	Miller, Federal Practice and Procedure	Dinh, Dallier & Pellet, Droit International Public
Jackson, Davey & Sykes, Legal Problems	Ricketson, The Berne Convention	Fitzmaurice, Law and Procedure of the ICJ
Stewart, The GATT Uruguay Round	Jackson, World Trading System	Jackson, Davey & Sykes, Legal Problems
Lauterpacht, Report on the Law of Treaties	Yasseen, L'interprétation des Traités	Lauterpacht, Report on the Law of Treaties

Table 12: Most cited teachings per type, WTO

Two additional dimensions of this question deserves scrutiny: the average age of authorities cited in judgments, and the topics that prompt the citations to these authorities.

B) Age

Authorities found in decisions are typically younger than those found in pleadings or even (in most cases) in individual opinions. As indicated in Table 13 below, precedents cited in ICJ judgments, for instance, have an average age of 16.44 years, whereas parties in their memos average citations to precedents of 20 years of age. A similar observation holds for all other fora in the Dataset,

save for the WTO, where parties would typically cite more recent authorities than the panel members.[740]

		Teachings	Precedents
ICJ	*Dissenting*	21.7	17.6
	Judgment	51.8[741]	16.4
	Separate	26.9	18.8
	Pleadings	21.8	20.1
INV	*Dissenting*	14.8	6.5
	Judgment	14.0	6.7
	Separate	14.0	5.1
	Pleadings	17.5	6.7
ITLOS	*Dissenting*	23.0	19.6
	Judgment	N/A	14.7
	Separate	19.6	22.1
	Pleadings	19.9	18.4
IUSCT	*Dissenting*	13.1	1.4
	Judgment	16.6	5.4
	Separate	14.9	1.6
	Pleadings	18.5	8.5
WTO	*Judgment*	18.0	6.6
	Pleadings	16.3	5.8

Table 13: Average age of authorities cited, by type of document

***Reading key**: teachings cited in ICJ dissenting opinions are 21.7 years old on average, while precedents cited in the same opinions are 17.6 years old on average.*

Again, a court or a tribunal's broader audience might drive this lower average age – as courts and tribunals would want to remain within the boundaries of what their audience know (i.e., up to a certain point, more recent cases are more likely to be known by a broader audience), while parties are freer to rely on a broader range of authorities, pushing up their average age. Since courts are

740 This does not differ much between Appellate Bodies and Panels.

741 Excluding one reference to Grotius, *De Jure Praedae*, which dates from 1604 and skewed the average given the ICJ's very few citations to teachings.

focusing on the issue at hand, they may benefit from using relatively fresher precedents to do so (and maybe drill down a recent jurisprudential turn), while parties and individual judges are freer to pick authorities from a wider range in addressing a broader set of issues.

For instance, nearly all citations to works that predate the year 1800 (works by Grotius, Vattel, Wolff, etc.[742]) are found in individual opinions or in pleadings – not in judgments. The WTO's different practice in this respect might be due to the care the Panels and the AB take in developing their jurisprudence, especially over frequent allegations of overreach, which might prompt them to find security in the authoritativeness of age. On the other hand, as noted above, all courts and tribunals in the Dataset have trended towards citing older authorities in the past two decades.

C) Topics

Citations in judgments and awards are associated with similar topics as those treated in priority by the parties or individual judges; there is a great deal of overlap. More interestingly, however, decisions are typically associated with a narrower range of topics than pleadings or individual opinions: at the ICJ, for instance, 6 distinct topics garner more than 50% of all citations, while this number is 8 for individual opinions, and up to 10 for pleadings.

Stark discrepancies also appear in the kind of authority different topics will attract. Some authors have suggested that procedural topics should be more likely to be attract citations to teachings than to precedents.[743] There is little data to support this opinion. If the IUSCT did indeed cite a fair share of teachings on the topic of its [Inherent Powers], for instance, these citations were still dwarfed by the citations to precedents even on this topic.

Rather, teachings in decisions are typically more cited on topics that are not specific to a forum in particular, with questions of [Equity], [Customary Law], [Estoppel] or [Res Judicata] among the top topics discussed with citations to teachings – even though, once again, in most cases these topics still command even more citations to precedents.

742 The oldest authority found in the Dataset is Glanvill's *Tractatus de legibus et consuetudinibus regni Anglie*, dated around 1188. It was cited in *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, Written Statement of the International Union for Conservation of Nature (19 August 2010), at §72, in support of the principle *sic utere tuo ut alienum non laedus*.

743 See M. Peil, "Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice" (2012) 1 *Cambridge Journal of International and Comparative Law*, at 154-155. Yet see also Shahabuddeen, *supra* note 682, at 135 for the proposition that procedural precedents should probably be much more binding over the court, lest procedural injustices ensue

There is also a temporal element to the question:[744] in common with the phenomenon identified above, at Chapter I, whereby the traditional role of teachings in international law has been supplanted by a growing jurisprudence, international courts and tribunals will often gradually adopt as their own solutions first encountered in teachings. In investment arbitration, for instance, no fewer than 16 topics[745] were more often discussed with citations to teachings than to precedents in the first 10 years of the jurisprudence, but the situation has reversed since then for nearly all of these topics.

D) The special case of "appellate" authorities

Appeal mechanisms, where they exist, are susceptible to compound the authoritative impact of both institutional identity and individual identity. Armed with the power to annul decisions and thus, to discern authoritative from unauthoritative sources, their decisions are likely to be an important guide to future parties. Besides, like Supreme Courts in domestic systems, appellate mechanisms are usually limited in their scope of review, and therefore, in theory, more likely to rule on points of stronger precedential value.[746] At the same time, they are usually manned with (supposedly) more eminent adjudicators, which should also strengthen their authority. For instance, with respect to ICSID annulment committees, Campbell MacLachlan wrote that:

> [i]n formal terms, the decision of an annulment committee has no greater precedential effect than an award. Nevertheless, [...] the eminent experience in public international law of the Committee, suggest[s] that great weight should be given to the Committee's categorical views on the central issues confronted in these cases.[747]

And yet, this expected accrued authority is not systematically retraceable in the Dataset. While AB decisions are indeed central to the work (and citations) of subsequent WTO panels, decisions by *ad hoc* committees in the ICSID system do not enjoy the same importance.[748]

These annulment decisions are indeed much less cited on average than arbitral awards: 368 citations on average for the latter in the ICSID investment jurisprudence, as opposed

744 See Stappert, *supra* note 709, at 979-980, suggesting that "young fields" are more likely to attract citations to teachings.

745 These are topics regarding [Exhaustion of remedies], [Good Faith], [Denial of Justice], [Interest], [State Responsibility], [Proof], [Declaration], [Estoppel], [Development], [Enforcement], [Remedy], [Interpretation], [Equity], [Res Judicata], [Sovereignty], and [Governing Law].

746 Sacerdoti, *supra* note 633.

747 See C. McLachlan, "Investment Treaties and General International Law" (2008) 57 *International and Comparative Law Quarterly* 390.

748 Non-ICSID awards, of course, can also be overturned on appeal – but these proceedings take place before domestic courts, and thus did not enter the scope of the Dataset.

to 27 citations on average for every decision of an *ad hoc* committee (citations that are, besides, mostly coming from other *ad hoc* committees, and not from tribunals). By contrast, Appellate Body reports are overcited compared to panel reports: 206 citations on average against 73 for simple panel reports or arbitral awards.

The same point is readily visible in a network analysis, which groups all decisions together around the most cited and important ones in the middle. As seen from Figure 10 below, AB reports stand in the centre of the WTO galaxy, while annulment committees at ICSID form their own hub of authorities on the outskirt of the galaxy formed by arbitral awards. These networks illustrate that for ICSID tribunals, annulment decisions are relevant only for limited matters.[749] WTO panels, meanwhile, look up to the AB reports (and AB members cite their own reports in priority) on a wider range of issues.

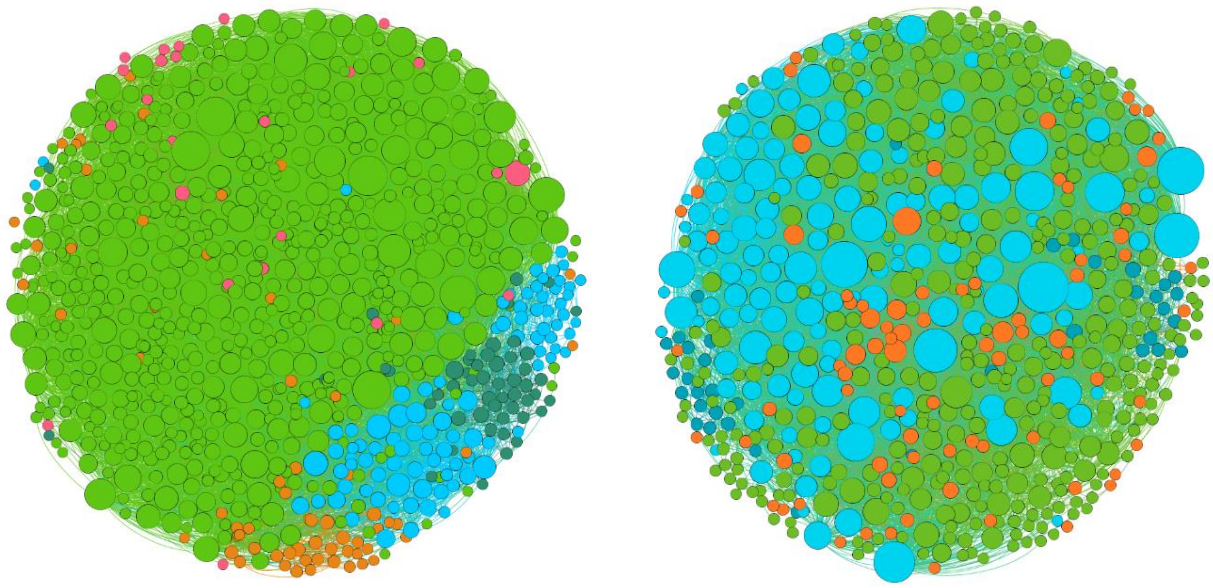

Figure 10: Network of decisions, per type, for INV (left),[750] *and WTO (right)*[751]

749 Citations from tribunals to *ad hoc* committee decisions are associated primarily with topics regarding their jurisdiction, such as the definition of [Investment] or the distinction between [Contract] and treaty claims. The latter topic is a testimony of the influence of the first annulment decision in the *Vivendi v. Argentina* case, the only annulment decision that is significantly cited in the Dataset.

750 Nodes are coloured per type of decisions: awards and decisions on jurisdiction in green, annulment decisions in blue, challenge decisions in turquoise. Orange and Pink nodes represent provisional measures orders and decisions on rectification and interpretation respectively. Node size depends on number of citations to a particular decision.

751 Nodes are coloured per type of decisions: AB reports in blue, panel reports in Green, article 21.5 reviews in Orange and other arbitrations in Turquoise. Node size depends on number of citations to a particular decision.

The relative isolation of annulment decisions in investment arbitration as opposed to AB decisions in the WTO system is also evidenced by an analysis of the full network of documents (i.e., decisions, opinions and pleadings as long as they cited at least one other document). In network analysis, *modularity* allows to identify groups of nodes with common and relevant links. Figure 11(a) below represents the full network of citations between cases and pleadings (teachings excepted) according to their forum; Figure 11(b) is the same map according to the modularity predicted of any node.

While the modularity analysis maps remarkably well into the different fora studied here, it is telling that the algorithms predict two different modularity classes for the investment galaxy on the left-hand side; most of the nodes in orange turn out to be decisions by *ad hoc* committees. There is no such distinction for the WTO AB decisions, nor, even for ICJ advisory opinions.[752] This indicates that decisions by ad hoc committees are sufficiently severed from investment awards to constitute their own ad hoc category, while AB reports (or advisory opinions at the ICJ) are better integrated within the scope of their respective forum.

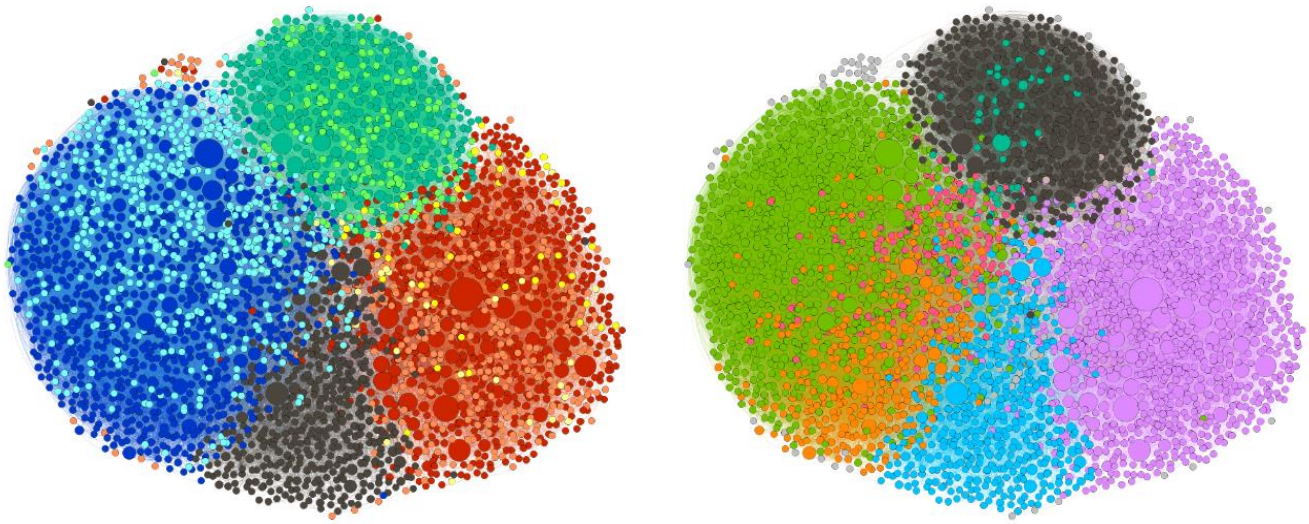

Figure 11: Full Network, per forum (left)[753] and modularity (right)

752 See above, at p. 69, for an introduction to modularity classes. While the WTO galaxy, on the top, also seems to encompass two modality class, it is because the analysis (puzzlingly) indicates that a set of decisions centred around EC – Hormones amounts to a modularity class in itself. Notice also how the ITLOS decisions have been phagocyted by the modularity class that represents the ICJ.

753 Investment arbitration in blue, WTO in green, IUSCT in black, ICJ in Red, and ITLOS in yellow. In all cases, dark nodes indicate decisions and light ones, pleadings (there are no pleadings for the IUSCT).

One important difference between these two appeal mechanisms is likely to account for impact of their decisions: under the ICSID Convention, the scope of review of *ad hoc* committees is much more limited than the review of the WTO's Appellate Body,[754] as committees are designed to annul awards only subject to relatively stringent tests. The limited sets of questions addressed by ICSID annulment decisions, and the unlikelihood that an ICSID award be annulled, therefore likely explains why ICSID tribunals do not feel a strong need to consider and cite annulment decisions – as opposed to how WTO panels look up to the Appellate Body's guidance.[755]

3. The role of authorities in shaping decisions

Beyond the *written* text of any given decision, what is the exact role of citations and authorities in the decision-making process that precedes that text? This interrogation is difficult, if not impossible to answer. All the caveats raised in the preceding chapters (regarding the limitation of citation analysis, the discrepancies of the practice of individual adjudicators, the gaps in the data collection, etc.) together prevent the development of a clear view as to the exact role of authorities in *making* a decision (as opposed to writing it).

To some extent, the answer depends on what is expected of authorities. Casting the debate in terms of bindingness is a dead-end, as there are few examples of an international court or tribunal professing to be bound by another decision in an unrelated case. Putting it in terms of persuasiveness is also unsatisfying, for the reasons highlighted in Chapter III (although there are plenty of examples of adjudicators professing that they have been persuaded by an authority).

Rather, the question is whether authorities have been material in influencing an outcome beyond their mere persuasiveness – and as much can cautiously be concluded from the fact that authorities are, as seen above, generally cited to *justify* a decision.

In this context, a few observations can be made that can, at least, inform the debate and hopefully take it forward.

754 See also *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee (3 October 2001), at §7: "on the other hand, the role of the Committee is narrowly defined and could be seen an ancillary to the arbitration function of ICSID as a whole"

755 A second important difference likely resides in the fact that ad hoc committees are not drawn from a fixed, specialized body of adjudicators like the Appellate Body is. Non-permanent WTO panellists and arbitrators are thus more likely to follow the authority of permanent Appellate judges.

A) The question of ritualism

As mentioned above, citing authorities sometimes runs the risk of turning into mere ritualism: authorities cited only following a blueprint of citations, with new authorities being aggregated to a growing list of statements in supports of boilerplate legal findings. Jennings, for instance, noted that the ICJ was not:

> above citing passages from previous judgments almost as if any pronouncement by the Court may be cited, not because it embodies the decision in the case but because it is a passage that has become hallowed into something akin to Holy Writ.[756]

This has found empirical backings: in an important study of citations at the ICJ and the WTO, Niccolò Ridi found that "both the ICJ and the Appellate Body tend to use precedent in a rather 'textual' manner, employing prefabricated, tested formulations as argumentative building blocks and stringing them together in their output."[757] Others have found that the European Court of Justice, for instance, was deeply ritualistic in its citation practice.[758] And as mentioned above,[759] decisions are replete with citations that were not part of the parties' debate.

In another paper with Wolfgang Alschner, we demonstrated that only a minority of all citations in ICJ judgments (27%, from a smaller dataset of citations) could qualify as "ritualistic" in character.[760] This conclusion was based on a measure of the number of paragraphs in ICJ judgments that cited the same couple of authorities as another paragraph. The underlying reasoning was that bundling precedents together in this way was an indication of pre-set, ritualistic citation blocks that were not necessarily central to a reasoning.[761]

The same analysis, extended to the much broader Dataset, indicates that what is true of the ICJ also applies in other fora – with some interesting variations.

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756 Sir R. Jennings, "The Judiciary, International and National, and the Development of International Law" (1996) 45 *The International and Comparative Law Quarterly* 1.

757 See Ridi, *supra* note 670, at 388.

758 Y. Panagis and U. Šadl, "Making EU (Case) Law: Evidence from a Paragraph-to-Paragraph Network on the Cases Concerning the Citizenship of the European Union" (2010), available at www.karlbranting.net/law-and-big-data-workshop/LawBD-2015_submission_3.pdf.

759 At p. 158.

760 W. Alschner and D. Charlotin, "The Growing Complexity of the International Court of Justice's Self-Citation Network: Institutional Achievement or Access-to-Justice Concern?" (2018) 29 *European Journal of International Law* 1, at 105.

761 Of course, a pair of authorities can also be cited in two different paragraphs only by coincidence.

Table 14 below retraces the proportion of "ritualistic" citing paragraphs (column "R") per type of document and forum. In most cases, these paragraphs account only for a fifth to a quarter of all paragraphs. For the ICJ, ITLOS and WTO, however, there are markedly fewer such paragraphs in pleadings – parties are less likely to aggregate citations to their reasoning and more likely to engage directly with the authorities cited. WTO decisions are however more likely to add up similar pair of citations, testifying to the rather exhaustive style of citation in this forum.[762]

	ICJ		INV		ITLOS		IUSCT		WTO	
Type	/	R	/	R	/	R	/	R	/	R
Dissent	0.83	0.17	0.77	0.23	0.89	0.11	0.77	0.23	/	/
Decision	0.80	0.20	0.77	0.23	0.79	0.21	0.75	0.25	0.68	0.32
Separate	0.81	0.19	0.76	0.24	0.82	0.18	0.80	0.20	/	/
Pleadings	0.88	0.12	0.74	0.26	0.94	0.06	/	/	0.83	0.17
Pleadings (in decision)	/	/	0.68	0.32	/	/	0.78	0.23	0.80	0.20

Table 14: Percentage of paragraphs with "ritualistic" citations

The main topics of these "ritualistic" paragraphs also differ from those of non-ritualistic ones. At the ICJ, for instance, the topic [Dispute] (i.e., the definition thereof) is often discussed in paragraphs that cite the same sets of precedents and authorities. Likewise, in investment awards, ritualistic paragraphs are primarily found in paragraphs that discuss [Annulment] standards (notably in decisions from *ad hoc* committees), or the fair and equitable standard of treatment. (At the ITLOS, IUSCT and in WTO cases, the main topics of the two types of paragraphs mostly overlap.)

In other words, while international courts and tribunals seem indeed to engage in some kind of "ritualistic" behaviour when they cite authorities, this practice remains rather limited to a minority of citations, and with respect to relatively uncontested topics. In most cases, when courts and tribunals cite, it is likely in order to engage at some level with the authority being cited rather than just following a pre-set blueprint.

B) The rare instances of express disagreement

A second indicia that citations are useful to *justify* a decision lies in the fact that citations are virtually always adduced in a decision to *support* the view taken by the judges and arbitrators.

762 And which results in the high density of the WTO's network of citations, as noted by Pauwelyn, *supra* note 683, at 166.

Conflicting authorities most of the time are shunned altogether, even if cited and relied upon by the losing party.

As mentioned above, there is a *due process* element to the activity of writing a decision, and ignoring the authorities relied upon by the losing side could be problematic in this context – this is why decisions sometimes expressly include boilerplate mentions to the effect that they have nonetheless considered all arguments. The ICSID *ad hoc* committee in *Karkey v. Pakistan* took a step further in this respect as it acknowledged that the jurisprudence on the question was not unanimous, yet opined that:

> The Parties have extensively referred to decisions of other ICSID *ad hoc* committees. The Committee has considered these decisions and the Parties' arguments based upon them to the extent that they shed useful light on the issues at stake here. In view of the considerable number of the decisions accumulated by now regarding the stay of enforcement, and the diversity among them, it is obvious that the Committee cannot accept and come out in line with all conclusions in these earlier decisions. In its reasoning, the Committee will refer to only some of these decisions which it considers to be of particular relevance for its own conclusions in the present Decision.[763]

Few decisions are as frank as this one, yet the practice of citing only supportive statements and ignoring unsupportive ones is common. As mentioned below in Chapter VI, it is consonant with the fact that courts and tribunals generally overcite the authorities relied upon by the winning party in a case as opposed to the authorities relied upon by the losing party.

4. Conclusions

This foray into the citation practice of courts and tribunals (as distinguished from their individual judges or the parties before them) has allowed to shed light on a few distinctive features. In particular, this practice is seemingly in line with strategic considerations whereby courts orient their discourse not only to the two parties to the dispute, but also to a broader audience. This is evidenced by various elements of their citation practice, as courts and tribunals: ignore most of the authorities cited by the parties; focus on the most authoritative found in the pleadings of both parties;

763 *Karkey Karadeniz Elektrik Uretim A.S.v. Islamic Republic of Pakistan,* ICSID Case No. ARB/13/1, Decision on the stay of enforcement of the award (22 February 2018), at §5.

cite *sua sponte* plenty less authoritative authorities, seemingly making an extensive use of their *iura novit curia* powers; and engage in some degree of ritualism that is absent from the legal reasoning of the parties or these courts' individual judges.

Chapter V – Citing authorities in individual opinions

As noted in Chapter II, focusing on the citations found in decisions allows only a limited foray into the motivations of international courts and tribunals. Many citations remain implicit, and the authoritativeness of uncited authorities unacknowledged. To some extent, these authorities can be retraced in the parties' pleadings (the subject of Chapter VI) and in individual opinions of the adjudicators, to which this Chapter turns. Both sets of documents offer clues as to what was at the back of the mind of the participants in any given case.

Individual opinions are not only an appropriate proxy to understand the "implicit" citations in majority opinions, however: they also shed light on what persuaded some judges and failed to move others. Fortunately for the purpose of this thesis, individual opinions are also generally subject to less formalistic concerns with respect to citations. Individual adjudicators have ample leeway to speak in their own voice and, perhaps, to genuinely acknowledge the authorities they considered in taking a position. Individual adjudicators also have distinct strategic motives in citing or not citing authorities in their opinions.

Allowing adjudicators to write individual opinions, however, has sometimes attracted criticisms, in ways relevant for their authority – and their use of authorities. After reviewing these debates (**Section 1**), as well as two possible strategic motives underlying the decision to write an opinion, this Chapter will turn to the authors of individual opinions: who are they, and how do these characteristics likely influence their practice of citing authorities (**Section 2**). A last section will then analyse how citation patterns in individual opinions differ from those in judgments and awards, and how separate and dissenting opinions differ between themselves (**Section 3**).

1. Reasons for individual opinions

Dissenting and concurring opinions are common in international dispute settlement. This is not a new phenomenon – the *Alabama* arbitration already had a dissenter[764] – though it has grown together with the number of international disputes, as judges and arbitrators have increasingly taken the opportunity to "express their personal views on aspects of a case".[765] The principle of issuing individual opinions has however sometimes been contested – in respects that are relevant for this thesis's inquiry into the marks of authority. The sections below review some of these criticisms, before turning to the expected benefit of penning individual opinions.

A) Opinions in international adjudication

Objections to judges airing out their individual opinions have been mounted in nearly all fora studied here; a (non-exhaustive) list follows:

- For the ICJ, Kammerhofer pointedly criticised the use of individual opinions (albeit in the context of a single case), opining that it "simply is not healthy";[766]
- In investment arbitration, Albert Jan van den Berg sparked a debate about the appropriateness of dissenting opinions in a system relying on party-appointment;[767]
- For the IUSCT, Gunmar Lagergren noted the impact of dissents on the authority of the Tribunal's awards,[768] on a background of bitter disagreements between the arbitrators; and
- At the WTO, individual opinions are reportedly actively discouraged, and mandatorily anonymous.[769]

The debate has deep roots. It flared at the time of writing the Statute of the Permanent Court of International Justice, and then again in the first decades of the ICJ's experience. In 1965, Ram

764 See a summary in "Alabama Claims Arbitration 1872", in J.B. Moore (ed.), *History and Digest of the International Arbitrations to which the United States has been a Party* (1898), at 653, and Sir Alexander Cockburn's Dissent (14 September 1872), at 659.

765 H. Mistry, "'The Different Sets of Ideas at the Back of Our Heads': Dissent and Authority at the International Court of Justice" (2019) 32 *Leiden Journal of International Law* 293, at 296.

766 J. Kammerhofer, "Oil's Well That Ends Well? Critical Comments on the Merits Judgement in the Oil Platforms Case" (2004) 17 *Journal of International Law* 695, at 716, opining that "[t]he more diligently the judges work on their own opinions, the more they undo the Court's work".

767 See A.J. van den Berg, "Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration", in Mahnoush Arsanjani, Jacob Cogan, Robert Sloane and Siegfried Wiessner (eds.), *Looking to the Future: essays on international law in honor of W. Michael Reisman* (Martinus Nijhoff 2010), at 821.

768 G. Lagergren, "The Formative Years of the Iran-United States Claims Tribunal" (1997) 66 *Nordic Journal of International Law* 23.

769 See M. Lewis, "Dissents", in Simon Lester and Bryan Mercurio (eds.), *Research Handbook on WTO Dispute Settlement* (Edward Elgar 2018).

Prakash Anand recorded the views of commentators who deplored the bitter tone of dissents at the ICJ (in particular), as well as these opinions' (alleged) corrosive impact on the authority of the Court's judgments and advisory opinions.[770] Similar criticisms have arisen in the arbitration field, in particular in response to the rise of higher-stake investment arbitration disputes.[771] Although it is unnecessary to overstate the number of critics (who are a minority), the evergreen character of the debate indicates that it is not made of whole cloth.

On some level, those unconvinced by the propriety of penning individual opinions are justified: dissenting (or emitting an opinion different from that of the majority) has a cost – not only for the dissenter, but also for the majority.[772] Beyond the arguments on the merits aired out by the dissenter (which might or might not be convincing), the mere fact that a decision was non-unanimous lessens its inevitability; it enhances the sentiment that a different bench would have come to a different outcome, and that luck had a hand in this outcome. In short, dissents are expected to diminish the authority of majority decisions.[773]

The critics' position depends however on a matter of framing, i.e., on the idea that dissents are the exception rather than the norm.[774] This framing is not a given.[775] On the contrary, individual opinions can be expected to bloom in international law, a legal field "generally found to be notoriously imprecise, fragmentary, uncertain and controversial".[776] Given the multiplicity and diversity of states and points of view in international law, dissents are an important device to maintain confidence in the system, for they allow minority views to be aired.[777]

For Ram Prakash Anand, the value of opinions further lies in making judges accountable and outcomes less susceptible of being influenced by politics; it also forces majority judges to give their

770 R.P. Anand, "The Role of Individual and Dissenting Opinions in International Adjudication" (1965) 14 *International & Comparative Law Quarterly* 788.

771 See van den Berg, *supra* note 767. For commercial arbitration, see notably A. Redfern, "The 2003 Freshfields-Lecture Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly" (2004) 20 *Arbitration International* 223.

772 See L. Epstein, M. Landes and R.A. Posner, "Why (and when) judges dissent: A theoretical and empirical analysis" (2011) 3 *Journal of Legal Analysis* 101, at 105.

773 G. Sacerdoti, "From Law Professor to International Adjudicator: The WTO Appellate Body and ICSID Arbitration Compared, a Personal Account" in David Caron, Stephan Schill, Abby Cohen-Smutny, Epaminontas Triantafilou (eds.), *Practising virtue: inside international arbitration* (Oxford University Press, 2015), at 213.

774 See van den Berg, *supra* note 767, at 841. Rogers put it well: "If the appropriate baseline for the number of dissents were near zero, the 22% [rate of dissent alleged by van den Berg] could be considered high"; see C. Rogers, "The Politics of International Investment Arbitrators" (2013) 12 *Santa Clara Journal International Law* 223, at 243.

775 *Ibid.*, at 243.

776 See Anand, *supra* note 770, at 805.

777 S.M. Schwebel, "The Docket and Decisionmaking Process of the International Court of Justice" (1989) 13 *Suffolk Transnational Law Journal* 543, at 556; see also Mistry, *supra* note 765, at 307.

best.[778] As Max Huber expressed it, "[t]he authority of the Court could only be increased by the whole truth",[779] and that truth is enhanced by allowing individual judges to explain their reasons to vote as they did.

The occurrence of individual opinions in this context might thus be a matter of design, not coincidence. In a system where individual and institutional identities both matter in terms of an authority's authoritativeness (as explained in Chapter III), the freedom to write an opinion has consequences.[780] For instance, a dissenting opinion might weaken or, as explained below, more likely, strengthen the majority's decision,[781] while concurring opinions can clarify it.[782] ICJ judgments, for instance, benefit from these two effects, as dissenting opinions will often prompt a majority to partly rewrite its decision.[783]

Beyond the individual case, individual opinions also serve the development of international law. Manley Hudson noted their importance in later judgments:

> the influence of some of the dissenting opinions may be traced in later judgments of the Court, and [...] some of them have been widely cited. It may not be too much to say, therefore, that they have made an important contribution to the materials out of which international law may be developed.[784]

B) Strategical use of individual opinions

From the perspective of the judge or the arbitrator, even before citation strategies come into play, why write an individual opinion, concurring or dissenting?[785]

Some opinions might be directed as influencing the majority's decision and its reasoning, for instance by prompting the majority to clarify its answer to the questions that prompt a dissent. ICJ judgments are often influenced in exactly this way by the dissents prepared by the judges.[786] Procedure has however a crucial role here: it is widely reported that the ICJ's practice of asking each

778 See Anand, *supra* note 770, at 794.
779 Minutes of the 1929 Committee of Jurists, League of Nations Doc. No. C. 166.M.66. 1929, V., at 52.
780 Mistry, *supra* note 765, at 306 *et seq.*
781 See above, Chapter III, at 119.
782 Mistry, *supra* note 765, at 307.
783 See Schwebel, *supra* note 777, at 555.
784 M. Hudson, *International Tribunals* (Washington, 1944), at 44. In the words of Chief Justice Hughes: "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the Court to have been betrayed." See C.E. Hughes, *The Supreme Court of the United States* (Columbia University Press 1928), at 68.
785 For an overview of the question, see van den Berg, *supra* note 767, at 821.
786 Schwebel, *supra* note 777, at 555. See also R. Kolb, *The International Court of Justice* (Hart Publishing 2013), at 1013.

judge to write preliminary notes encourages them to convert this Note into an individual opinion. Not all fora benefit from the same procedure, however. In the IUSCT practice, notably, it was common for arbitrators, Iranian like Americans, to file their dissent later, sometimes much later, than the Tribunal's award.[787]

More importantly, opinion-writers might seek to:

(i) try to undermine the authoritativeness of a solution in the eye of future courts or tribunals;[788] and/or

(ii) (ii) influence *future* awards and decisions.[789]

Undermine the authority of the majority opinion

If judges intend to undermine or lessen the authority of a majority decision with their opinion, there is little evidence that this strategy is efficient in practice. In the context of the IUSCT, some arbitrators explicitly described opinions as strategic tools designed to vary the authoritativeness of certain decisions,[790] in a context where all parties were conscious that the Tribunal's awards would subsequently become authoritative precedents.[791] Arbitrator Khalilian for instance warned in a dissent that:

> in light of the blatant defects therein, which I shall list herein-below […] it will not be possible to rely upon this Award as precedent.[792]

At another juncture and for his part, Arbitrator Bahrami said that he:

787 See, e.g., *Watkins Johnson et al. v. Iran*, Award No. 429-370-1 (27 July 1989), reprinted in 22 Iran-U.S.C.T.R. 218, at 258, Dissenting Opinion of Arbitrator Noori (filed on 8 January 1990).

788 See Lagergren, *supra* note 768, at 31.

789 See P.A. Moin, "Dynamics of Decision-Making (III)", in David D. Caron and John R. Crook (eds.) *The Iran-US Claims Tribunal and the Process of International Claims Resolution* (Transnational Publishers 2000), at 266, describing some opinions as "putting psychological pressure on the panel and paving the way for the next cases and awards"; see also C.N. Brower and J.D. Brueschke, *The Iran-United States Claims Tribunal* (Martinus Nijhoff 1998), at 661, explaining how the existence of "third-country" arbitrators set up "predictable dynamic, namely competition for the 'hearts and mind' of" these arbitrators. "Where," they continue, "the vast bulk of claims is asserted against one side, namely Iran, clearly it is the Iranian side that must display the greater concern as regards the attitude of the third-country judges."

790 See *ITT Industries v. Iran*, Award No. 47-156-2 (26 May 1983), reprinted in 2 Iran-U.S.C.T.R. 356, at 357, Note by Dr. Shafie Shafeiei Regarding the Concurring Opinion of George H. Aldrich.

791 Trooboff, *supra* note 696, at 297.

792 *Phillips Petroleum v. Iran*, Award No. 425-39-2 (29 June 1989), reprinted in 21 Iran-U.S.C.T.R. 79, at 196, Statement by Judge Khalilian.

> would hope that such an award which is, as set forth above in this Opinion, devoid of legal reasoning and legal justification, will not be held up as a precedent in the Tribunal's future proceedings.[793]

This proposition can be tested by observing the citations of majority (as opposed to unanimous) awards and decisions as they in later decisions. In this respect, it appears that majority awards were cited nearly twice as often in subsequent IUSCT awards, and nearly four times as often when counting subsequent citations from individual opinions.[794] The very award that arbitrator Khalilian hoped would not be seen as a precedent eventually was one of the most cited in later awards from the Tribunal. This is in line with Chapter III above, which found no evidence that majority decisions are less cited or relied upon than unanimous ones. (There is likewise no clear evidence that dissenting opinions in investment arbitration result in higher chances of annulment or set aside.)

It is impossible to rule out that opinions lessen the authoritativeness of a particular decision, but additional effects might balance this corrosive impact. In particular, providing the majority of the court or tribunal is mindful of the legal strength of its reasoning and decision, decisions that are accompanied by individual opinions might actually be better reasoned, in order to answer the points from which these opinions sought to depart.[795] And indeed, non-unanimous awards at the IUSCT are nearly three times longer than unanimous awards in the Dataset, running to 9,500 words on average against 3,500 words for unanimous awards.[796]

It is unclear, however, in what direction the causation goes – as more difficult cases might entail both higher chances of dissent and higher length. As can be seen in Table 15 below, the same relation between dissents and ruling length holds for the Iran-US Claims Tribunal and for WTO panels and arbitrations, but not, surprisingly, for investment awards:

	IUSCT	**INV**	**ICJ**	**WTO[797]**	**ITLOS**
Unanimous	1,890	28,500	(see below)	82,000	(see below)

793 *General Dynamics Telephone Systems Center v. Iran*, Award No. 192-285-2 (4 October 1985), reprinted in 9 Iran-U.S.C.T.R. 153, at 180, Dissenting Opinion of Hamid Bahrami.

794 Of course, cases prompting dissents are more likely to have higher-stakes or involve less well-settled legal issues, which are additional reasons why they would be further cited in future cases.

795 See S.A. Baker and M.D. Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran-United States Claims Tribunal* (Kluwer Law and Taxation 1992), at 154.

796 This concords with what can be observed at the United States Supreme Court and Federal Court of Appeals, for instance: see, respectively, A. Feldman, "An Opinion is Worth at Least 1,000 Word" (3 April 2018) *Empirical SCOTUS*, available at: https://empiricalscotus.com/2018/04/03/1000-words/; Epstein, Landes and Posner, *supra* note 772, at 105.

797 Most of the discrepancy is due to AB reports in this respect, which are more than twice as long in the (few) cases decided by majority; panel reports and arbitration awards are actually slightly longer when unanimous.

Majority	7.200	26,600		110,300	

Table 15: Length of unanimous and majority decisions

***Reading key**: IUSCT rulings taken unanimously number on average 1,890 words, while rulings taken by majority number on average 7,200 words.*

The situation for the ICJ and the ITLOS is slightly different: given the high number of judges (as opposed to arbitral tribunals' three members), and the participation of judges *ad hoc*, decisions are only rarely unanimous. The ICJ's practice of holding several votes on distinct questions in each decision also further muddies the waters. As mentioned above, it is possible to create a composite measure of consensus of ICJ judgments (i.e., an "unanimity ratio") on a basis of 100, such that judgments with unanimous votes on every question would score 100, while judgments decided by the casting vote of the president would score 50.

On this measure, as seen in Figure 12 below, the relation between the number of negative votes (reflected in a unanimity ratio closer to 50) and the length of a judgment (reported in the number of print characters) is interesting. Longer judgments are for the most part associated with votes in which the dissenters represent 10 to 25% of all judges voting – in short, judgments will tend to be longer in cases where a strong majority is answering a non-negligible minority.[798] Remarkably, this is in line with the finding of Chapter III above that the same kind of judgments at the ICJ (i.e., not unanimous nor split 50/50) tends to be ever-more-so authoritative in the jurisprudence.

798 This might, once again, be due to the ICJ's peculiar procedure, where a decision's every sentence is reportedly discussed and reviewed by the entire bench. In these circumstances, decisions adopted by a short majority will tend to hew closely to the most basic elements of a case and will not engage in additional considerations and *obiter dicta* – these will be left to concurring opinions.

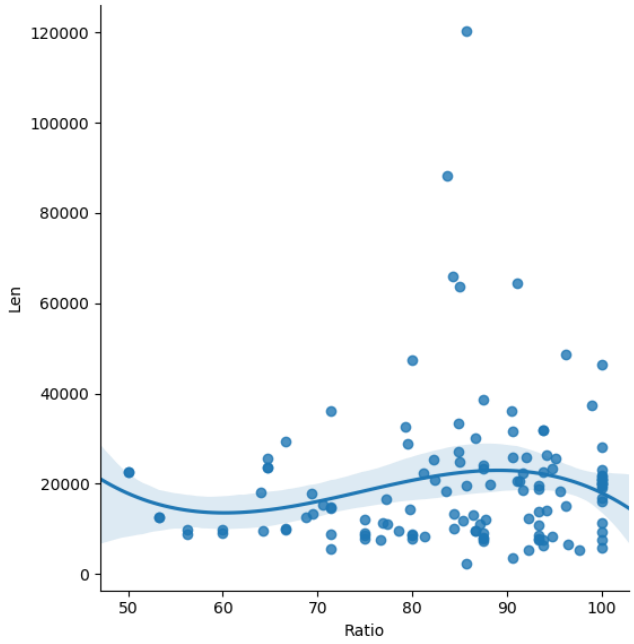

Figure 12: Length of ICJ judgments (y-axis) per ratio of unanimity (x-axis)

Individual opinions as future authorities

Judges might also write individual opinions to steer and inform an ongoing legal debate, with the intention of becoming an authority for the future. If so, there is likewise limited evidence that this goal has ever been reached (regardless, of course, of some isolated opinions that became authoritative). Indeed, courts and tribunals rarely cite individual opinions, and the practice is not without detractors.[799] In his (generally critical) account of the role of individual opinions in investment arbitration, Albert van den Berg for his part faulted the reliance of the *Helnan v. Egypt* tribunal on an individual opinion as an authority,[800] and remarked that:

> [t]he tribunal's reliance on this dissenting opinion is remarkable because there is a large number of precedents, representing unanimous or majority awards, that make the same point. Actually, in the alphabetical listing of investment awards, one need go no further than the As to find an example of a unanimous award that has been referred to many times in subsequent awards and literature: Azinian […].[801]

799 The tribunal in *Rompetrol v. Romania* was asked to opine on the authority of a "dissenting opinion in contrast to the Award itself", but step-sided the issue: see *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility (18 April 2008), at §85.

800 See *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award (3 July 2008), at §125.

801 See van den Berg, *supra* note 767, at 826, note 21.

This argument targeted *dissenting* opinions in particular, and there is some evidence that this kind of opinion generally commands lower authoritativeness. The fact that dissenting opinions contradicted a majority will indeed always serve as a ready argument to rebut them,[802] or to dismiss them as "not persuasive".[803]

In the US context, Epstein and Posner evaluated the benefit of dissenting opinions by the number of times they are later cited – and, on this measure, found that most dissents are hardly beneficial for future decisions.[804] Likewise, citations to individual opinions are not unusual in the Dataset, yet confined nearly exclusively to other opinions and pleadings. By and large, they are not cited in majority judgments and awards, with a few exceptions.

For Robert Kolb, "all [ICJ] judges [should] realise that the influence of their opinions is often in inverse proportion to their length."[805] And indeed, the most cited opinions are not necessarily the longest or the most comprehensive. While short opinions (or "Declarations" in the ICJ's jurisprudence) are distinctively under-cited, the most cited separate and dissenting opinions all have between 5,000 and 20,000 words on average; longer opinions are by comparison under-cited. Nor is the authority of opinions correlated with the propensity to write opinions: the most cited authors published less than 10 opinions. Judge Oda participated in around 50 opinions (either as sole author or as co-author), and most of these were never cited back in future ICJ judgments or opinions.

Most opinions are simply never cited at all: only 282 out of 785 dissenting opinions, and 252 out of 718 separate opinions are cited at least once. Out of these, only 105 are cited more than five times, nearly equally split between separate and dissenting opinions. Both types are as likely to be cited in future opinions, with each type attracting around 1.2 citations per opinion. As such, if dissenting opinions are meant to be less authoritative, this seemingly does not affect the number of citations they attract. While there is a debate over the qualification of these opinions as "judgments" or as some kind of especially authoritative teachings,[806] it seems in fact that individual opinions are cited less often, and with less authority, than some teachings.

802 See, e.g., *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Award (30 August 2018), at §256.

803 As the *Methanex v. USA* tribunal held of the dissenting opinion of Eric Schwartz in *S.D. Myers v. Canada*: see *Methanex Corp. v. United States of America*, UNCITRAL, Preliminary Award on Jurisdiction and Admissibility (7 August 2002), at 143.

804 See Epstein, Landes and Posner, *supra* note 772, at 106: "We assume that the benefit of dissenting derives from the influence of the dissenting opinion and the enhanced reputation of the judge who writes the dissent. We proxy this benefit by the number of citations to the dissenting opinion." The authors' second possible benefit, a higher chance of the case being granted *certiorari* by the US Supreme Court, does not apply in the international context.

805 See Kolb, *supra* note 786, at 1017.

806 See Chapter III *supra*, note 511, and the associated quote.

2. The Opinionated

The two strategic motives just identified – undermining the authority of a majority opinion or create an authority for future cases – are not the only (non-exclusive) reasons to write an individual opinion. A third possibility is that opinions are meant to raise the profile of the dissenting or concurring judge, or of a group of judges as opposed to the entire court or tribunal. Can this be observed in the citation practice of these judges?

A) Sociology

Individual judges have different approaches when it comes to citing authorities.[807] To the extent authors of opinions write in their semi-individual capacity (i.e., writing as *members* of courts and tribunals, but not as the Court or Tribunal itself), their opinions allow to check the role of authorities in influencing particular types of decision-makers, in a way that the semi-anonymity of multi-members majority decisions cannot. In short, since "different actors will rely on different sources, which better match their arguments",[808] the sociology of the citer should influence what will eventually be cited.[809]

When the drafters of the PCIJ Statute discussed whether to allow judges to append individual opinions to the judgments of the Court, one of the main axes of the debate was based on legal culture and education: individual opinions were understood to be associated with Common Law lawyers, and therefore alien to Civil Law judges. A look at a list of authors of individual opinions nowadays indicates that this dichotomy does not hold very well for the authoring of opinions. As seen below, it remains however relevant to the practice of *citing* in opinions.

The importance of the nationality of individual judges and arbitrators should indeed not be overstated. For instance, the proportion of judges from a given UN Group authoring an opinion at the ICJ or at the ITLOS tracks remarkably well the proportion of judges sitting on these two bodies'

807 See R. Higgins, "Remarks of Rosalie Higgins" (2011) 105 *American Society of International Law Proceedings*, at 217, noting that "some judges on a particular point of law will always want citations of as many as possible of the previous cases where we've decided that point. Others will say, 'No. One will do. We're here just to decide a case. Just mention the last one.'"

808 See T. Schultz and N. Ridi, "Arbitration Literature", in Thomas Schultz and Federico Ortino (eds.), *Oxford Handbook of International Arbitration* (Oxford University Press 2019).

809 See A. Roberts, *Is International Law International?* (Oxford University Press 2017), at 85, discussing empirical studies that demonstrate that domestic judges are more likely to cite sources from the place of their degree.

benches, as Table 16 indicates. A judge's gender seemingly has also little relevance in this context, although the overall extremely low number of female judges prevents clear conclusions.

	ICJ				ITLOS			
	In decisions		*In opinions*		*In decisions*		*In opinions*	
	#	%	#	%	#	%	#	%
Eastern Europe	588	14.17	164	11.59	194	11.76	21	9.59
Latin America and Caribbean	591	14.24	198	13.99	289	17.52	42	19.18
Asia Pacific	701	16.90	257	18.16	338	20.48	33	15.07
Western European and Others	1529	36.85	511	36.11	474	28.73	78	35.62
Africa	740	17.84	285	20.14	355	21.52	45	20.55

Table 16: Judges on bench and authoring opinions per geographical origin

	ICJ				ITLOS			
	In decisions		*In opinions*		*In decisions*		*In opinions*	
	#	%	#	%	#	%	#	%
M	3963	95.52	1346	95.12	1618	98.06	213	97.26
F	186	4.48	69	4.88	32	1.94	6	2.74

Table 17: Number of judges on bench and authoring opinions per gender

The distinction between Common Law and Civil Law tradition should likewise not be overstated, given that with few exceptions, all judges in the Dataset are prone to cite precedents and authorities in their opinions. Where they tend to differ, however, is in the extent to which they cite and rely on authorities: at the ICJ, the list of the top citers (in terms of number of citations per 1,000 words) is populated with judges hailing from Common Law jurisdictions, whereas the bottom of the same list mostly hails from Civil Law ones. (These judges also tend, on average, to write shorter opinions).[810]

Rank	Name	Citation per 1k words	Nationality	# Opinions	Total Words
Top 10	ALFARO	6.0	Panama	2	5,498

810 This can be compared with the findings of J. Hsiang and J. Nyarko, "Precedent Citation at the WTO-Shifting the Empirical Focus to Panelists" (2016), available at http://acle.uva.nl/binaries/content/assets/subsites/amsterdam-center-for-law--economics/conferences/celse-2016/conference-papers/session-iii/paper-hsiangnyarko-2016.pdf?1466066673136, at 19, that there is no observable differences at the WTO in the use of precedents in panel reports between Common law and Civil law-hailing chairs.

	HIGGINS	5.4	United Kingdom	23	79,938
	CRAWFORD	4.3	Australia	3	13,349
	JESSUP	3.6	United States	9	199,026
	MAVUNGU	3.6	Congo (DR)	2	14,888
	S. RAO	3.5	India	1	8,891
	DE CARA	3.5	France	1	11,007
	XUE	3.2	China	10	28,037
	SHAHABUDDEEN	3.2	Guyana	23	176,190
	TRINDADE	3.1	Brazil	29	691,877
	DONOGHUE	3.0	United States	13	55,595
	[…]				
Bottom 10	TANAKA	0.4	Japan	6	119,755
	FORTIER	0.4	Canada	2	5,712
	BASDEVANT	0.4	France	8	22,663
	STASSINOPOULOS	0.4	Greece	2	7,927
	ALVAREZ	0.4	Chile	11	40,289
	FERNANDES	0.3	Portugal	1	9,630
	SORENSEN	0.3	Denmark	2	15,670
	HOLGUIN	0.2	Colombia	1	8,290
	DAUDET	0.2	France	1	4,698
	BUSTAMANTE	0.2	Peru	8	76,823
	CORDOVA	0.2	Mexico	3	12,646

Table 18: Most and least frequent citers at the ICJ

Related to nationality and legal background, ideology[811] can also weigh in a judge's inclination to pen an opinion and cite authorities.[812] In another paper, for instance, I noted how Iranian judges at the Iran-US Claims Tribunal were less likely to cite precedents from the International Court of Justice, and suspected that this was related to the Tribunal's generally diminished reputation in the 1980s to the eye of non-Western countries.[813]

811 See the example of the socialist judges as related in K. Grzybowski, "Socialist Judges in the International Court of Justice" (1964) *Duke Law Journal* 536, at 536.

812 See, e.g., M. Waibel and Y. Wu, "Are arbitrators political?" (2011) LawEcon Workshop Bonn, available at: http://www-bcf.usc.edu/~yanhuiwu/arbitrator.pdf.

813 See D. Charlotin, "A Data Analysis of The Iran-US Claims Tribunal's Jurisprudence – Lessons for International Dispute settlement Today" (2019) 10 *Journal of International Dispute Settlement* 443.

Lastly, there is evidence that decision-makers are more likely to rule in favour of their appointed party.[814] This makes strategic sense: in a context where parties have a say in appointing the decision-maker (and thus, a context characterised by a principal-agent relationship), parties typically go to great lengths to select adjudicators that will support their views.[815]

In this context, it could be expected that decision-makers would favour the party appointing them by voting in its favour and/or penning an opinion that support that party's views. The empirical data supports this theory, as on average judges appointed by a party at the ITLOS or the ICJ devote more of their citations to the authorities cited by the party appointing them, and especially to the authorities cited *only* in the submission of the appointing party.

This principal-agent relationship has another consequence for *ad hoc* judges at the ICJ, whose separate (but, intriguingly, not dissenting) opinions and declarations are on average typically and distinctly longer in terms of words than opinions from permanent judges. Beyond displaying support for their appointing party (virtually all opinions by *ad hoc* judges are in favour of the appointing party), this might also reflect an attempt, at least for some of those judges, to be re-appointed permanently to the Court by showcasing their skills and knowledge.

Type Judge	Declaration	Dissenting	Separate
Ad Hoc	2,396	4,706	17,007
Not Ad Hoc	1,421	9,365	6,187

Table 19: Average length of opinions for ad hoc judges

B) Topics

Opinion-writers seemingly dedicate their opinions to a carefully selected number of topics, as the majority of the citations found in these opinions relate to a handful of topics they keep coming back to.

The topic analysis collected around 91 different topics of international law in the Dataset. Yet, for the vast majority of judges who wrote individual opinions, more than 50% of their citations was dedicated to one or two topics only, and none of them dedicated more than 50% of their citations to more than 6 topics. These topics, far from being pet causes, are often among the most discussed

814 See the results in E. Posner and M. de Figueiredo, "Is the International Court of Justice Biased?" (2005) 34 *The Journal of Legal Studies* 599.

815 See the discussion and examples noted in Rogers, *supra* note 774, at 251 *et seq.*

topics in decisions (questions of [Interpretation], for instance, or the law on [Delimitation]), although a few individual judges also use the space of their individual opinions to discuss topics that are less likely to figure in the Court's majority decision. (Judge Cançado Trindade, for instance, is rather fond of discussing questions of [Human Rights] – a topic that is rarely found in majority decisions at the ICJ.)

C) Relationships

A review of the citation practice of individual judges indicate that judges, to the extent they cite anything, are relatively fond of citing other opinions.

There are 833 citations in the Dataset *between* individual opinions at the ICJ, and 45 at the ITLOS.[816] Figure 13 below is a network analysis based on these citations, which sheds light on who cites whom in these individual opinions, and which judges develop particularly authoritative positions in the view of their colleagues.[817]

In another paper, I retraced how judges at the Iran-US Claims Tribunal mostly cited opinions of their co-nationals; I interpreted this practice as a strategy designed to create a bloc of self-supporting jurisprudence.[818] In the network analysis of the broader Dataset, Iranian judges at the IUSCT have the highest scores in terms of "clustering coefficient" – i.e., the tendency to cluster together (in citations) as opposed to citing beyond their cluster. This also shows in their semi-detached position in Figure 13.

There are no equivalent tight clusters of judges in other fora. As indicated by node size (which depends on PageRank), the most authoritative judges often hail from the "Western European and Others" group at the United Nations (the pink nodes). Within this group, judges from the US and the UK – two countries with a strong tradition of individual legal opinions – stand out as well.

816 Citations from opinion to opinion in investment arbitration decisions were too few to be of use in this part.

817 More precisely, citations between individual judges of joint opinions were dis-amalgamated for sources and targets of citations. For instance, there are 8 different links (2 * 4) for the citation of the Joint declaration of Judges Shi and Koroma in the *Application of the Genocide Convention* case to the Dissenting Opinion of Judges Guerrero, Sir Arnold McNair, Read, Hsu Mo in the *Reservations* advisory opinion.

818 See Charlotin, *supra* note 813.

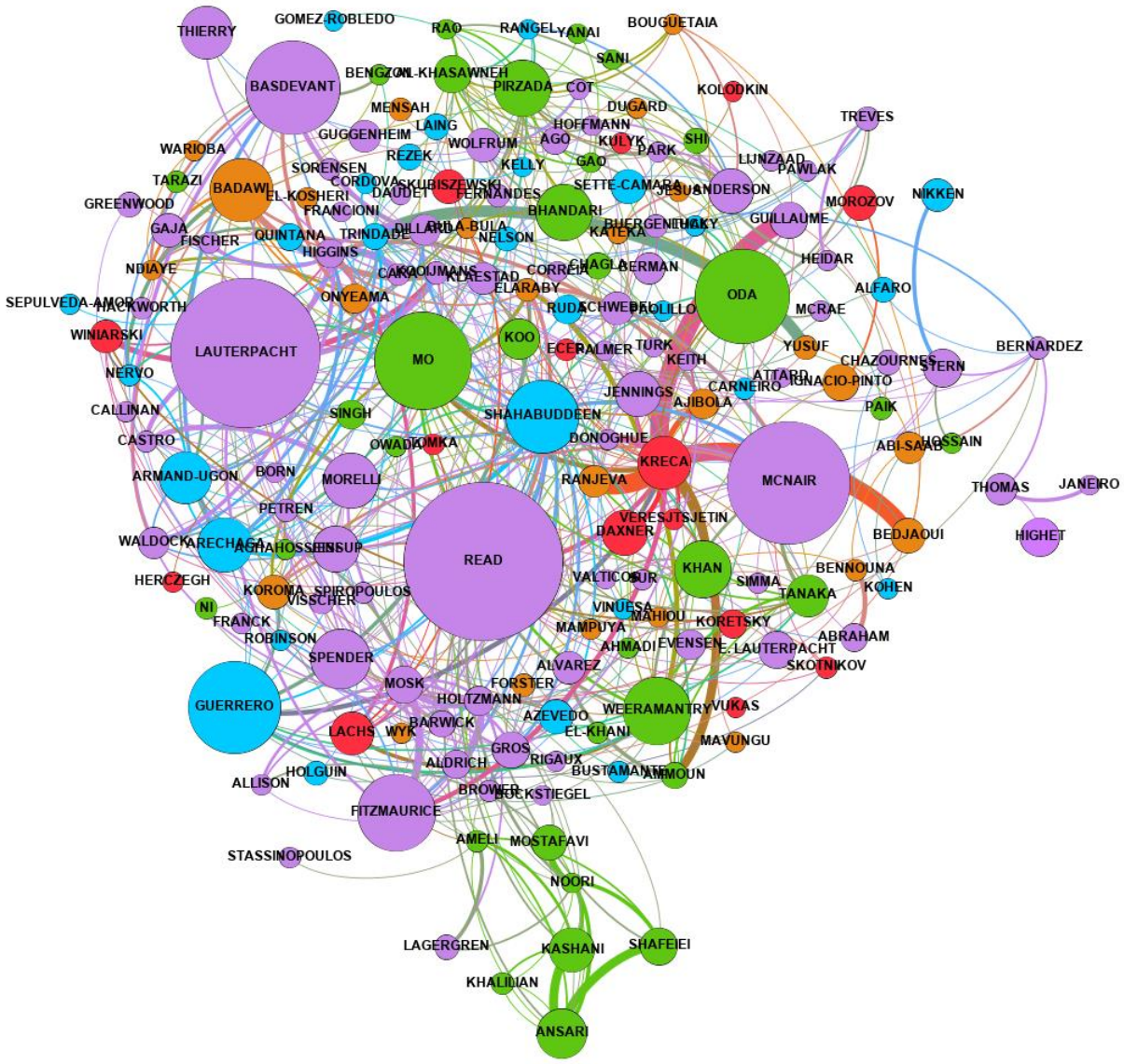

Figure 13: Individual opinions network, by UN Group[819]

A modularity analysis[820] of this latter graph indicates distinct boundaries between ITLOS opinion-writers (orange, on the top side of the graph) and ICJ ones, with some degree of overlap: Judge Oda's opinions in cases involving law of the sea matters have often been cited by ITLOS judges, making him a member of that class, for instance.[821] IUSCT judges, meanwhile, are understood (by

819 Pink nodes are judges from the "Western European and Others" UN group; green from the "Asia Pacific" group; blue from the "Latin America and Caribbean" group; Orange from the "Africa" group; and red for "Eastern European" group.

820 Modularity Analyses are explained above in Chapter II *supra*, at p. 69.

821 Something he might not have predicted: see S. Oda, "The International Court of Justice Viewed from the Bench" (1995) 244 *Recueil des Cours – Académie de Droit International de La Haye* 23, at 144.

the modularity algorithm) as being closer to a subset of ICJ judges, centred around Judge Fitzmaurice.[822] The few citations to individual opinions in investment arbitration suffice to create a modularity class in itself (in green) – although one that is not related to the IUSCT, in sharp contrast with investment awards (who cite IUSCT award profusely). For the rest, modularity classes seem based to a large extent on the judges' terms on the Bench, as they are indeed more likely to cite judges in contemporary cases than in older cases.

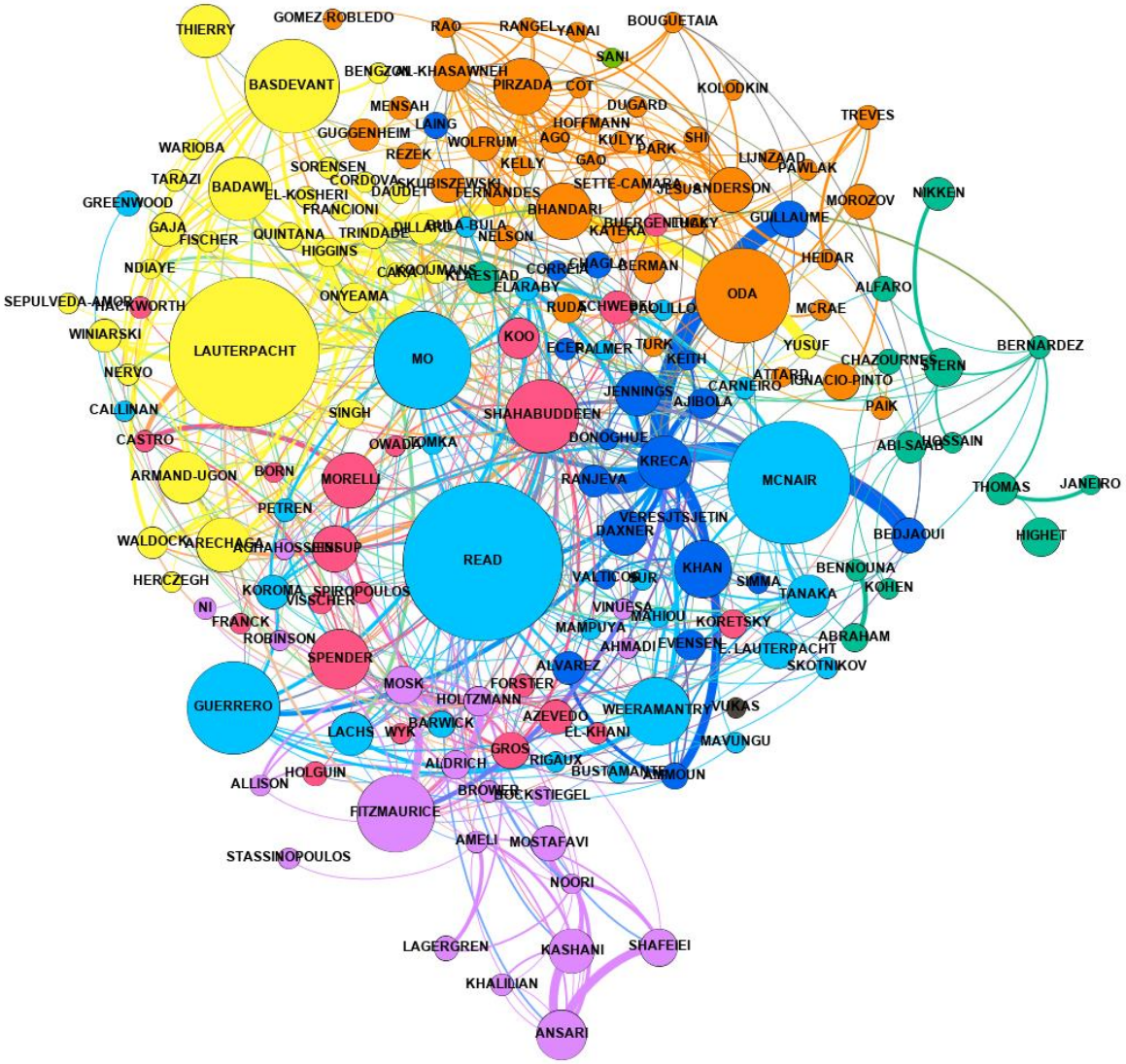

Figure 14: Individual opinions network, by modularity

822 IUSCT judges notably cited Judge Fitzmaurice's separate opinion in *Barcelona Traction*.

D) Self-citing

It is not only other judges that opinion-writers cite; sometimes, they only cite themselves.

The Dataset contains more than 350 self-citations of this kind, be it to prior individual opinions (individual or joint) or to doctrinal teachings by a given judge. At the ICJ, Judge Oda's inclination to cite himself did not go unnoticed,[823] and indeed with 39 self-citations he takes the second place of the podium. The first place belongs to Judge Cançado Trindade – although most of the citations in his individual opinions are to his own writings rather than his previous opinions.

Judges	Self-Citations to Teachings	Self-Citations to Individual opinion
Trindade	178	25
Oda	5	33
Fitzmaurice		17
Kooijmans		16
Gros		11
Weeramantry	4	6
Schwebel	1	6
Bula-Bula	2	4
Lauterpacht		5
Kreca		4
Mavungu	2	2
Simma	4	
Ahmadi	3	
Castro		3
Donoghue		3
Hackworth	3	

Table 20: Top 15 of judges citing themselves

823 See Kolb, *supra* note 786, at 1015.

***Reading key**: 203 citations of Judge Cançado Trindade were to himself, 178 to his writings and 25 to his own past opinions.*

Nearly all judges listed in Table 20 have sat at the ICJ – the practice is simply rarer in other fora (except at the IUSCT), certainly because the number of individual opinions is much lower and the practice of writing them less well-ingrained. This pattern concords with the authoritativeness of individual opinions in general, which are rarely cited in investment arbitration or even at the IUSCT, but distinctly more important in ICJ proceedings. The judges listed in Table 20 also score higher on average in terms of their authoritativeness, or that of their opinions.

A look at the topics treated most frequently in these self-citations indicate a certain tendency for the most prolific judges to try to push a point or a legal proposition that is dear to them. For the majority of the 15 judges above, the main topic of their self-citations matched the main topic that prompted all of their non-self-citations. Thus, Judge Fitzmaurice cited several times his joint dissenting opinion with Sir Percy Spender in the *South West Africa* case when questions related to the League of Nations' [Mandate] System came back to the fore in the *Namibia Advisory Opinion*. Meanwhile, a full 90% of all self-citations by Judge Cançado Trindade bear on questions of [Human Rights] – indeed the main topic of his individual opinions in the Dataset.

3. The Opinion

A) Contrast with majority judgment

A first contrast between individual opinions and decisions is that the former cite a broader scope of authorities. Individual opinions for instance cite to more external authorities, and more scholarship than majority opinions. It is as if the reluctance of courts and tribunals to cite teachings was counterbalanced by the greater liberty of individual writers to do so.[824] Opinions, indeed, "have a character and individuality which cannot be expected of decisions or opinions embodying the combined views of some ten or twelve judges."[825]

824 As noted in J. Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 2012), at 43.

825 See G. Fitzmaurice, "The Law and Procedure of the International Court of Justice: General Principles and Substantive Law" (1950) 27 *British Yearbook of International Law* 1, at 2.

The Dataset bears witness to this reality, as the proportion of external precedents[826] (column "Ex" below in Table 21) is nearly always higher in dissenting and separate opinions.

	ICJ		INV		ITLOS		IUSCT		WTO	
	/	Ex	/	Ex	/	Ex	/	Ex	/	Ex
Dissent	99	1	94	6	75	25	94	6		
Decision	100	0	95	5	51	49	98	2	100	0
Separate	99	1	89	11	76	24	87	13		
Pleadings	96	4	94	6	25	75			100	0
Pleadings (in decision)			97	3			92	8	100	0

Table 21: Proportion of external precedents in citations

***Reading key**: At the ICJ, around 1% of all citations to precedents in dissents are oriented towards non-ICJ precedents, while there is next to no such citation in ICJ decisions.*

This broader range of authorities might explain why the authorities cited in dissenting and concurring opinions are usually *older* on average than those cited in majority decisions, as seen in Table 13 in the preceding Chapter. This is also consistent with a model in which opinion writers are freer to engage with a larger set of materials in explaining their vote or their disagreement with the majority decision.

B) Contrasts between "dissenting" and "separate" opinions

What are the differences between dissenting and separate opinions?

A preliminary point is in order: adjudicators are generally free to label their opinions as they think fit, and there are no standard criteria in this respect. Some concurring opinions, or even declarations, contain the most scathing criticisms of the related decision,[827] while certain dissents are so mild as to be cosmetic.[828] Separate opinions in particular are meant to reflect a "disagreement on reasoning but concurrence with result"[829] – a relatively awkward position that soon turns into a

826 I.e., authorities from outside a judge's own forum. See further Chapter VIII below.
827 See Mistry, *supra* note 765, at 297, and the examples cited.
828 See Fitzmaurice, *supra* note 825, at 21, giving the example of an opinion styled as "dissenting" but for the most part actually concurring with the majority decision.
829 See van den Berg, *supra* note 767, at 837. See also *ITT Industries v. Iran*, Award No. 47-156-2 (26 May 1983), reprinted in 2 Iran-U.S.C.T.R. 356, at 357, Note by Dr. Shafie Shafeiei Regarding the Concurring Opinion of George H. Aldrich.

certain kind of dissent. These considerations should colour the observations below, which rely on the way judges have themselves categorised their opinions in the various fora.

Dissents and separate opinions first differ in terms of tone and sentiment. Anand aptly advised that a dissent "should express disagreement without being disagreeable".[830] This seems to be a tough line to walk, however. "Disagreeableness" can be roughly assessed by calculating the average "sentiment score" of a text.[831] When comparing the score of dissents and separate opinions, the former are usually more negative (on average) than citing paragraphs in separate opinions.[832]

	ICJ	INV	ITLOS	IUSCT
Dissenting	0.051	0.054	0.073	0.041
Separate	0.07	0.075	0.068	0.064

Table 22: Average sentiment score of dissents, separate opinions and judgments

***Reading key**: Citing paragraphs in dissenting opinions at the ICJ have a sentiment score of 0.051, lower than separate opinions.*

Dissents are also distinctly longer than separate and concurring opinions. As Table 23 indicates, however, this length does not result in a higher number of citations, as the ratio between the number of citations and the length of their opinions is lower for dissents than for separate opinions. This could reflect either a greater willingness to engage with the facts of a case (which would not prompt citations), or a greater tendency to ramble. Alternatively, it could also reflect a practice for authors of separate opinions to expound on a broader range of reasons, including reasons that have no support in precedents and teachings, to decide as they did.

	ICJ		INV		ITLOS		IUSCT	
	Dissenting	*Separate*	*Dissenting*	*Separate*	*Dissenting*	*Separate*	*Dissenting*	*Separate*
Length	9681	6685	9593	4823	5651	4630	5923	2700
Citations per 1,000 words	1.22	1.78	2.11	2.18	1.11	1.49	1.77	4.12

830 See Anand, *supra* note 770, at 807.

831 In data science, sentiment analysis assigns a score ranging from -1 to +1 to texts, with lower scores reflecting more "negative" language and tone. The analysis was performed on citing paragraphs and not on the entire text of an opinion for the same considerations that informed the collection of topics (see above, Chapter II), but also because sentiment analysis works best on shorter snippets of text.

832 The differences are statistically significant for all fora, except for the ITLOS, the only fora where dissenting opinions are seemingly more positively-toned than separate ones.

Table 23: Length and number of citations per 1000 word

***Reading key**: dissenting opinions at the ICJ are 9681-word long on average, with 1.22 citations per 1,000 words.*

Prior studies have found that dissents at the US Supreme Court are more prone to cite scholarship.[833] This is also the case in dissents at the ICJ and ITLOS, but not for dissents in investment arbitration and before the Iran-US Claims Tribunal, where separate opinions contain more citations to teachings than dissents.

While the reasons for this discrepancy are not altogether clear, it might reflect a distinction between the existence of appellate mechanisms of some sort; the different expected audiences of different courts, as explained above in Chapter IV, might also play a role. Dissenting judges at the ICJ and ITLOS, addressing themselves to the entire assembly of states, might be more inclined to explain at some length (and quite academically) why a majority erred. By contrast, dissenters in investment tribunals could be more preoccupied with crafting a punchier argument, and hope to convince appellate authorities of the weaknesses in the majority's position.[834]

	ICJ		INV		ITLOS		IUSCT	
	Dissenting	*Separate*	*Dissenting*	*Separate*	*Dissenting*	*Separate*	*Dissenting*	*Separate*
ICJ	45	56	4	4	54	60	4	6
INV	0	0	83	68	/	/	0	1
ITLOS	0	0	/	/	18	19	/	/
IUSCT	0	0	1	2	/	/	70	50
WTO	0	/	0	1	/	/	/	/
Teachings	55	44	12	26	27	20	26	43

Table 24: Percent of all citations to specific sources per type of opinion

***Reading key**: citations to ICJ precedents amount to 45% of all citations in dissents at the ICJ*

833 See A. Feldman, "With a Little Help from Academic Scholarship" (31 October 2018) *Empirical SCOTUS*, available at: https://empiricalscotus.com/2018/10/31/academic-scholarship/

834 Not to mention that judges at the ICJ and ITLOS are more likely to benefit from more time and resources (in terms of research assistance, notably) than *ad hoc* arbitrators in writing their opinions.

Table 24 also indicates that separate opinions in investment arbitration cases and at the IUSCT are much more likely to dedicate a substantial part of their citations to external precedents. However, this is not necessarily associated with separate opinions broaching a broader range of topics, as in both dissenting and separate opinions, the same number of unique topics account for the majority of citations. The above-average interest for non-forum citations in these separate opinions is accordingly unlikely to be an attempt to bring external topics into the jurisprudence – but rather more to inform their review of the case at hand with the experience of other fora.

4. Conclusions

Individual opinions (in the fora that allow them) have distinct citation practices, reflecting the greater freedom and idiosyncrasies of the judges who write them. In particular, the authorities cited in these opinions are broader in scope, age, or nature. There is no clear difference in this respect between dissenting and separate opinion, perhaps reflecting the fact that the distinction between these two types of opinions is itself to some extent artificial.

Judges are however relatively likely to cite themselves, or to cite other judges. In so doing, they might pursue a strategic agenda to build up a set of common jurisprudence to which they can later rely. A similar strategic motive might underlie the practice of some judges to *self-cite*, notably when dealing with topics on which these judges intend to develop an expertise.

These findings could support the view that the motives to write an opinion are, at least partly, to raise one's profile, maybe in view of further appointments.[835] The quality of the legal reasoning, in this respect, might not matter too much: as explained, there is no indication in the dataset that a dissent has an impact on the authoritativeness of the majority's decision, nor that an individual opinion is likely to gain much authoritativeness itself. Most of the few citations to individuals opinions in the Dataset are found in other opinions, as well as in the pleadings of the parties.

835 I reviewed such an hypothesis for investment arbitration, and found evidence that writing an opinion does indeed correlate with increased appointments down the line – though not necessarily with increased *partisan* appointment: see D. Charlotin, "Separate Opinions and Appointments in Investment Arbitration: Signalling and Crystallisation" (22 February 2018), available at https://medium.com/@damien.charlotin/separate-opinions-and-appointments-in-investment-arbitration-signalling-and-crystallisation-1f5e838542c3.

Chapter VI – Citing authorities in pleadings

Citing is not a practice specific to international law decisions and the opinions appended to them, but a ubiquitous feature of international dispute settlement, as evidenced by the fact that parties commonly cite authorities in their pleadings and submissions.[836] If anything, authorities are even more important for parties than for courts and tribunals: parties will often try to rebut an unfavourable argument by challenging the authorities supporting it, and rarely miss a chance to point out when no authority is supporting the opposing party's case.[837] Parties (or at least, their counsel) likewise spend time and resource monitoring legal developments for more authorities and chances to sail on favourable jurisprudential and doctrinal winds.[838] Some parties even engage in strategic moves that will *create* favourable authorities for future use.[839]

And yet, the use of authorities by disputing parties in international dispute settlement has been frequently overlooked by the literature, which tends to focus unhealthily on courts, tribunals and individual adjudicators. All too often, international legal scholarship implicitly proceeds on the assumption that international courts operate in a vacuum; that these court's conclusions emerge all formed from the Olympian foreheads of the men and women on the bench. This approach overlooks that every case has been argued – sometimes exhaustively – before being decided, and as such "only

836 See, e.g., Appellate Body Member Ricardo Ramírez-Hernández, Farewell speech, 21 May 2018, available at https://www.wto.org/english/tratop_e/dispu_e/ricardoramirezfarwellspeech_e.htm: "I've never seen a [WTO] Member who has not argued its case based on previous case law."

837 See *Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award (25 July 2017), at §801, where the tribunal preferred the submissions of the claimant's experts over Venezuela's because the former made "abundant and relevant reference to the financial literature, including to the opinions of renowned experts like Damodaran and Copeland, while the experts of [Venezuela] relied on subjective appreciations […]" (translation from original Spanish.)

838 *China Heilongjiang International Economic & Technical Cooperative Corp., Beijing Shougang Mining Investment Company Ltd., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia*, PCA Case No. 2010-20, Award (30 June 2017), at §64, describing the tribunal setting up a "procedure for the Parties to introduce additional legal authorities in light of the extended time since the Parties' written submissions."

839 See, e.g., M. Daku, K.J. Pelc, "Who Holds Influence over WTO Jurisprudence" (2017) 20 *Journal of International Economic Law* 233, finding that the language used in some pleadings is later adopted by panel reports; on this criteria, wealthier, more litigation-seasoned countries exert much more influence over the content of WTO law irrespective of their record in winning the merits.

captures part of the picture."[840] A full account of the importance of authorities in international dispute settlement simply cannot ignore their use by parties to international proceedings.

The following pages sketch the outlines of such an account. Just as with decisions and opinions, there are specific reasons and strategic considerations behind the citations to authorities in pleadings and other written submissions – the topic of **section 1** below. **Section 2** then tries to assess the weight of authorities in adjudicating a case on the merits. A **third and last section** will mention the use of pleadings *as* authorities.

1. Strategic argumentation from authority

A) No pleadings without authority

It is the rare written submission now that cites no authority at all in support of what a party seeks from a Court or a tribunal. The ubiquity of legal authorities in pleadings does not only stem from a general practice adopted by parties, however: citations and recourse to authorities are sometimes explicitly required of them. Some tribunals explicitly ask parties to explain their positions on some legal matters and to "refer to apposite authorities."[841] Given these expectations, parties will sometimes explicitly acknowledge and explain why they have been unable to cite anything.[842] As seen in Figure 15 below, the proportion of pleadings documents with at least one citation has been steadily growing for the past 20 years.

840 S. Sivakumaran, "The Influence of Teachings of Publicists on the Development of International Law" (2017) 66 *International & Comparative Law Quarterly* 1, at 29: "Citation by States in pleadings is equally important but more frequently overlooked."

841 *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Procedural Order No. 5 (4 June 2018), on post-hearing briefs, at 1(i), but also at 5, 6. Questions from the tribunal included, at 1(ii): "Is there any NAFTA or other authority directly answering the foregoing questions either in the affirmative or the negative?" or at 1(iii): "Please identify the NAFTA or other authorities addressing the question of […]."

842 See, e.g., in *Dunkwa Continental Goldfields Limited & Continental Construction and Mining Company Limited v. Ghana*, ICC Case No. 18294/ARP/MD/TO, Final Award (30 July 2015), at §180, the Respondent "explain[ing] that it cannot point to a precedent for the application of the principle in a case such as this, because the Claimants' case is so unorthodox."

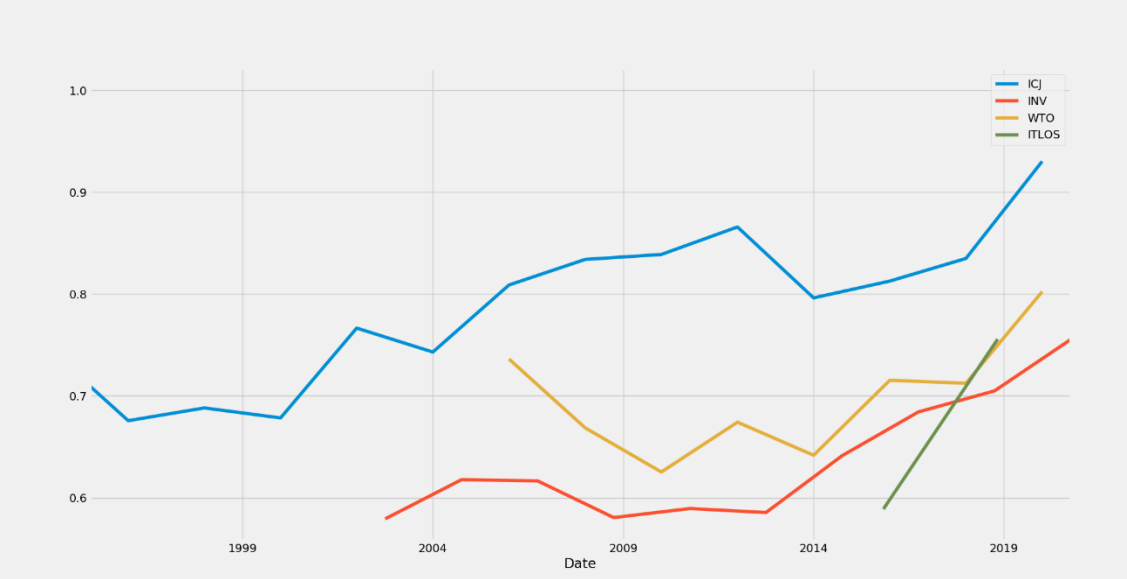

Figure 15: Percent of pleadings documents with at least one citation

This is to be expected. As mentioned above, authorities "redistribute argumentative burdens"[843]: they often represent focal points and signals around which the parties will frame their debate. Consider for example the scope of MFN clauses in investment arbitrations, and the opposite positions represented by the awards in *Maffezini v. Spain* and *Plama v. Bulgaria*. The role of authorities in such circumstances is often to clarify the intellectual and jurisprudential lineage of the solution advocated by a party.

Failing to cite a satisfying authority – or indeed, to cite *any* authority – readily becomes a chief argument to reject a party's contention. In *Olin v. Libya*, for instance, the tribunal dismissed an argument from Libya by noting that "[…] the Respondent's arguments in this respect: a) Are not supported by any legal authorities; […]."[844] Alleging that the other party's position is not backed up by proper authorities is a common argumentative device.[845]

843 See A. von Bogdandy and I. Venzke, "The Spell of Precedents: Lawmaking by International Courts and Tribunals", in Cesare Romano, Karen Alter and Yuval Shany (eds.), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013), at 504.

844 See *Olin Holdings Ltd v. Libya*, ICC Case No. 20355/MCP, Award on Jurisdiction (28 June 2016), at §164(a).

845 See *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Panama's Reply on Expedited Objections (7 August 2017), at §9, noting that "Claimants' second assertion […] like their first, is unaccompanied by citation […]".
On the other hand, excessive reliance on authorities can also being criticised. See, e.g., *UP (formerly Le Chèque Déjeuner) and C.D. Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award (9 October 2018), at §86.

Parties are therefore likely incentivised to *over*-cite authorities, lest they miss out on the one authoritative source that will win them the argument.[846] If the determining weight of any given authority is, on average, rather low (in the sense that it is the rare authority on which the entire case hinges[847]), their combination can however be more than the sum of their parts. If, as seen in Chapter III, consistency and unanimity are important features of authoritativeness, piling up authorities should reap authoritativeness harvests.[848] Besides, citing several authorities will reassure the adjudicator that an argument has been thoroughly and exhaustively briefed.

All these strategic pressures explain why parties are significantly more likely to cite a large number of broad authorities in support of their reasoning, compared with courts and tribunals and individual judges. This "kitchen-sink" approach to citations is evidenced by the fact that around 55% of the paragraphs in the pleadings Dataset cite *more* than one authority.[849] This approach might also explain why, as evidenced in Table 9 above (at p. 150), only a portion of the parties' authorities find their way into a final decision. In this respect, citations by one side of a dispute might prompt more citations by the other side: in any given case, there is a very strong correlation (R^2 of 0.83) between the number of citations in claimants' and respondents' pleadings. As explained below, however, only a portion of citations between the two sets of pleadings are generally shared between the parties, indicating that each party is likely to match the other party's level of citations by citing anything – and not necessarily the authorities cited in the other parties' pleadings.

846 J. Crawford, A. Pellet and C. Redgwell, "Anglo-American and Continental Traditions in Advocacy before International Courts and Tribunals" (2013) 2 *Cambridge Journal of International & Comparative Law* 715, at 13. See also the passive-aggressive observations of the tribunal in *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award (27 March 2007), at §88: "the transcript is 485 pages long"; "[t]he file occupies about five meters of shelf length".

847 This is reflected in the approach of some adjudicator to some authorities, whereby they wo not necessary read them entirely but work on the basis of rough familiarity. See, e.g., the comments of the Chair in *Zbigniew Piotr Grot and others v. Republic of Moldova*, ICSID Case No. ARB/16/8, Hearing on Jurisdiction and the Merits – Transcript, Day 1 (11 December 2017), at 34:10-14: "We have read everything. We have read the pleadings, we have read the exhibits, we have read the reports, we have read the witness statements. We are generally familiar with the authorities, and you can proceed on that basis."

848 See an interesting example in the set aside proceedings of the international award in *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award (13 December 2017). The Swiss Federal Tribunal recounted that the investor had allegedly criticised the state for citing a single authority in support of its definition of "investment". The state then cited several authorities in reply and in defence. Remarkably, however, the Swiss judges found that DT never actually made this argument, and that India had just overreacted: see No. 4A_65/2018, Judgment of the Swiss Federal Tribunal (11 December 2018), at 3.2.1.2.4.

849 This proportion however tracks the same measure in judgments and opinions, which also typically cite two or more authorities in 50% (the ICJ) to 65% (the IUSCT) of their paragraphs.

B) Ignoring authorities relied on by the other party

Discussing authorities, like citing them, is costly. Parties need to spend resources researching ways to convincingly distinguish an adverse authority, or to find some other way to challenge the opposing party's reliance on this adverse authority.

They might sometimes be inclined to ignore them instead. Consider the following submission by Mexico in an investor-state arbitration, which is quite telling as to how parties see authorities as strategic tools in support of their argumentation:

> Finally, the Respondent notes that, in their submissions regarding Mexico's objection to registration, the Claimants relied on several arbitral decisions and awards for their contention that the requirements under Article 1121 are merely procedural and can be cured at a later stage of the proceedings. Mexico has a response for each of them, but will not elaborate upon them here unless the Claimants reaffirm their reliance on them in their Counter-Memorial on jurisdiction. It simply bears noting that such arguments must be rejected because they violate the principle of *effet utile*, and also that the contemporary NAFTA jurisprudence and the consistent submissions of the NAFTA Parties together establish conclusively that Article 1121 must be applied as written.[850]

In short, Mexico declined to engage in an individual rebuttal of the authorities relied by the claimant; at the same time, however, the state indicated that it was relying on sources that are more authoritative than what the claimants managed to marshal. (Mexico eventually discussed these authorities in its Reply in this case; ultimately, the tribunal ruled in favour of the claimants.[851])

Yet, the practice of ignoring authorities can be dangerous. In the Dataset, when an authority in a decision is not cited by both parties (in other words, when an authority has been ignored by one of the two parties), that authority is more likely than not to have been introduced in the pleadings of the *prevailing* party. Given, besides, the importance that most courts and tribunals grant to authorities that are cited by both parties (as greater portion of which is cited in the final decision,

850 *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Mexico's Memorial on Jurisdictional Objections (30 May 2017), at §93

851 A divided tribunal eventually upheld jurisdiction over the case: see *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award (19 July 2019).

as seen in Table 9 above), parties are well advised not to miss the opportunity to discuss the authorities cited by the other party.

C) Challenging authorities

Given the now common reliance on authorities by international adjudicators, parties have an uphill challenge directly impugning an authority.[852] For parties inclined to take that route, however, there are roughly two avenues to do so.

First, criticisms often go to the substantial relevance of the authority, its persuasiveness writ large: an authority can be unpersuasive due to its intellectual merits, but also because it refers to a factual and legal situation that differs in one way or another. The second situation usually entails the process of distinguishing (or "reverse analogy"[853]). The idea is to lessen the challenged authority's *level* of authoritativeness.

A variant of this argument consists in pointing out that an authority does not say what it is purported to say. In *EuroGas and Belmont v. Slovakia*,[854] for instance, the tribunal faulted a claimant's for relying on only a (supportive) section of an (otherwise unsupportive) authority. In a twist, the tribunal later lent great weight to that authority (in its long form) in its own reasoning, observing that this authority's authoritativeness was established by the fact that both parties had cited it (although the claimants had only cited a portion).[855]

Some authorities are also sometimes challenged as simply not applicable because of their *nature*, regardless of their content. In other word, the goal of this type of argument is to deny *any* authoritativeness to the authority. This challenge is often framed in terms of "bindingness", a chief concept at play by international parties to distinguish between relevant and non-relevant authorities.[856] "Non-bindingness" notably took an important role in the answer of many investment tribunals to the European Court of Justice's ruling in *Achmea v. Slovak Republic*, with arbitrators unvaryingly insisting that the latter's authority was not binding upon them.[857]

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852 See von Bogdandy and Venzke, *supra* note 843, at 511: "since courts have an interest in consistency and only very seldom overrule earlier decisions, parties are well advised to try to give precedents another spin rather than to argue for their reversal."

853 M. Jacob, "Precedents: Lawmaking Through International Adjudication" (2011) 12 *German Law Journal* 1005, at 1028.

854 *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award (18 August 2017), at §413.

855 Jacob, *supra* note 853, at 1029.

856 See J. d'Aspremont, "Bindingness", in Jean d'Aspremont and Sahib Singh (eds.), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar Publishing 2018).

857 See, e.g., *United Utilities (Tallinn) BV (UUTBV) and AS Tallinna Vesi (ASTV) v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award (21 June 2019), at §498.

There is evidence that parties do challenge the authorities relied upon by the opposing party, especially if this authority is, usually, more favoured by this opposing party (as claimant or respondent) in terms of citations. Using the source of citations to an authority as a proxy, it is indeed possible to find claimant-favoured authorities and respondent-favoured authorities. These authorities, in turn, are cited differently by the different parties, as claimants tend to talk about respondents' authorities in more negative terms (e.g., these paragraphs have a lower sentiment score) and vice-versa.

		Authority favoured by	
		Claimant	**Respondent**
Paragraph by	*Claimant*	0.0527	0.0431
	Respondent	0.0432	0.0463

Table 25: Average sentiment score of paragraphs citing authorities

***Reading key**: Paragraphs found in claimants' pleadings discussing authorities more often cited by claimants have an average sentiment score of 0.0527, higher than paragraphs by respondents discussing the same claimant-favored authorities. Higher sentiment scores indicate a more positive tone in the text of these citations.*[858]

D) Sycophancy – does it pay?

Parties spend a lot of time vetting adjudicators to appoint, scouring hell, earth, and heaven to find any opinion he or she ever uttered.[859] But once that individual has been appointed, is it enough to trust him or her to stay faithful to his or her past opinions? The alternative is to try to strategically cite these past opinions in a given case, as a gentle reminder of the adjudicator's past inclinations.

This is not a not uncommon practice, as it represents 0.45% of all citations, and a full 2% of citations to teachings in pleadings. Without being necessarily obsequious, the idea is probably to

858 Differences in averages are statistically significant. Only citations to precedents are counted here, as there are few citations to teachings that are distinctly cited by one party over another.

859 C.N. Brower and C.B. Rosenberg, "The Death of the Two-Headed Nightingale: Why the Paulsson-van Den Berg Presumption That Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded" (2013) 29 *Arbitration international* 7, at 17.

work on the notion of consistency that, as demonstrated above (in Chapters III and IV), acts as a powerful factor in the authoritativeness of an authority.

A telling example can be drawn from the experience of the ICJ: Peru in the *Asylum* case cited the opposing party's *ad hoc* judge (and called him an "eminent author") as supporting its case.[860] This citation came in support of an *a contrario* argument to demonstrate that nobody, not even its hand-picked judge, would follow Colombia's arguments. Likewise, in *China Heilongjiang v. Mongolia*, the respondent enlisted on its side of the debate "the academic writings of Claimants' own counsel."[861]

This does not seem to be a fruitful strategy, however, as the rate of such citations when controlling for outcomes does not differ in systematic ways for any of the fora studied here. Sycophancy, it seems, does not pay – although it is not clear that it entails costs either.

A more widespread practice consists in citing authorities that merely *involved* one or more of the adjudicators in a given dispute: for instance, a precedent in which at least one of the adjudicators was already on the Bench. On this measure, around 14% of all citations by a party refer to a precedent or a writing related to at least one of the adjudicators on the Bench (column "S" in Table 26 below[862]). This proportion however differs markedly between the different fora in the Dataset.

The discrepancies are likely due to the fact that some fora have stable benches, and citing recent decisions will necessarily entail citing precedents in which the adjudicators have participated. Parties are however on average less likely than tribunals to engage in this practice: presumably because courts and arbitrators are often even more familiar with the precedents in which they participated themselves.

	ICJ		INV		ITLOS		IUSCT		WTO	
	/	S	/	S	/	S	/	S	/	S
Pleadings	47.55	52.45	91.87	8.13	72.73	27.27	/	/	96.87	3.13
Pleadings (in decision	/	/	88.87	11.13	/	/	62.79	37.21	92.11	7.89

860 See *Asylum (Colombia v. Peru)*, Rejoinder submitted by the Government of the Republic of Peru (15 June 1950), at 408-409.

861 *China Heilongjiang et al. v. Mongolia, supra* note 838, at §261. See also *Christian Doutremepuich and Antoine Doutremepuich v. The Republic of Mauritius*, PCA Case No. 2018-37, Award (23 August 2019), at note 66, in which respondent cited claimant's lead counsel. As any good thing, parties might sometimes abuse citations to their adjudicators' writings.

862 Only citations to precedents from the same forum are counted in this analysis.

Dissenting	45.82	54.18	90.50	9.50	28.00	72.00	90.65	9.35	/	/
Judgment	37.49	62.51	87.09	12.91	20.98	79.02	53.64	46.36	88.90	11.10
Separate	47.39	52.61	88.01	11.99	7.41	92.59	84.82	15.18	/	/

Table 26: Percent of citations to in-forum authorities involving adjudicators

***Reading key**: parties in pleadings at the ICJ cite authorities in which at least one of the adjudicators has participated 52.45% of the time.*[863]

2. Measuring success in using authorities

The precedent subsection leads to the broader questions of whether the strategic citation of authorities in pleadings has any weight in the outcome of a case. Ubiquitous as they are, are citations material in helping a party to prevail in a case and defeat an opposing party's arguments?

As mentioned above with respect to decisions, the ultimate role of authorities in determining a legal outcome is a question that is impossible to answer definitively. There is certainly a feeling that authorities, at their individual level, usually matter little.[864] Yet, as with decisions, what the individual case level cannot reveal, a pattern of cases maybe can. With pleadings as well, the practice of citing authorities displays interesting patterns that could inform our appreciation of their role in the eventual decision.

A) Citing as claimant or respondent

In most instances, claimants cite more than respondents, either in terms of unique authorities or in terms of the total number of citations. This is expected: research in the context of US domestic courts has found that successful claimants cite more authorities than respondents, since the latter merely need to defend their case.[865] The discrepancy, however, is not particularly large – although, as always, this needs to be qualified by the incomplete state of the pleadings Dataset.

863 Observe also how this proportion increases between standalone pleadings and pleadings as summarised in decisions. To the extent the adjudicator is responsible for writing these summaries, it is unsurprising that he or she would focus on the authorities he or she knows best.

864 See, e.g., *Zbigniew Piotr Grot and others v. Republic of Moldova*, ICSID Case No. ARB/16/8, Hearing on Jurisdiction and the Merits – Transcript, Day 1 (11 December 2017), at 31:5-9, about an objection to one authority (because it was only in Spanish), the following remarks by the chair: "My experience with these case [sic], both formally as counsel and now sitting as Arbitrator, is invariably you end up focusing on a single line of an arbitral award on which it would be extraordinary if a huge amount turned.".

865 See B. Hoover, "Introducing Clerk", *Judicata Blog* (5 October 2017), available at https://blog.judicata.com/introducing-clerk-848abbed8fd3.

		ICJ	INV	ITLOS	IUSCT	WTO
Claimant	All	45.8	41.6	16.9	4.2	12.1
	Unique	24.6	16.3	10.1	3.2	4.5
Respondent	All	35.1	37.9	47.2	4.7	11.2
	Unique	18.6	15.2	20.7	3.8	4.5

Table 27: Citations in pleadings, average of total and of unique authorities cited

***Reading key**: Claimants in ICJ proceedings cite authorities 45.8 times on average in their briefs, and 24.6 unique authorities on average.*

While claimants and respondents generally invoke a broad range of authorities in support of their respective cases, their corpora of authorities have but a limited overlap: on average, only 10% of the authorities cited by the parties are found in the pleadings of both parties.

As indicated by Table 9 above, however, these authorities shared between two parties are more likely to be cited back by courts and tribunals – especially when counting only precedents.[866] This is also, of course, because authorities cited by both parties will usually be at the centre of the debate, and thus more likely to be cited back by the adjudicators. Indeed, authorities shared between the parties have on average a higher PageRank score than authorities that are found on only one side of an opposite pair of submissions.

Finally, claimants and respondents do not really differ in their use of different types of authorities: in any given pair of submissions, the proportions of teachings, or of external citations cited by claimants or respondents is roughly equivalent.

866 For examples from the jurisprudence, see, e.g., *Orascom TMT Investments S.à.r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award (31 May 2017), at §261: "Indeed, as can be seen from the excerpts quoted above, both Parties have invoked the same legal authorities in this particular respect. In particular, both Parties rely on Rompetrol and KT Asia." See also *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, WT/DS442/R, Report of the Panel (16 December 2016), at note 206.
The argument that consists in stressing the parties' agreement on an authority can be abused, however. For instance, in *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Osvaldo Guglielmino in dissent faulted the majority for its reliance on one academic article allegedly cited by both parties. The dissenter pointed out that (i) this was only one authority; and (ii) the parties did not actually agree on their interpretation of this authority. See Dissenting Opinion of Osvaldo Cesar Guglielmino (30 August 2018), at §224.

B) Contrast with the authorities cited in the decision

These two types of citations, however, are much more common in pleadings compared to decisions (as indicated by Table 3 and Table 4 above). The willingness of parties to cite a broader set of authorities concords with the doctrinal observations of some authors,[867] but also with common sense: since they are generally less concerned with the impact of one particular pleading on their future authoritativeness (as contrasted with courts),[868] parties can be expected to cite a broader range of sources.

The parties' citing style is however not entirely disconnected from that of the adjudicators. The reluctance of courts to cite teachings should be expected to impact pleadings, for that reluctance indicates that citing only scholarship is a risky strategy.[869] Given the generally higher status of precedents, scholarship is therefore usually reserved to contentions that are not well-settled by precedents.[870] A general trend is observable in the Dataset, whereby citations by parties to teachings typically plunge between the early days of a forum and its more recent cases. For instance, between 1949 and 2000, 40% of all citations in respondents' briefs at the ICJ were to teachings, a proportion that has dropped to 16% since then. The few topics that remain frequently pleaded with reference to teachings are typically less-established in the case law. At the ICJ, for instance, pleadings (but also individual opinions) often cite teachings on questions of [Equity], a topic mostly discussed in scholarly teachings.

The temporal scope of the authorities cited in pleadings is also usually broader than in decisions (but not individual opinions). As Table 28 below indicates, the average minimum age (column "Amin") of authorities cited by claimants at the ICJ is 3.73 years, whereas the youngest authority cited by Court in judgments usually is on average twice as old. All other fora, by contrast, seem more mindful of integrating recent jurisprudence and teachings into their decisions: the

867 See J. Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 2012), at 43: "There are many references to writers in pleadings before the Court."

868 Yet, consider the policy of some states to pursue coherent interpretation of some treaties (e.g., the NAFTA parties in investment arbitration) or of some fields of international law (e.g., France's attitude with respect to the notion of *jus cogens*).

869 See, for instance, *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on stay of enforcement of the award (12 August 1988): "The only authority relied on by MINE is the unsupported opinion of van den Berg"

870 For instance, in *Sedelmayer v. Russia*, an early case in investment arbitration, the claimant cited three doctrinal articles for the proposition that the definition of an investor entailed the "control" over the investment, while Russia cited a commentary (in German) of the Germany USSR bilateral investment treaty. See *Mr. Franz Sedelmayer v. The Russian Federation*, SCC Case No. 106/1998, Arbitration Award (7 July 1998). In the years since then, more than 95% of the citations associated with this topic cite to precedents.

average age of the youngest authority they cite being lower than the youngest age of the parties' pleadings.

	ICJ		INV		ITLOS		IUSCT		WTO	
	Amin	*Amax*	*Amin*	*Amax*	*Amin*	*Amax*	*Amin*	*Amax*	*Amin*	*Amax*
Claimant	3.43	53.25	2.96	26.17	5.09	67.00	4.38	9.31	3.49	11.81
Respondent	3.82	56.69	3.01	26.42	5.31	46.81	4.24	17.24	3.63	11.72
Tribunal	6.81	29.97	2.64	27.27	4.72	22.66	2.79	9.54	1.52	14.66
Opinion	3.73	58.14	3.79	31.85	5.92	41.88	8.88	33.12		

Table 28: Average age of authorities, per party

Reading key: on average, the youngest authority cited claimants at the ICJ had a minimum age of 3.43 years, and the oldest a maximum age of 53.25 years.

Likewise, it is only at the ICJ that pleadings cite a larger number of unique authorities compared to the average judgment. Although this should be qualified by the lack of exhaustive pleadings data for the other fora, this is likely a feature of the ICJ having a more parsimonious style of writing.

	ICJ	INV	ITLOS	IUSCT	WTO
Claimant	25.57	16.22	10.05	3.29	4.42
Respondent	19.55	15.22	20.74	4.25	4.53
Tribunal	7.14	19.45	12.21	15.96	24.49

Table 29: Average number of unique authorities cited by party

Reading key: on average, claimants before the ICJ cite 25.57 unique authorities in their pleadings, while the Court makes do with an average of 7.14

This writing style also possibly explains why ICJ decisions cite authorities that are much more authoritative on average than the authorities found in the parties' pleadings – whereas in other fora the average PageRank score of decisions track the average of the parties' pleadings.

	ICJ	INV	ITLOS	IUSCT	WTO
Claimant	9.2	6.9	9.2	3.1	8.1

Respondent	9.1	6.4	7.9	3.1	8.2
Tribunal	14.6	6.8	5.1	5.0	8.2

Table 30: Average PageRank score of cited authorities

Reading key: the average PageRank of authorities cited by claimants and respondents at the ICJ is 9.2 and 9.1 respectively, while the PageRank of authorities cited by the Court itself is higher by a half

C) *Authorities in final decisions*

Turning, finally, to the main question: do the parties' citations affect the outcome of a dispute?

As indicated in Table 10 above (in Chapter IV), only a portion of the citations found in decisions originated from the pleadings of the parties. Controlling for outcome, as done in Table 31 below, adds nuance to this observation.

Indeed, investment tribunals, the IUSCT and the ITLOS seemingly draws more from the authorities cited by the prevailing party (although only marginally for investment tribunals).[871] The WTO DSB, by contrast, tends to cite more authorities cited by respondents, whatever the outcome of a case, whereas the situation is inversed at the ICJ, which consistently prefers to cite authorities cited by claimants.

These discrepancies might indicate different adjudicative styles: investment tribunals are more focused on resolving a dispute and will adopt a reasoning (and cite authorities) consonant with the argument of the prevailing party; the ICJ and WTO, with an eye to their broader audiences, might want to discuss at length the cases of claimants and respondents respectively.

	Outcome in favour of	ICJ	INV	ITLOS	IUSCT	WTO
Authorities cited by Claimant	Claimant	39.0	27.9	3.4	6.2	8.3
	Respondent	26.4	27.4	0.0	4.3	18.9
Authorities cited by Respondent	Claimant	29.4	25.6	6.8	4.7	11.8
	Respondent	25.2	27.2	10.6	26.5	22.3

Table 31: Ratio of authorities in decisions also found in pleadings

871 As usual, these findings need to be caveated by the limited Dataset with respect to pleadings.

Reading key: When a claimant prevails at the ICJ, 39% of the authorities cited by the Court are also cited by that claimant, a ratio that fells to 26.4% when respondent prevails.

Beyond this, the parties' citation practice rarely predict outcomes in a reliable manner. The age of the authorities cited, for instance, seems to have little impact on who prevails in a given case, although the prevailing party tend to cite the youngest authority on average. Likewise, for the size of submissions: while in the US context, scholars found a strong correlation between submission length and outcomes at the appellate level (despite the frequent diatribes of federal judges against overly long briefs[872]), extra length does not correlate with the outcome of the disputes before the ICJ.

The only other feature that seems to have an impact in this respect, albeit limited, is the range of authorities cited by a party. Although claimants tend to cite more than respondents in all cases (as seen above) and whoever the prevailing party, the difference between claimants and respondents fluctuates with the outcome of a dispute: cases won by claimants are characterised by claimants citing an extra average of unique authorities compared to cases in which respondent prevailed. In other words, it seems that citing more unique authorities helps to prevail in a case. This is consistent, once again, with the role of consistency in establishing authoritativeness.

	Outcome in favour of	ICJ	INV	ITLOS	IUSCT	WTO
Claimant	CLAIMANT	30.8	16.6	10.6	3.6	3.2
	RESPONDENT	24.6	16.0	1.3	1.8	8.7
Respondent	CLAIMANT	21.9	14.5	18.9	3.8	3.9
	RESPONDENT	18.6	16.2	20.3	4.0	8.5

Table 32: Number of unique authorities cited per party and per outcome

Reading key: claimants cite on average 30.8 authorities in cases they win at the ICJ, as opposed to 24.6 in cases where respondent prevailed. This is then a difference of 6.2 extra unique authorities cited by claimants in cases where claimants prevail.

872 See G. Sisk and M. Heise, "'Too Many Notes'? An Empirical Study of Advocacy in Federal Appeals" (2015) 12 *Journal of Empirical Legal Studies* 578.
The World Court also likes to complain of the length of the parties submissions: see R. Kolb, *The International Court of Justice* (Hart Publishing 2013), at 1017.

Finally, prevailing parties at the ICJ (the forum with the most exhaustive data on citations in pleadings) do cite authorities characterized by a higher PageRank score on average. This indicates, although this is far from a surprise, that citing authoritative authorities likely helps in prevailing in a case.

3. Pleadings as cited authorities

Pleadings do cite authorities; pleadings can also, themselves, sometimes serve *as* authorities.

Citations to pleadings were not collected in the Dataset, and it is unclear how prevalent the practice is. A few examples, however, indicate that citing pleadings as an authority is not unknown in international dispute settlement.

The bulk of this kind of citations is likely to be found not in decisions, or even in individual opinions, but in other pleadings. Frequently, briefs and submissions serve as instruments to interpret treaties. This is particularly plain in arbitrations under the North America Free Trade Agreement ("NAFTA"), as NAFTA parties routinely refer to available pleadings and submissions of themselves or of their NAFTA counter-parties.[873] Likewise, in *Bridgestone v. Panama*, Panama chose to debate the interpretation of the denial-of-benefit clause in the underlying investment treaty with reference to a submission of the United States, the investor's host state, in an unrelated case (*Renco v. Peru*) that involved a similar clause.[874] In the same vein, pleadings are also sometimes cited as evidence of state practice.[875]

More interestingly (especially in view of Chapter VIII below), pleadings also evidence the limits of international law. Cases in which some pleadings and contentions were disregarded, contradicted, or dismissed by an international adjudicator indicate the boundaries of what is an authoritative legal argument and what is not. For instance, in *US & Federal Reserve Bank of New York v. Iran & Bank Markazi*, the tribunal dismissed an argument by Iran by pointing that a similar argument by Slovakia had been dismissed in the *Gabcikovo-Nagymaros* case.[876]

873 See, e.g., *B-Mex and Others v. Mexico*, Mexico's Memorial on Jurisdictional Objections, *supra* note 850, at §84, citing a U.S. *amicus* brief in *BG Group v Argentina*, UNCITRAL, Brief for the United States as Amicus Curiae (10 May 2013).

874 See *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Panama's Reply on Expedited Objections (7 August 2017), at §12.

875 See e.g., *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, U.S. Rejoinder on Competence and Liability (1 October 2001), at 43, citing the UK's pleadings in *Anglo-American Oil Co v. Iran*.

876 See Case No. A28, Dec. No. 130-A28-FT (19 December 2000), at §§81-82.

Further cases of unrelated pleadings being cited in a decision are presumably exceedingly rare.[877] Yet, there are multiple instances of pleadings being cited in individual opinions of ICJ judges, on various subjects. At the ICJ, an important part of these citations refers to the pleadings in the *North Sea Continental Shelf* case, a case whose judgment tops the list of most-cited authorities in the Dataset.[878] It is possible that, just like authoritative authorities become more authoritative over time,[879] a sort of "halo effect" operate such that the documents associated with these authorities acquire their own derived authority.

4. Conclusions

The citation practice of parties in international dispute settlement is shaped by strategic pressures, and notably the concern of not citing enough. The fact that international courts and tribunals increasingly expect parties to explicitly list the authorities they rely on, and the risks involved in ignoring authorities cited by the other party, contribute to this concern, and create a self-reinforcing pattern of increasing citations among the parties – as evidenced by the clear and strong correlation between the number of citations in the parties' pleadings.

This results in a frequent "kitchen-sink" approach to the citation of authorities in a given case. This is especially the case for claimants, who on average cite more authorities than respondents – as expected from the fact that they bear the onus of proving their legal arguments.

There are indications that this "kitchen-sink" approach is useful to an extent, but only insofar parties cite more unique authorities than the other party. Besides, and in accordance with intuition, parties citing more authoritative authorities tend to get the upper hand in a dispute – a conclusion that underlines how important it is to better pin down what makes an authority authoritative, as discussed in Chapter III above.

877 See K. Ameli, "Confidentiality of Arbitral Proceedings before the Iran-United States Claims Tribunal" (2010) paper presented to the International Law Association Committee on International Commercial Arbitration, at 3.

878 See, e.g., *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, 1993 I.C.J. 38, Separate opinion of Judge Shahabuddeen, and the several references to the pleadings in the *North Sea Continental Shelf* case.

879 The notion of "Preferential Attachment" explained above, at p. 134.

Chapter VII – External citations

As seen in the four previous Chapters, the practice of citing precedents and teachings in international dispute settlement is widespread. In the next two Chapters, two consequences of this widespread practice for the authoritativeness of authorities are reviewed in more details. First, Chapter VII reviews the role played by authorities in the fragmentation of international law, and notably within the judicial dialogue meant to remedy it. Second, and in a more general manner, Chapter VIII identifies the role of authorities in international law in general, and what this entails for the set of authoritative authorities.

It should not be surprising to see courts and tribunals, individual judges, and parties cite the jurisprudence of the forum hearing a case.[880] This type of citation plays maximally on the features of authoritativeness noted above, including the ideas of consistency, consensus, and the natural inclination of courts and tribunals to take into account their own precedents.

This differs however from "external citations", whereby a precedent from *another* forum is cited as an authority; these citations entail different considerations and their own set of issues and questions.[881] The jurisprudence displays a range of positions with respect to these citations, from the (usually tacit) fear of some adjudicators that citing to other courts and tribunals will undermine their own authority, to the hopes of others that external citations will foster a "judicial dialogue" that could remedy the fragmentation of international law.[882]

Even the latter position however does not suffice to hide pervading suspicions attached to external citations, which will frequently be suspected of amounting to cherry-picking by adjudicators pressed to justify their conclusions, somehow. To a large extent, the "alien-ness" of external authorities is bound to impact their authoritativeness; citations to external authorities should

880 C.P. Romano, "Deciphering the Grammar of the International Jurisprudential Dialogue" (2008) 41 *NYU Journal of International law and Politics* 755, at 758: "[…] judicial autarchy and self-reference are the default posture of international courts. […] citing in international judgments will generally be done sparingly, selectively, and reluctantly."

881 D. Charlotin, "Of Islands and Bridges: an empirical Study of Citations between World Courts", Sciences Po's *Parcours d'Iniation à la Recherche* memorial, directed by Horatia Muir-Watt, on file with the author.

882 See below, note 910, and the quote from Judge Greenwood.

remain exceptional. Conversely, however, the authoritativeness of these authorities should have an impact on their likelihood of being cited by a different forum.

Section 1 below first reviews the debate regarding the fragmentation of international law, before turning, in **Section 2** to what might prompt a court to cite another forum. Finally, **Section 3** will investigate what, to the contrary, could discourages external citations between different fora.

1. Background: fragmentation of international law and judicial dialogue

A) Fragmentation

Much has been written and said about the fragmentation of international law, to the extent that some scholarly fatigue might have taken hold. (Recent works argue that it could be time to say farewell to the concept.[883]) The concept of fragmentation relates to the increased risk of different bodies of international law developing concurrently and, god forbids, contradictorily. The phenomenon is fed by the "proliferation" of new courts and tribunals entrusted with the task of settling international law disputes.[884] These courts and tribunals' sometimes overlapping jurisdictions is, in this narrative, prone to conflicting interpretation of international law.[885]

This proliferation arises out of two broad trends: the regionalisation and specialisation of international law.[886] For Laurence Boisson de Chazournes, in the "increasing density and complexity" of international law, fragmentation is both symptom and cause. The fuzzy boundaries of some international legal systems compound the issue, as an increasing number of fora finds themselves dealing with question straddling several regimes of international law.[887] This growing complexity is at the advantage of more powerful states, who strategically exploit the cracks in the system for their own benefit.[888]

The literature on fragmentation has frequently been focused on assessing the seriousness of the phenomenon in the actual practice of international courts and tribunals. Few cases of overt

883 M. Andenas and E. Bjorge, *A Farewell to Fragmentation* (Cambridge University Press 2015).
884 C. Rogers, "The Politics of International Investment Arbitrators" (2013) 12 *Santa Clara Journal International Law* 223, at 257.
885 F. Zarbiyev, "Saying Credibly What the Law Is: On Marks of Authority in International Law" (2018) 9 *Journal of International Dispute Settlement* 291, at 299.
886 See L. Boisson de Chazournes, "Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach: A Rejoinder – Fears and Anxieties" (2017) 28 *European Journal of International Law* 1275, at 30-31.
887 S. Puig, "Experimentalism, Destabilization and Control in International Law: Afterword to Laurence Boisson de Chazournes' Foreword" (2017) 28 *European Journal of International Law* 1267, at 1272.
888 E. Benvenisti and G.W. Downs, "The Empire's New Clothes: Political Economy and the Fragmentation of International Law" (2007) 60 *Stanford law review* 595.

fragmentation, some have pointed out, are markedly problematic, while the same examples of inconsistent rulings are unavoidably always cited.[889] On the other hand, and despite the best efforts of international legal scholars, many conflicts might just be under-reported.[890] Besides, and in any case, the pragmatic observation that there are few conflicts does not however necessarily assuage more principled fears regarding the phenomenon.

The threat of increasing fragmentation also stems from circumstances that are not expected to disappear, such as the fact that courts and tribunals are irremediably prone to favour their own jurisprudence and jurisdiction (so as to maintain their relevance and activity in the future). This inclination in turn is the fate of every organisation bent on ensuring its survival – that is to say, of every organisation.[891] The problem is further compounded by the fact that ensuring the coherence of international law might occasionally conflict with the plain duty of adjudicators to rule on the dispute before them.[892] The preference for internal over external authorities is, under these circumstances, unsurprising.[893]

B) Judicial dialogue

Solutions have been offered to the fragmentation problem, most notably in a report by the ILC that focused on the law of treaties as a tool to ensure some kind of coherence.[894] Others, meanwhile, have insisted on the need to mitigate the risks associated with fragmentation by fostering a "judicial dialogue" between international courts and tribunals. If international adjudicators lent attention to what is happening in other fora, and remained vigilant not to let international law take contradictory courses, the argument goes, the worst of fragmentation might be averted.

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889 Boisson de Chazournes, *supra* note 886, at 32. See also R. Higgins, "A Babel of Judicial Voices? Ruminations from the Bench" (2006) 55 *International and Comparative Law Quarterly* 791, at 797.

890 See Y. Shany, "Plurality as a Form of (Mis) Management of International Dispute Settlement: Afterword to Laurence Boisson de Chazournes' Foreword" (2017) 28 *European Journal of International Law* 1241, at 1248, opining that adjudicators might deliberately stay mute as to the consequences of their findings in light of the broader international jurisprudence.

891 "Organisation survival" is a key assumption in the sociology of organisations: see, e.g., T. Watson, *Sociology, Work and Organisation* (Routledge 2012), at 155.

892 Shany, *supra* note 890, at 1245.

893 See, e.g., *Zbigniew Piotr Grot and others v. Republic of Moldova*, ICSID Case No. ARB/16/8, Hearing on Jurisdiction and the Merits, Transcript, Day 1 (11 December 2017), at 30:22-24, in which the investor opposed Moldova's reliance on the award in *Rhone & Cervin v. Costa Rica*; the chair (Phillipe Sands), after asking which type of award it was, opined that: "As an ICSID Tribunal, it is a little difficult for one ICSID Tribunal to say we are not going to have regard to another one."

894 United Nations, International Law Commission, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", A/CN.4/L.682, available at: http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf.

External citations do seem to be increasing in the Dataset, especially since the turn of the century when most of the fora studied here started to operate. This is all the more remarkable than, as mentioned below, it is frequent for fora to display a large proportion of external citations at their beginnings and before they have had the opportunity to build their own body of jurisprudence.

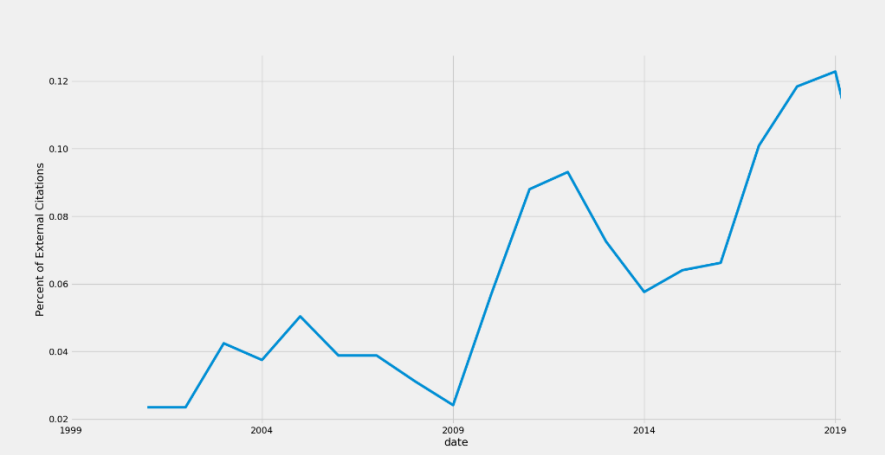

Figure 16: Percent of external citations in the Dataset, 12-month moving average

This phenomenon is partly spurred by individual international lawyers, as the same individual populate the participants in disputes between the various courts and tribunals in the Dataset.[895] The frequent citations to WTO jurisprudence in *Continental Casualty v. Argentina*,[896] for instance, have been related to Giorgio Sacerdoti, a former AB Member, chairing that case.[897] Conversely, one of the few citations to investment jurisprudence by parties in WTO proceedings was to a case chaired by a former chairman of the Appellate Body.[898]

In the same vein, Fuad Zarbiyev observed that "decisions or opinions issued by arbitrators with a public international law background are often replete with references to the case law of the ICJ, [while] decisions issued by arbitrators with a different background often contain few if any such references."[899] There is evidence for this view in the data, as tribunals that comprise an ICJ judge, past or present, cite half as much more ICJ decisions as tribunals that do not. (Investment awards

895 See Zarbiyev, *supra* note 885, at 310.

896 *Continental Casualty Co. v Argentine Republic*, ICSID Case No ARB/03/9, Award (5 September 2008).

897 As noted in A. Stone Sweet and F. Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017), at 164.

898 See *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, Report of the Panel (10 November 2004), Annex C, responses of Canada to questions from the Panel, citing the award in *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (9 January 2003). Canada even made sure to mention that Mr. Florentino Feliciano was President of that tribunal, without mentioning his co-arbitrators.

899 See Zarbiyev, *supra* note 885, at 309: "in investment arbitration, the authority of the ICJ is not felt with the same intensity depending on the composition of arbitral tribunals.

with ICJ judges on the tribunal are also ever-so-slightly more likely to be cited in the future, and have in general a marginally higher PageRank score.)

	No ICJ judge on tribunal	ICJ judge on tribunal
ICJ	1.62	2.22
INV	85.72	86.22
ITLOS	0.01	0.04
IUSCT	2.23	1.86
WTO	0.07	0.03
Teachings	9.86	8.68

Table 33: Percent of external citations in INV, depending on presence of ICJ Judge on tribunal

Reading key: 2.22% of all citations by investment tribunals that comprise an ICJ judge are directed to ICJ precedents, as opposed to only 1.62% for tribunals that do not

If a dialogue is to be had, however, the onus should fall on all participants in international law proceedings.[900] Secretariats and registrars, for instance have an important role to play in this respect.[901] This is also, if not more, true of the parties to international disputes. In the very *Continental Casualty* case mentioned above, the claimant took care to argue its case based on AB jurisprudence – and notably on jurisprudence in which the tribunal's chair had participated.[902] As can be seen in Table 34 below, pleadings are the prime supplier of external citations in any given case. Parties therefore have a role in ensuring that tribunals are fully briefed as to the systemic relevance of their findings.[903] Fortunately, fostering this judicial dialogue is also often in the interest of parties themselves.[904]

	ICJ	INV	ITLOS	IUSCT	WTO
Dissenting	5.81	4.21	7.39	40.94	/
Judgment	2.49	36.12	23.86	27.17	59.26

900 On top of the judges and parties mentioned below, see also T. Streinz, "Winners and Losers of the Plurality of International Courts and Tribunals: Afterword to Laurence Boisson de Chazournes' Foreword" (2017) 28 *European Journal of International Law* 1251, at 1255, also mentioning clerks, research assistants, etc.

901 G. Sacerdoti, "Remarks by Giorgio Sacerdoti" (2011) 105 *American Society of International Law Proceedings* 168, at 168.

902 Stone Sweet and Grisel, *supra* note 897, at 164.

903 Sacerdoti, *supra* note 901, at 168.

904 See Sir F. Berman, "Authority in International Law" (2018) *KFG Working Paper Series*, no. 22, at 10: "it would be unthinkable for a litigating State, and possibly irresponsible so far as its counsel are concerned, not to cite to the ICJ the reasoned and considered decisions of other bodies in comparable cases."

Separate	7.47	0.92	21.55	24.80	/
Pleadings	84.23	43.62	47.20	/	24.69
Pleadings (in decision)	/	15.12	/	7.09	16.05

Table 34: Percent of external citations per forum and per type of document

This does not mean that external citations are a panacea to fragmentation. As any citation, external citations can also obfuscate complicated debates, and the adoption of a concept from one system to another might alter that concept.[905] External citations do not necessarily take place in "a friendly, almost bucolic, environment in which actors, driven by a shared desire to avoid discrepancies and achieve coherence, respectfully listen to each other."[906]

Yet, as explained in the next Chapter, citations matter beyond their mere application to a given case: they indicate, for future disputes and future parties, the boundaries of what can be cited and what cannot. A growing practice of citing externally, therefore, should foster the habit of parties and adjudicators to consider the jurisprudence and practice of external fora – and argue from it. Adjudicators should also be mindful that their decision "have effects beyond individual disputes. They exceed the confines of concrete cases and bear on the general legal structures."[907] Adjudicators need to be careful of what they cite in view of future citations.[908]

All in all, however, the "judicial dialogue" theme has seemingly taken its due space at the back of the adjudicators' mind – some of them anyway.[909] Judge Greenwood for instance held in an 2012 opinion at the ICJ, that "[i]nternational law is not a series of fragmented specialist and self-contained bodies of law, […] it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other courts and tribunals."[910]

905 See J. Odermatt, "The International Court of Justice and the Court of Justice of the European Union: Between Fragmentation and Universality of International Law", forthcoming in William A. Schabas and Shannonbrooke Murphy (eds.), *Research Handbook on the International Court of Justice* (Edward Elgar 2019).

906 V. Bílková, "The Threads (or Threats?) of a Managerial Approach: Afterword to Laurence Boisson de Chazournes' Foreword" (2017) 28 *European Journal of International Law* 1259, at 1261.

907 See A. von Bogdandy and I. Venzke, "Beyond Dispute: International Judicial Institutions as Lawmakers", in Armin von Bogdandy and Ingo Venzke (eds.), *International Judicial Lawmaking* (Springer 2012), at 3.

908 See the examples cited in A. Pellet, "Should We (Still) Worry about Fragmentation?", in Andreas Føllesdal and Geir Ulfstein (eds.), *The Judicialization of International Law: A Mixed Blessing?* (Oxford University Press 2018), starting at 230.

909 R. Wolfrum, Statement to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs (29 October 2007), at 6-7.

910 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, 2012 I.C.J. 324, Declaration of Judge Greenwood, at 394.

2. Citations to other fora

International courts and tribunals do cite external precedents – they just do not do so consistently, to the same extent, or following any kind of clear or explicit rules. This is in part due to a lack of explicit rules on this respect,[911] leaving external citations a pure matter of practice, susceptible to change over time and to differ markedly between fora.

External citations, although growing in importance, remain relatively rare, as they amount to less than 5% of all citations to the fora in the Dataset. As noted in Figure 11 above, a modularity analysis over the full network of citations overlaps remarkably well with the network's divisions between fora – which indicates that internal citations are much more frequent than external citations.

Two further observations stand out and are reviewed in turn below: (i) the International Court of Justice has assumed a central place in international jurisprudence; and (ii) not all topics are similarly prone to attract external citations.

A) Centrality of the ICJ

A critical aspect of external citations at the international level is that, in line with its own aspirations, the ICJ has attained a certain centrality in the view of other international courts and tribunals.[912] Recognising this importance is now a *lieu commun*.[913] Even when they deny the existence of any "hierarchy" proper in international law,[914] it seems fair to say that international adjudicators "do look to the Court as the principal judicial organ of the United Nations and are aware of its judgments and so forth."[915]

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911 One exception resides in the status of the Special Court for Sierra Leone, 2178 UNTS 138, article 20: "[t]he Judges of the Appeal Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda". See Boisson de Chazournes, *supra* note 886, at 39, for further examples.

912 For instance for the WTO's Appellate Body, see G. Sacerdoti, "Precedent in The Settlement of International Economic Disputes: The WTO And Investment Arbitration Models", in Arthur W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Brill 2011) 225, at note 47.

913 See Boisson de Chazournes, *supra* note 886, at 21-22, and 24.
See also S. McCaffey, "Remarks by Stephen McCaffey" (2011) 105 *American Society of International Law Proceedings*, at 170.

914 See, e.g., *Prosecutor v. Kvocka*, Case No. IT-98-30/1, Judgment (25 May 2001), at §15, with the Appeals Chamber opining that:

> [T]his Tribunal is an autonomous international judicial body, and although the ICJ is the "principal judicial organ" within the United Nations system to which the Tribunal belongs, there is no hierarchical relationship between the two courts.

915 See remarks by McCaffey, *supra* note 913, at 170.

The ICJ accounts for the major part of all external citations in the Dataset, and is by far the main target of citations for all non-ICJ fora, as seen in Table 35 below.

	ICJ	INV	ITLOS	IUSCT	WTO
ICJ		61.8	99.0	96.5	86.4
INV	26.3		0.8	3.5	9.9
ITLOS	21.4	0.3			
IUSCT	46.2	31.5	0.2		3.7
WTO	6.1	6.4	0.1		
Total of External Citations	**262**	**4443**	**1731**	**254**	**81**

Table 35: Percent of external citations' target per forum

Reading key: 26.3% of the 262 external citations in the ICJ's jurisprudence are directed to investment arbitration awards, and another 21.4% to ITLOS decisions

Why this predominance? The features of authoritativeness identified in Chapter III above certainly explain part of it. The Court is widely held to be composed of experts in international law, and gains from the authority of its individual members, which are numerous and diverse (not to mention that acceding to a seat on its bench is seen as the pinnacle of any international legal career). The Court's judgments are published and available in English (and French), while its proceedings evidence a high level of process, with each case going through lengthy written and oral submissions by both parties.

A further part of this hegemony is also likely the result of a sociological process. International law remains taught through heuristics that divide it between a "general" practice and specialised one. In this context, "general" international law is especially associated with the ICJ, itself seen as the embodiment of a socially-sanctioned expertise in general international law. In other words, "generations of so-called 'generalist international lawyers' have equated public international law with its representation by the ICJ." [916] Crucially, this impression is seemingly shared by international adjudicators themselves:

> In [their] minds, international courts seem to be divided between generalists (like the ICJ) and specialists (all others), and between regional courts and the so-called

916 See Zarbiyev, *supra* note 885, at 304.

> universal courts, that is to say, those whose jurisdiction is not restricted to any particular geographic area.[917]

This explanation fits well with the data, as the Court is indeed mostly cited on topics of general international law, such as the law of treaties or of international responsibility. In a speech to the UN, the President of ITLOS smiled at the Tribunal's practice of citing ICJ precedents, and described it as a "constructive manner of maintaining consistency in international law and reinforcing the necessary coherence between general international law and the law of the sea."[918] This is not necessarily a pure question of reserving general international law question to the ICJ, however, as the borrowings can help foster a forum's own contributions to general international law. Although the WTO's Appellate Body, notably, has often cited the ICJ on matters of interpretation,[919] this did not prevent it from developing its own influential case law on the subject.[920]

The ICJ's importance on matters of general international law is readily observable in the topics that bring up citations to the World Court in other fora – although different fora find an interest in different topics from the ICJ.

INV	ITLOS	IUSCT	WTO
Remedy	Delimitation	Nationality	Obligations
Jurisdiction	Dispute	Provisional Measures	Interpretation
Dispute	Jurisdiction	Interpretation	Governing Law
Prima Facie Jurisdiction	Provisional Measures	Jurisdiction	Dispute
Expropriation	Negotiations	Procedure	State Responsibility

Table 36: Top 5 most frequent topics of citation to the ICJ, per forum

The ICJ's predominance in the field of general international law is by now well-established. It might even have resulted, in some contexts, in a kind of intimidation of other courts and tribunals,

917 D. Terris, C. Romano and L. Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Oxford University Press, 2007), at 121.

918 See Wolfrum, *supra* note 909, at 7.

919 See, e.g., *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R, Report of the Panel (21 December 2009), at §396, note 705.

920 See M. Waibel, "International Investment Law and Treaty Interpretation", in Rainer Hofmann and Christian J. Tams (eds.), *International Investment Law and General International Law : from Clinical Isolation to Systemic Integration?* (Nomos 2011), observing that the WTO interpretative practice has been "radiant"; more generally, I. van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford University Press 2009). See also Table 37 below.

as is generally bound to happen in a core-periphery framework.[921] In this respect, this illustrates well Makane Moïse M'Bengue's proposition that precedents set by international courts and tribunals are:

> thus in reality an instrument of domination, in particular in an era of multiplication of international courts and tribunals. It allows international courts and tribunals to put themselves, consciously or unconsciously, into a nexus of hierarchical positions.[922]

B) Topics prompting external citations

Table 37 below retraces the 10 most cited topics underlying citations to the precedents of the five fora studied in the Dataset. Investment tribunals and the IUSCT are primarily cited on matters of expropriation, while the ICJ is most often cited on questions of delimitation (although virtually only by the ITLOS). The influence of the WTO's jurisprudence on matters of interpretation, meanwhile, has been noted in the literature.[923]

Forum	ICJ	INV	ITLOS	IUSCT	WTO
# Number of citations to	2,784	100	71	1,525	302
Top 10 Topics	Delimitation	Expropriation	Territory	Expropriation	Interpretation
	Jurisdiction	Dispute	Delimitation	Quantum	Discrimination
	Interpretation	Negotiations	Environment	Damages	Proof
	Dispute	Annulment	Costs	Interest	Obligation
	Remedy	Interpretation	Customary	Shareholders	Products
	Provisional Measures	Provisional Measures	Procedure	Evidence	Control
	Prima Facie Jurisdiction	Equity	Risk	Remedy	Evidence
	Customary	Exhaustion of remedies	Interpretation	Argument	Argument
	Governing Law	Argument	Provisional Measures	Jurisdiction	Due Process

921 See Zarbiyev, *supra* note 885, at 305, note 84, citing the Concurring Opinion of Judge Peollonpää, joined by Judge Sir Nicolas Bratza, in *Al Adsani v. United Kingdom*, European Court of Human Rights, Judgment (21 November 2001), at §2. Concurring Opinion of Judge Caflisch, joined by Judge Ziemele in *Hirschhorn v. Romania*, European Court of Human Rights, Judgment (26 June 2007), at §2.

922 See M.M. M'Bengue, "Precedent", in Jean d'Aspremont and Sahib Singh (eds.), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar Publishing 2018), at 717.

923 See Waibel, *supra* note 920.

	Expropriation	Control	Vessels	Contract	Dumping

Table 37: top 10 most cited topic from each forum

Just like the ICJ is cited on matters of general international law, specialised fora will often be cited on matters in which they specialise.[924] Accordingly, decisions from the ITLOS are cited on Law of the Sea matters, decisions from the WTO on trade matters, etc. There is likely, in this respect, a first-mover advantage whereby certain fora acquire a reputation for developing expertise with respect to a particular field.[925] This reputation might be more important for its authority than a forum's exact output. For instance, the perceived specialisation of the IUSCT on questions of [Expropriation] made it a prime source on this topic (especially before the rise of investor-state arbitration) – notwithstanding that the Algiers Accords had a definition of "taking" that was much broader than customary international law on expropriation, or even broader than most BITs.[926]

Beyond this, however, external citations fall in two main (and non-exclusive) categories: (i) filling gaps in the jurisprudence and (ii) developing the boundaries of a common judicial function.

Gaps

One of the main reasons to cite an external authority is often, simply, a lack of internal guidance or precedent on a given topic – such that the decision-maker will attempt to draw inspiration from other courts and tribunals when dealing with a matter of first impression. Faced with a new procedural development (a request for interpretation), the tribunal in *Wena v. Egypt* expressed it as such:

> Wena's Application for Interpretation is the first request of its kind ever received by ICSID. Accordingly, no previous decisions by ICSID arbitral tribunals exist that deal with the purpose, scope and limits of the interpretation procedure. However, in making its decision, the Tribunal was able to rely not only on the relevant provisions of the ICSID Convention and the ICSID Arbitration Rules and their interpretation

924 See, e.g., J.P. Commission, "Precedent in Investment Treaty Arbitration-A Citation Analysis of a Developing Jurisprudence" (2007) 24 *J. Int'l Arb.* 129, at 153.

925 See G. Marceau, A. Izaguerri, and V. Lanovoy, "The WTO's influence on other dispute settlement mechanisms: a lighthouse in the storm of fragmentation" (2013) 47 *Journal of World Trade* 481–574, at 492.

926 See A. Bjorklund, Remarks on the panel "The Role of International Tribunals in Managing Coherence and Diversity in International Law" (2011) 105 *American Society of International Law Proceedings*, at 175.

> by well-known scholars, but also on decisions by other tribunals, in particular, the Permanent Court of International Justice ("PCIJ") and its successor, the ICJ.[927]

This gap-filling is practiced by most international courts and tribunals. At the WTO, for instance, the Appellate Body has referred to jurisprudence from the PCIJ at times to deal with issues that are not treated in its constitutive instruments.[928] Terris et al. describe external citations by judges chiefly as a practice that consists in looking at other precedents when none is at hand (apart from that, they write, "citing [from external sources] is generally done sparingly, selectively, and grudgingly"[929]).

This is notably why external citations are typically more numerous in the beginnings of an international legal regime. Most courts and tribunals studied here started with a proportion of out-forum citation higher than in- forum citations, with the ratio gradually reverting through time. (For the ITLOS, it never fully reverted, as ICJ precedents remain crucial to the work of the Tribunal. At the ICJ, it is the external citations found in individual opinions that account for the phenomenon: the Court's well-known reluctance to cite externally is further studied below.)

927 *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application by Wena Hotels Ltd. for Interpretation of the Arbitral Award (31 October 2005), at §72.

928 See M.Q. Zang, "Shall We Talk? Judicial Communication between the CJEU and WTO Dispute Settlement" (2017) 28 *European Journal of International Law* 273, at 282.

929 See Terris, Romano and Swigart, *supra* note 917, at 120.

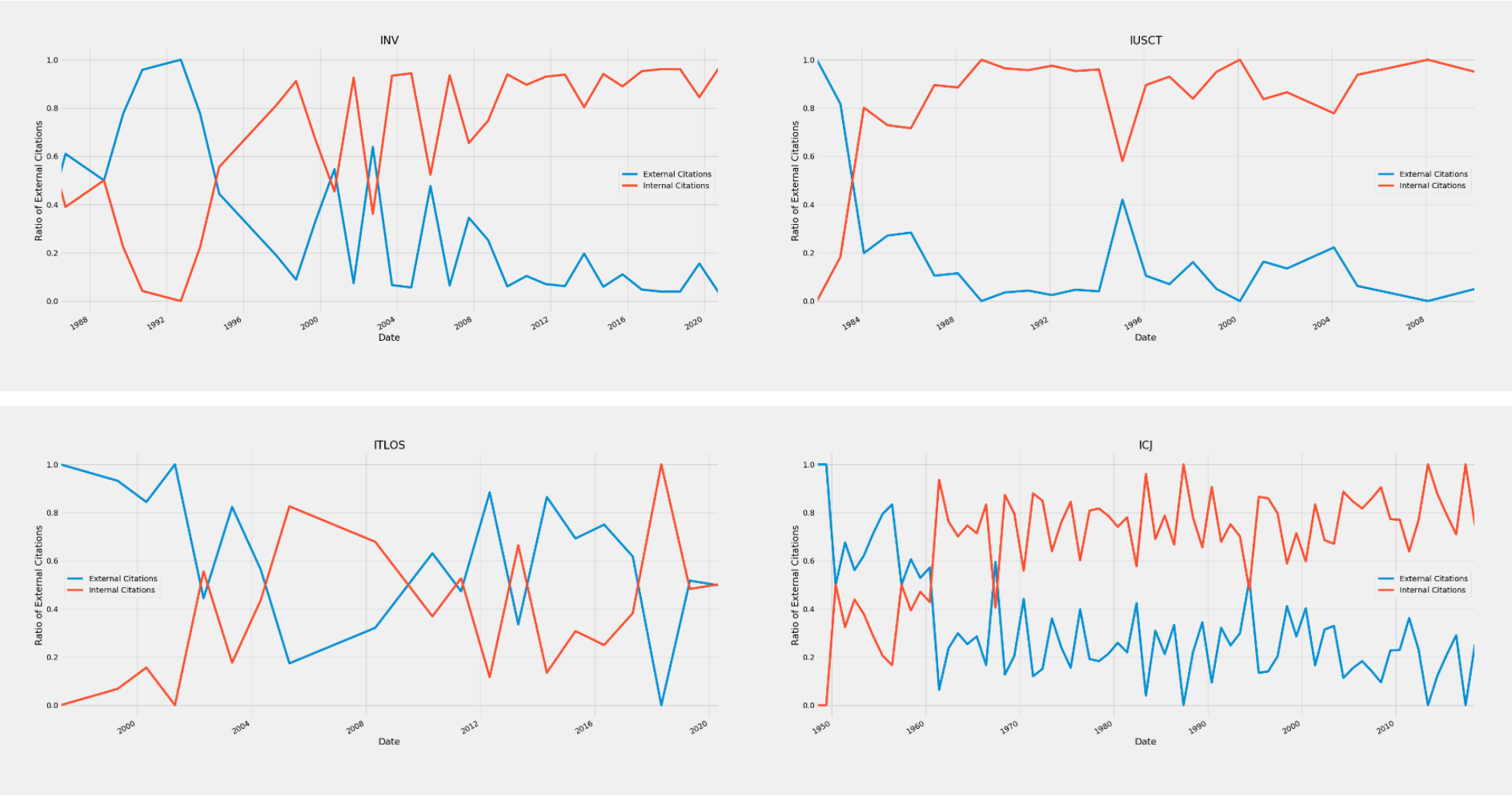

Figure 17: Proportion of external citations over time

Shared topics

Although, as noted above, fora are often cited on topics close to their field of expertise, a substantial part of external citations is also prompted by topics that are not associated with any given forum.

Some external citations relate, for instance, to procedural matters.[930] This tendency to cite the procedural experience of other courts has not been unnoticed,[931] with the WTO's Appellate Body in particular being eager to learn and adopt practice developed elsewhere.[932] In this context, one of the most frequent topic underlying external citations is the topic of [Provisional Measures], with the ICJ's jurisprudence in *LaGrand* particularly cited on this point.[933] Closely related, external citations have often informed the question of the importance of precedents in international law. The WTO's report in *US – Stainless Steel (Mexico)* is exemplary in this regard, as it cites a precedent from the International Criminal Tribunal for Yugoslavia together with an investment arbitration award on this topic, as well as a citation to Hersch Lauterpacht's doctrinal writings.[934]

Finally, another set of topics make a frequent appearance in the set of external citations: questions of [Evidence] and [Proof], and of [Res Judicata]. This is not surprising, as these issues are largely uncodified in international law (notwithstanding the existence of authoritative material on the subject), and as such often litigated by international parties with reference, not only to teachings (as noted above in Chapter IV), but also to the experience of other courts and tribunals. For all these topics, besides, it would be unfortunate if different international courts and tribunals were to adopt varying standards.[935]

There is a common thread linking these topics: they all relate to the extent and scope of the international judicial function writ large. That these topics are a cause for external citation says a lot about international adjudicators being willing to cite and use example from other fora as a way to better understand the extent and scope of their powers in ruling over international cases. In so

930 On this topic, see notably C. Brown, *A Common Law of International Adjudication* (Oxford University Press 2007), at 52-53.

931 A. von Bogdandy and I. Venzke, "The Spell of Precedents: Lawmaking by International Courts and Tribunals", in Cesare Romano, Karen Alter and Yuval Shany (eds.), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013), at 517.
See also N. Miller, "An International jurisprudence? The Operation of 'precedent' across international tribunals" (2002) 15 *Leiden Journal of International Law*, at 496, for an early empirical finding that external citations are often prompted by procedural topics.

932 Marceau, Izaguerri and Lanovoy, *supra* note 925, at 497.

933 On this topic, see notably K. Oellers-Frahm, "Expanding the competence to issue provisional measures-strengthening the international judicial function", in von Bogdandy and Venzke, *supra* note 907, at 389.

934 See *United States – Final anti-dumping measures on Stainless Steel from Mexico*, WT/DS344/AB/R, Appellate Body Report (30 April 2008), at §116. See also Sacerdoti, *supra* note 901, at note 52.

935 Zang, *supra* note 928, at 291.

doing, these courts and tribunals demonstrate that they "regard themselves as forming part of a community of international courts", which, according to Chester Brown, is bound to "have positive implications for the further development of the international legal system."[936]

3. Not citing from other fora

If external citations are so beneficial, why, then, do courts often refrain from citing to other fora?

As noted above, courts and tribunals are jealous of their own prerogatives and prone to insist on developing their own jurisprudence in priority to citing other tribunals.[937] In this context, judicial dialogue might at times be antithetical to a forum's self-built authority. At the risk of being irrelevant and/or subordinated, a court should insist that its jurisprudence matters. Strategical considerations in terms of attracting disputes, in a context of competition between courts and tribunals and of forum-shopping by parties,[938] will further prompt courts and tribunals to insist on citing their own output over the legal production of any other court or tribunal.

The ICJ is a case in point, as it has long been well-known for citing only itself and a few *ad hoc* tribunals, usually manned by its members,[939] while shying away from recognising the contribution of other international bodies. For Franklin Berman, this was not only a question of politics to shore up the court's "status and authority",[940] but was also explained by the fact that parties mostly cited from the Court's jurisprudence in ICJ proceedings. As noted in the next Chapter, the two practices are self-reinforcing: the Court works from the sources cited by the parties, which prompt future parties to follow the (implicit) instruction of the Court to consider that only ICJ jurisprudence is worthy of a citation.

936 C. Brown, "The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals" (2008) 30 *Loy. LA Int'l & Comp. L. Rev.* 219–245, at 244.

937 See also Miller, *supra* note 931, at 499, venturing that "[t]ribunals' preferences with respect to type of reference could perhaps be explained as a function of their desire to maintain their independence and the integrity of their jurisprudence while respecting that of other tribunals".

938 See Benvenisti and Downs, *supra* note 888, at 628.

939 In a speech to the United Nations, Judge Gilbert Guillaume took care of emphasising this few citations to *ad hoc* tribunals to deny the charge that the Court was mostly navel-gazing: see G. Guillaume, "The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order" (2000) *Speech to the Sixth Committee of the General Assembly of the United Nations*, available at https://ghum.kuleuven.be/ggs/events/2013/springlectures2013/documents-1/guillaume-proliferation-intnat-judicial.pdf.

940 See Berman, *supra* note 904, at 9.

The ICJ has however recently slightly changed course and accepted to consider citations from other fora, with scholars pointing to the Court's judgment in the *Diallo* case in particular.[941] Yet, a close look at what happened in that case indicates that this was not a plain and simple *ouverture* of the ICJ's jurisprudence to external authorities. Instead, the shift was made in the Court's own terms. The ICJ did not merely cite to the HRC, it also – crucially – offered expansive reasons to justify this citation. Those reasons, which for the most part overlap with the determinants of authoritativeness identified above, were meant to be seen as a standard that external authorities should meet to be worth a mention.[942] In other words, rather than engaging in dialogue, the ICJ has tried to lay down its rules.[943]

Every court jealous of its prerogatives – that is, every court – is likely to operate similarly. The Court of Justice of the European Union offers another good example in this respect: the CJEU frequently deals with trade matters, in which it could or should take guidance from the main forum in this respect, the WTO. However, as noted by Michelle Zang, the CJEU never cited the WTO DSB in a judgment, even when invited to do so by its Advocate Generals, preferring, instead, to hew closely to the WTO's jurisprudence without ever mentioning it.[944] We are far from judicial dialogue being a "two-way non-hierarchical conversation".[945]

This failure to cite can be problematic. This is especially the case when parties continue to rely on authorities that are being shunned in that fashion. Michelle Zang rightly opines that the CJEU's "muted dialogue" strategy with the WTO is probably mistaken,[946] and observes that it lessens certainty: parties do not know whether the Court will ever follow or not follow the WTO DSB. Likewise, Paolo Palchetti agrees that clear criteria about what is authoritative and what is not helps international litigants by strengthening transparency and predictability, "thereby reducing the risk of [a court] being perceived as selective, or even arbitrary, in its reliance on external precedents."[947]

941 See P. Palchetti, "The Authority of the Decisions of International Judicial or Quasi-judicial Bodies", in *Decisions of the ICJ as Sources of International Law?* (Gaetano Morelli Lecture Series ed, International and European Papers Publishing 2018), at 113-114. See also A. Pellet, "Decisions of the ICJ as Sources of International Law?", in Gaetano Morelli Lecture Series (International and European Papers Publishing 2018), at 33, note 63.

942 See also S. Sivakumaran, "The Influence of Teachings of Publicists on the Development of International Law" (2017) 66 *International & Comparative Law Quarterly* 1, at 7.

943 See Palchetti, *supra* note 941, at 118. The main rule in this respect is that external authorities will be considered only if they stem from specialised bodies. It is probably then ironic that the Court, not a specialised body, was not entitled deference by the ICTY in *Tadic*.

944 Certainly, this practice enhances the Court's discretion to ignore the WTO's guidance whenever it wishes.

945 See Boisson de Chazournes, *supra* note 886, at 41.

946 Zang, *supra* note 928, at 285.

947 See Palchetti, *supra* note 941, at 117. Palchetti also observes that "determining the 'rules of the dialogue' is a delicate exercise."

Yet, the concerns of courts and tribunals are not unreasonable. While some have tried to side-step these concerns by noting that "referring to and even quoting a judgment of another court does not make it a formal source"[948], this is mistaken: as the concerns and the impediments to a fuller judicial dialogue indicate, precisely, that what can be cited and what cannot is irremediably linked to the question of sources of law. By citing external authorities, international courts and tribunals, explicitly and implicitly, rule on which other courts and tribunals they wish to cite or rely upon, and in so doing to which authority they grant authoritativeness or not. And as explained in the next Chapter, what is true of external authorities is also true of all authorities.

948 See Terris, Romano, and Swigart, *supra* note 917, at 120.

Chapter VIII – The boundaries of international law

Law is whatever can stand as a legal proposition. That much is not new: legal realists and others have been arguing along these lines for decades. A variant of realism, in turn has underpinned the turn to empirical legal analysis, sometimes in an avowed contrast with some branches of doctrinal theorising that are held as too far disconnected from the law in action.[949]

The hope is that empirical inquiries, insofar they focus on the law as it is acted out, indeed reveal *what* the law is. This is well put by Urska Šadl and Henrik Palmer Olsen, for whom:

> [q]uantitative techniques or citation network approach are relevant for the study of international case law primarily because (contrary to many methods used by political scientists) they clearly shift the focus from legal/doctrinal questions to the content of judicial decisions, meaning the law itself.[950]

If the law is revealed and acted out in legal reasoning, and if, as seen in Chapter I, citations are key to that reasoning, then it follows that the law is whatever can be cited. Citations indicate the boundaries of what a community consider authoritative and, ultimately, legal. They delineate the "belief system" of the community of international lawyers.[951] A similar line of thinking also underpins the realism of Louis Sohn:

> I submit that states really never make international law on the subject of human rights. […] If you go to the State Department and they have a question, where do they

949 See T. Ginsburg and G. Shaffer, "The Empirical Turn in International Legal Scholarship" (2012) 106 *The American Journal of International Law* 1, at 3: "Theory, in other words, must not supplant the rigorous empirical examination of practice, and thus the testing of theory."

950 U. Šadl and H.P. Olsen, "Can Quantitative Methods Complement Doctrinal Legal Studies? Using Citation Network and Corpus Linguistic Analysis to Understand International Courts" (2017) 30 *Leiden Journal of International Law* 1, at 327.

951 See F. Zarbiyev, "Saying Credibly What the Law Is: On Marks of Authority in International Law" (2018) 9 *Journal of International Dispute Settlement* 291, at 296.
See also *ibid.*, at 298: Marks of authority "are 'socially accepted criteria' that link authority to its social basis—an authority of a person or an institution exists because and to the extent that that person or institution possesses properties that are socially sanctioned as commanding deference."

> find the answer? If they find it in Ms. Whiteman's Digest, they consider that they have solved the problem.[952]

In this belief system, not every citation will be endowed with authority, and not to the same extent. As the preceding chapters have demonstrated, authorities in international dispute settlement – precedents and teachings – differ in their authoritative weight, sometimes widely. To some extent that weight is a matter of subjective appreciation, and different citers will adopt various citing patterns depending on their positions as parties, individual judges or members of a majority. Within this belief system, further, adjudicators will feel the need to remain within the boundaries of what had been decided before (and can then be cited).[953] At the other end of the process, they shall also be careful of what they write, for their decisions will likely have systemic effect.[954]

The previous Chapters have offered various examples and illustrations that support these observations. Chapter I indicated that arguing from authorities is not only a valid argumentative method – it is also the main way to argue in legal matters. Chapter III showed that what makes an authority "authoritative" is a complex mix of features and characteristics – rather than only persuasiveness, indicating that international law is more than mere "reason" applied to a set of pre-existing rules. Chapters IV, V and VI have identified how courts, judges and parties cite authorities – and demonstrated that arguing is often a matter of delineating a corpus of authorities, in line with strategic considerations depending on the citing party. Finally, Chapter VII has analysed how international courts are engaged in a common exercise of attributing or refusing authoritativeness between themselves.

Together, these elements support the thesis that the law is whatever is citable – with consequences as to the definition of the boundaries of the "citable". Accordingly, **Section 1** below first reviews the role of citations and authorities in *making* international law. **Section 2**, in turn, concludes with the main consequences deriving from this role, namely, the strategic delimitation of what can and cannot be cited in any given forum.

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952 See L.B. Sohn, "Sources of International Law" (1995) 25 *Georgia Journal of International & Comparative Law* 399.

953 See, e.g., *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal (2 October 2006), at §293.

954 See A. von Bogdandy and I. Venzke, "Beyond Dispute: International Judicial Institutions as Lawmakers", in Armin von Bogdandy and Ingo Venzke (eds.), *International Judicial Lawmaking* (Springer 2012), at 979. See also Sir G. Fitzmaurice, "Hersch Lauterpacht, The Scholar as Judge: Part I" (1961) 37 *British Yearbook of International Law* 1, at 18: "[t]he international community is peculiarly dependent on its international tribunals for the development and clarification of the law."

1. The development of international law based on authorities

A) The "develop-not-make" fiction

Debates in international law literature and scholarship have frequently maintained, discussed or challenged a classic fiction according to which international adjudicators do not make law but only, at most, *develop* it. With the growing importance and magnitude of international dispute settlement, and the ever-expanding range of precedents from courts and tribunals, the distinction, however, has proven increasingly "difficult to maintain in practice."[955]

As explained in Chapter III, this fiction is complemented and strengthened by a focus on authorities as cited only in function of their persuasiveness: if authorities are material only insofar as they are persuasive, then precedents and teachings truly have no law-making effects; if courts and tribunals only "develop" the law, then they should be judged on the merits of their efforts of developing that law through their reasoning.[956] Both fictions are equally useful for adjudicators, as it coheres with their expected role, and contribute to a "prevailing and self-reinforcing judicial ethos."[957]

Yet, both fictions are betrayed by their inherent contradictions. Alain Pellet rightly said that we call "legislation" what we do not like and development what we endorse. But he himself talks along this useful fiction, whereas in other circumstances he has no cavil admitting that some part of international law is essentially "judge-made"[958] – just like most scholars are agreed that the Law of the Sea is to a large extent "ICJ Law".[959]

An increasing number of commentators have however taken the further step to admit that international courts and tribunal indeed do make law, and in a systemic fashion[960] – with impact,

955 See C.J. Tams, "The Development of International Law by the International Court of Justice", in Gaetano Morelli Lecture Series (ed.) *Decisions of the ICJ as Sources of International Law?* (International and European Papers Publishing 2018), at 69.

956 In the same sense, see G. Hernández, "Interpretative Authority and the International Judiciary", in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds.), *Interpretation in International Law* (Oxford University Press 2015), at 181.

957 See von Bogdandy and Venzke, *supra* note 954, at 984.

958 With respect to the law of international responsibility: see A. Pellet, "Some Remarks on the Recent Case Law of the International Court of Justice on Responsibility Issues", in Peter Kovacs (ed.), *International Law – A Quiet Strengh (Miscellanea in memoriam Geza Herczegh)* (Pazmany Press 2011), at 112.

959 See, e.g., Tams, *supra* note 955, at 84.

960 See, e.g., J. Alvarez, "What are International Judges for? The Main Functions of International Adjudication", in Cesare Romano, Karen Alter and Yuval Shany (eds.), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013), at 169: "in many cases, the main function of an international adjudication is to render an authoritative judgment on a disputed point of law and not merely to fill those 'interstitial' legal gaps needed to resolve a concrete dispute"; Hernández, *supra* note 956, at 181: "Whether or not judgments

as argued in the next part, on what can or should be cited in any given case. This law-making activity on the part of courts and tribunals, but also of individual adjudicators[961] and scholars, is why authorities, which are cited to build up new legal reasoning, are so important. The disputes around these authorities and their authoritativeness are further evidence of their importance to the participants in the international legal system.[962]

This important role is a feature rather than a bug. International law having, for the most part, no legislator, there is then little by way of "solid" authorities that could clearly lay out the law. (States, in their treaty-making power, only cover a part of what ends up being litigated.) When it comes to settling a dispute, it is therefore a system particularly prone to reliance on international courts and tribunals[963] and, in turn, on the authorities studied in this thesis;[964] precedents and teachings might be challengeable and lack the firm authoritativeness of clearly laid-out law – yet they have for them that they exist, are available, can be cited and relied upon.

The modern structure of international law further facilitates this role for authorities. Whereas "bindingness" is key to international legal argument, international practitioners have taken to assign (and dispute) binding character to rules that have been validated in the international legal order.[965] In other words, rules, once validated by judicial application or endorsement from an authority, can become "eligible for use in international legal argumentation."[966] Precedents and teachings are a primary receptacle for these validated rules, and in turn primary material for valid

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are a *source of law* or merely a means for the *determination of the law*, a court's interpretation nevertheless contributes to the creation of what it finds"; G. Messenger, "The Practice of Litigation at the ICJ: the Role of Counsel in the Development of International Law", in Mosh Hirsh and Andrew Lang (eds.), *Research Handbook on the Sociology of International Law* (Elgar 2018), at 210: "the dividing line between interpretation and creation far less clear than can be portrayed"; N. Ridi, "The Shape and Structure of the 'Usable Past': An Empirical Analysis of the Use of Precedent in International Adjudication" (2019) 10 *Journal of International Dispute Settlement* 200, at 245: "International lawyers are, by and large, sensitive to the appeal of the systemic: cases having bearing on systemic issues – sources, interpretation, other fundamental doctrines – are often ready at the fingertips of an academic and act as a fundamental building block in her argumentative toolbox. International adjudicators, it appears, are far less interested in systemic questions – or in so appearing."
But see von Bogdandy and Venzke, *supra* note 954, at 980, saying that theory and doctrine are yet to take stock of this increasing reality.

961 See R. Kolb, *The International Court of Justice* (Hart Publishing 2013), at 1014, opining that individual opinions at the ICJ can "influence the development of international law."

962 See von Bogdandy and Venzke, *supra* note 954, at 992.

963 See S.M. Schwebel, "The Docket and Decisionmaking Process of the International Court of Justice" (1989) 13 *Suffolk Transnational Law Journal* 543, at 547.

964 See M. Jacob, "Precedents: Lawmaking Through International Adjudication" (2011) 12 *German Law Journal* 1005, at 1017.

965 See J. d'Aspremont, "Bindingness", in Jean d'Aspremont and Sahib Singh (eds.), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar Publishing 2018), at 69-70.

966 Ibid, at 70.

international law arguments and reasoning.[967] As such, their binding force is a matter of fact, and not necessarily of law.[968]

Besides, to the extent that legal reasoning "builds systemic relationships between rules and principles", this reasoning increasingly obeys the "*political obligation* on law-appliers to make their decisions cohere with the preferences and expectations of the community whose law they administer".[969] Frequently, these preferences and expectations are themselves embodied in the authorities studied in this thesis, which are then cited to display a legal reasoning's "insertion in a whole […], in an order that [this legal reasoning] contributes to create, as well as by this judgment's potential to alter or correct this order."[970] In short, in line with the argument of Chapter I, authorities are legal arguments; it does not take much from there to find that, in some cases and *de facto*, the argument is the law itself.

B) The role of authorities in setting legal boundaries

Concluding on the systemic role of authorities in legal reasoning, Frederick Schauer explained that:

> what counts as a legal source, [… is] what counts as a *legal* argument; and what counts as a legal argument – as opposed to a moral, religious, economic or political one – is the principal component in determining just what the law is. The boundaries of law are set by the boundaries of legal authority, and law speaks as law through its sources.[971]

Ditto for international law. In the framework identified above in which courts and tribunals commonly make law by deciding disputes, authorities occupy a crucial place in delineating the boundaries of what is and is not a proper international law argument. Two mechanisms are operating concurrently: (i) international legal decisions (but also, to a lesser extent, individual opinions and submissions) indicate the boundaries of international law by endorsing and dismissing

967 See also I. Venzke, "Semantic Authority", in d'Aspremont and Singh, *supra* note 965, at 816, arguing that international law-making "unfolds in the communicative practice of its everyday operation."

968 B. Jia, *International Case Law in the Development of International Law* (Brill Nijhoff 2017), at §193.

969 M. Koskenniemi, *ILC Study Group on the Fragmentation of International Law, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (UN Doc A/CN.4/L.682),

970 G. Canivet, "L'autorité du jugement", in Antoine Compagnon (ed.), *De l'autorité* (Odile Jacob 2008), at 28

971 F. Schauer, *Thinking like a lawyer* (Harvard University Press 2009), at 84, who adds that: "When previously prohibited authorities become optional, and when previously optional authorities become mandatory, the nature of legal sources has changed, and with that change comes a transformation in the nature of the law itself."

some authorities and not others; (ii) these decisions themselves become authorities that clarify the extent, scope and content of international law.

As to the second effect, it results from the fact that "[n]orms are generally strengthened through their encounters with judicial actors, and their content is made more determinate, not indeterminate."[972] Part of a decision's authoritativeness is likely due to this power to clarify what used to be indeterminate: the clearer the authority, the likelier the citation. Through becoming an authority, decisions then acquire performative effects.[973] They become examples and inform the future choices of parties in international disputes.[974]

Precedents are a good example of what is at stake. Alf Ross, writing shortly after the ICJ was established, explained that:

> There is reason to believe that gradually, as the number of precedents of the Permanent Court increases, an international judge-made law will be established by practice, a law which will be of the greatest importance by giving to International Law that stability in which it is now so wanting. Whether or not the court formally believes in the binding force of precedents is actually of no great consequence.[975]

In other words, the authority of precedents and their role in framing international law do not depend on whether they are binding or not; they do not strictly depend on their degree of persuasiveness; they depend on these precedents' mere existence, on the fact that the Court formally adopted a solution that will later inform the behaviour of international law practitioners. This is also what Lauterpacht had in mind when he mentioned "the mysterious birth of an authoritative source of law out of what is evidence of the existing law."[976]

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972 See L. Boisson de Chazournes, "Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach: A Rejoinder – Fears and Anxieties" (2017) 28 *European Journal of International Law* 1275, at 35. She likens it to the benefits of fragmentation.

973 See A. von Bogdandy and I. Venzke, "The Spell of Precedents: Lawmaking by International Courts and Tribunals", in Romano, Alter and Shany, *supra* note 960, at 506: "Some jurists likewise 'succumb to their own timorous fiction, that a statement of 'the law' is a statement of fact.' But it can hardly be denied that statements of fact are themselves performative statements that contribute to the construction of the world and the making of the law."

974 See von Bogdandy and Venzke, *supra* note 954, at 979.

975 See A. Ross, *A Textbook of International Law* (London 1947), at 86-87.

976 See H. Lauterpacht, *The Development of International Law by the International Court* (Cambridge University Press 1934), at 20; Lauterpacht also explained that this process was not much studied because it is "of small practical importance." Closer to our times, see J. d'Aspremont, "If International Judges Say So, It Must Be True: Empiricism or Fetishism?" (2016) 4 *ESIL Reflections* 9, at 4, noting that "[f]or most international lawyers, the key doctrines around which legal arguments must be articulated acquire their authenticity as structures of legal argumentation only once they have received the seal of international courts."

The same performative effects also characterise the choice of citations in international legal argument. A *first* citation to an authority becomes the foundation for future citations by parties or judges, who expect it to be a proper authority and to support their argument. The Dataset illustrates this: for the majority of authorities (and especially decisions from courts or tribunals), their rate of citation *increases* following a first citation by an international court and tribunal (as compared to their share of citations before then). The effect is especially strong when looking at citations in pleadings, indicating that parties are receptive of the "favour" granted by adjudicators to some authorities in their decisions. For instance, following the ICJ's citation to the UNHRC in 2010 in the *Diallo* case, no fewer than 27 different cases have seen citations to the Committee, either by parties or the tribunal – including 22 investment arbitrations and two WTO proceedings.

As has been noted, international law operates and evolves through legal argumentation: "[w]hatever else international law might be, at least it is how international lawyers argue […] and this can be articulated in a limited number of rules that constitute the 'grammar' – the system of production of good legal arguments."[977] Or, as Judge James Crawford commented, "[i]n the absence of a coherent corpus of jurisprudence, all that is left for international law is argument – and the system as presently."[978] Parties, individual judges and courts and tribunals all participate in this argument – although, as seen in Chapter III, some voices are louder than others.

In this context, whether a citation *in a given case* did or did not have any "influence" on that case's outcome has limited relevance for its weight in the broader legal argument. Just like decisions, citations have systemic effects.[979] Legal argumentation is a practice that, in turn, informs future practitioners, framing their actions and their understanding of what is international law.[980] Citations, whatever the motives underlying then, will then delineate the sources of international

977 See M. Koskenniemi, *From Apology to Utopia* (Cambridge University Press 2005), at 568. See also I. Scobbie, "Towards the elimination of International Law: Some Radical Scepticism about Sceptical Radicalism" (1990) 61 *British Yearbook of international Law* 346. See also N. MacCormick, *Rhetoric and the Rule of law: a Theory of Legal Reasoning* (Oxford University Press 2005), at 53.

978 See J. Crawford, *Chance, Order, Change : The Course of International Law* (Brill Nijhoff 2013), at 128.

979 See H.G. Cohen, "Theorizing Precedent in International Law", in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds.), *Interpretation in International Law* (Oxford University Press 2015), at 281: "Conceptions of authoritative sources are constantly being constructed through the interaction of the various actors." See also S. Manley, "Referencing Patterns at the International Criminal Court" (2016) 27 *European Journal of International Law* 191–214, at 214.
This is why this conclusion is not affected by the opinion of J. Kammerhofer, "Law-making by scholars", in Catherine Brölmann (ed.), *Research Handbook on the Theory and Practice of International Law-Making* (Edward Elgar 2016), at 322, that "factual analysis cannot provide a feed-back loop to determine the legal powers of scholarship". The legal import of an authority for a given case is indeed (mostly) beyond reach of investigation; *systemic* import, however, does not depend on the use of a legal authority in any given case.

980 See C.P. Romano, "Deciphering the Grammar of the International Jurisprudential Dialogue" (2008) 41 *NYU Journal of International law and Politics* 755, at 765.
See also M.Q. Zang, "Shall We Talk? Judicial Communication between the CJEU and WTO Dispute Settlement" (2017) 28 *European Journal of International Law* 273, at 285, faulting the CJEU for seemingly following yet never citing the WTO precedents, and arguing that it is detrimental to consistency and certainty in EU law.

law by endowing some sources with legitimacy, and refusing such legitimacy to others.[981] In this context, the persuasiveness of the authority, or even its bindingness, will not be determinative as to its authoritativeness.[982]

As such, what can and cannot be cited will be decided by the actual practice of courts, tribunals, and litigators.[983] For instance, consider the GATT and WTO panels and Appellate Body reports that provided *unadopted* panel reports with authority.[984] It is practice, in opting for one "learned" source over another (such as the ILC in priority over other doctrinal authorities), that indicates where authority (and power) lies in international law.[985] (No wonder then that international courts are reluctant to cite "teachings of publicists."[986]) Authorities often cited gain in legitimacy; those ignored lose their "vitality."[987]

Citations cumulatively determine what is deemed a legitimate legal source and what is not.[988] They delineate the boundaries of international law.[989] For Grant Lamond:

> All of the preceding devices [i.e., citations] have the effect of giving primacy to the collective view of the judiciary over any individual judge's view. There would be no need for such devices if judges had Herculean powers, or could straightforwardly reach the correct decision "according to law." But the legal system must work with judges who have human capabilities. These devices create a feedback system in which judges must persuade other judges that their reasoning is convincing as a matter of

981 As put by F. Schauer, "Authority and Authorities" (2008) 94 *Virginia Law Review* 1931, at 1934: "[…] then something as seemingly trivial as citation practice turns out to be the surface manifestation of a deeply important facet of the nature of law itself."

982 Jacob, *supra* note 964, at 1015: "a simple binary 'on-or-off' or 'black-or-white' understanding of precedents' authority is not very helpful when considering the import of prior cases. Bindingness is not *sine qua non* for system-building."

983 G. Lamond, "Persuasive Authority in the Law" (2010) 17 *The Harvard Review of Philosophy* 19, at 32.

984 See *Japan – Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Appellate Body Report (1 November 1996), at 14: "we agree that 'a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant'." As seen in Chapter III, however, unadopted panels reports have a starkly lower authoritativeness; still, they continue to be cited.

985 See N. Duxbury, *Jurists and Judges: An Essay on Influence* (Hart Publishing 2001), at 13.

986 See M. Peil, "Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice" (2012) 1 *Cambridge Journal of International and Comparative Law*, at 146.

987 See P.M. Wald, "The Rhetoric of Results and the Results of Rhetoric: Judicial Writings" (1995) 62 *The University of Chicago Law Review* 1371, at 1399.

988 See also Schauer, *supra* note 971, at 80, assessing the US debate over foreign sources as being "about which sources should be taken as genuinely authoritative, even if not absolutely so. This is a debate that goes to the heart of the authoritative character of law itself […]."

989 See A. Pellet, "Decisions of the ICJ as Sources of International Law?", in Gaetano Morelli Lecture Series (International and European Papers Publishing 2018), at 44, with respect to the ICJ.

> law. It inclines them to draw on the common stock of arguments and values shared by the judiciary.[990]

The practice of citation, better than formal rules such as article 38(1) of the ICJ Statute, better than any textbook treatment, then identifies what counts as law in international dispute settlement. It sheds light on the corpus of permissible authorities, permissible arguments, that inform the law in any given case. In seeking to persuade the audience by invoking an authority, the citing party engages in a process with systemic implications[991] – which, in turn, shape the nature of authorities,[992] and of international law itself.

2. The strategic use of authorities by adjudicators and parties

If, as indicated above, citing is a highly strategic activity with systematic effects, then two conclusions follow: that adjudicators will try to delineate the range of permissible authorities (A), and, consequently, that these boundaries will be up for debate (B).

A) The strategic designation of a range of citable authorities

Although some authorities are recognised as being authoritative and others (by not being cited) are not, the range of authoritative authorities remains relatively open-ended.

Certainly, as seen in Chapter III, not all ICJ precedents, for instance, are authoritative to the same extent. Yet, despite their varying authoritativeness, the entire category of "ICJ decisions" – which is open-ended as long as the Court is extant – is presumably authoritative for disputes occurring in fora that accept ICJ precedents as authoritative sources of international law (and as long as these fora do so). In other words, once one particular set of authorities is cited by an adjudicator, parties can legitimately assume that all elements falling in that category will be authoritative (if not necessarily to the same extent) in similar circumstances.

This is why the recognition of the authority of some sources often come with more specific rules as to the extent of this authoritativeness. We witnessed this in Chapter VII in the ICJ laying

990 Lamond, *supra* note 983, at 33. See also H.G. Cohen, "International Precedent and the Practice of International Law", in Michael Helfand (ed.), *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism* (Cambridge University Press 2015), at 174.

991 Just like forum shopping is "about strengthening the authority of one site relative to that of others": see N. Krisch, "Liquid Authority in Global Governance" (2017) 9 *International Theory* 237, at 248.

992 Of authorities in general, but also of the specific authorities being cited in each case, as indeed each citation endows this particular authority with additional meaning. On this point, see W. Werner, "Recall it again, Sam. Practices of Repetition in the Security Council" (2017) 86 *Nordic Journal of International Law* 151, at 158.

down rules as to its reliance on specialised bodies such as the HRC, but this is also what is at stake in the common position of all international adjudicators that they are not bound by previous international law decisions. In so doing, they limit the amount of the authoritativeness they just, in the same stroke, grant to (some) of these decisions. Jean d'Aspremont puts it well, observing that:

> After all, the choice to turn down the principle of *stare decisis* and the rejection of a formal doctrine of precedents boils down to a choice for a wide communicative discretion about how the past is used and constituted. In other words, the current state of the practice pertaining to precedents is itself a strategy about how much leeway international courts and arbitral tribunals enjoy when they communicate about the relevance and content they give to the past in the present.[993]

Adjudicators are often situated in a double-bind, as they wish both:

- to shore up the authority of their own decisions, not only for the parties at stake in the case, but in the future as well. This is due to their judicial ethos, yet takes particular salience, as discussed above, in a context of competition between courts and tribunals;[994] and
- to limit the authoritativeness of *future* authorities, whose content is necessarily unpredictable.

This double bind means that, if adjudicators could in theory expand their discretion in a particular case in relying on a broader range of authorities (and therefore a broader range of justifications for new or unexpected legal solutions),[995] this would be a costly strategy for future adjudication. In so doing, they would also likely constrain their own discretion in future cases by expanding the range of sources, or "argumentative burdens", they cannot simply overlook. As seen above in relation to external citations, if laying out clear criteria as to what is authoritative and what is not enhances predictability and transparency, not doing so strengthens a court or tribunal's ultimate discretion to rely on the sources it prefers.

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993 See J. d'Aspremont, "The Control Over Knowledge by International Courts and Arbitral Tribunals", in Thomas Schultz and Federico Ortino (eds.), *Oxford Handbook of International Arbitration* (Oxford University Press 2019).

994 See M.M. M'Bengue, "Precedent", in Jean d'Aspremont and Sahib Singh (eds.), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar Publishing 2018), at 718.

995 This is exactly what is at stake in the debate surrounding the Supreme Court's use of foreign law: for Antonin Scalia, the majority's use of "cherry-picked" precedents from other countries allowed it to justify things it could not have gotten away with under strictly American sources. See *Roper v. Simmons*, 543 US 551, 627 (Scalia J, dissenting).

This is also why citation practices frequently have an all-or-nothing character: remember the ICJ's long practice of not citing other international courts, or the CJEU's steadfast policy not to cite WTO authorities. Courts and tribunals, especially when they are institutionalised like the ICJ or the WTO, will rarely slip and cite the odd authority that does not conform to their explicit or implicit criterion. Doing otherwise would lessen the strength of the signals of authoritativeness. It also entails a degree of informality in the practice of citing, which is likely to (i) reduce the deference due to the most authoritative sources; and (ii) lower the barrier of entry for new authorities to challenge central ones.[996]

All this should lead to an equilibrium whereby (i) precedents are not binding; (ii) yet operate as argumentative burdens; (iii) precedents of one own's court are granted more authority over external precedents; (iv) only a few teachings (e.g., from the "most highly qualified publicists of the various nations") will have some authoritativeness. This is exactly the equilibrium that obtains in the data, as demonstrated throughout this thesis.

Three consequences also further follow from this equilibrium.

The first is that, to the extent only some and not all precedents are granted authoritativeness, parties and adjudicators will need to draw as much as they can from the few sources imbued with authority. As has been noted, "a multitude of legal positions can be wriggled out of precedents if only one is willing to argue accordingly".[997] If only ICJ precedents, for instance, are endowed with particular authority, then parties and decision-makers will try to locate ever more legal propositions in the closed set of existing ICJ precedents, even though better-suited but less-authoritative sources concurrently exist.[998] The Dataset indicates a clear correlation (R^2 of around 0.6, depending on the forum) between the PageRank score of an authority and the number of unique topics that authority is cited about. This repurposing of old sources for new legal propositions might actually explain why the average age of authorities cited in decisions is increasing, as seen in Chapter IV.

A second consequence of all this is that the increase of citable authorities within open-ended authoritative categories of sources might render disputes more complicated – not less. In another

996 Krisch, *supra* note 991, at 246.

997 See Jacob, *supra* note 964, at 1016. He adds: "[…], no matter whether *stare decisis* is officially endorsed or not."

998 We evidenced this phenomenon in W. Alschner and D. Charlotin, "The Growing Complexity of the International Court of Justice's Self-Citation Network: Institutional Achievement or Access-to-Justice Concern?" (2018) 29 *European Journal of International Law* 1, at 101, where we demonstrated that the same paragraphs from ICJ precedents are increasingly used in support of a growing number of legal propositions.

paper with Wolfgang Alschner, we argued that the increasing complexity of the ICJ's citation network entails a greater complexity of litigating disputes before the World Court, as "an increase in the use of precedents places greater demands on parties and judges to effectively navigate the maze of judicial authorities."[999] Other scholars have reached the same conclusion for WTO disputes.[1000]

B) Contested rules of citation

The third, and most important consequence of this strategic use of authorities, is that the choice of what categories of authorities are authoritative and which are not will be imbued with strategical considerations and become a prime source of contestation. In other words, this will become a battleground for the parties, adjudicators and commentators, alike, who will dispute what can and cannot be cited in international proceedings.[1001]

A 2009 decision of the IUSCT offer a good example.[1002] In this decision, a majority of the Tribunal adopted an interpretation of the principle of *res judicata* drawn from WTO jurisprudence and with support taken from two doctrinal authorities. In a commentary, Michael Ottolenghi deplored that the Tribunal's decision on this point:

> […] rel[ied] on *obiter dicta* from a decision by a World Trade Organization dispute panel and the opinions of two commentators. […] This departure from the Tribunal's established practice is unsupported by the practice of other international courts and tribunals, as evidenced by the Tribunal's reliance on *obiter dicta* from a WTO panel-which is, at best, of questionable relevance, given the very different institutional structure of the WTO and the different rules and guidelines governing its dispute panels.[1003]

This results in frequent propositions to add more criteria to what can or cannot be cited. Parties in investment arbitration have for instance proposed that precedents not based on the same

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999 See *ibid.*, at 112.

1000 See J. Pauwelyn and W. Zhang, "Busier than Ever? A Data-Driven Assessment and Forecast of WTO Caseload" (2018) CTEI Working Papers CTEI-2018-02, at 20.

1001 A related question lies in the debate as to international courts and tribunals should or should not accept *amicus curiae* submissions. In the *Shrimp-Turtle* case, the AB disagreed with the panel on the admissibility of *amici curiae*, especially unsolicited ones – a split that makes sense when viewed as question (and a conflict) over the range of valid authorities in deciding a dispute. See *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Appellate Body Report (12 October 1998).

1002 See *Iran v. United States*, Case No. B61, Partial Award No. 601-A3/A8/A9/A14/B61-FT (17 July 2009), at §119.

1003 See M. Ottolenghi, "Islamic Republic of Iran v. United States: Case Nos. A3, A8, A9, A14, and B61 International Decisions" (2010) 104 *American Journal of International Law* 474, at 478. As noted above in Chapter IV and in Chapter VII, questions regarding "res judicata" frequently occasion citation to external authorities and to teachings.

treaty should not be granted any authority. At the annulment stage in *Vieira v. Chile*, the claimant asked the tribunal to annul the award *inter alia* because of the tribunal's reliance on a dictum from the *Luccheti v. Peru* case under a different bilateral investment treaty.[1004] The *ad hoc* committee, however, only saw there a "common practice" of "citing the precedents of other tribunals or ICSID *ad hoc* committees […] when making a decision".

Likewise, the respondent in *Standard Chartered Bank v. TANESCO* argued that only past decisions can be relied upon. In that case, the Bank was trying to challenge the tribunal's decision on the basis of the unrelated legal findings of the tribunal in *Burlington v. Ecuador*. TANESCO replied:

> In TANESCO's view, the *Burlington v. Ecuador* decision, referenced by SCB HK in the Annulment Proceeding, is not relevant to the proceeding before this Committee. It recalls that the decision in *Burlington v. Ecuador* was published almost three years after the Decision on Jurisdiction was issued and five months after the publication of the Award. Thus, according to TANESCO, even if *Burlington v. Ecuador* supported SCB HK's position, it would be impossible to justify the Tribunal's reconsideration of the Decision by reference to a later case, which of course it did not consider.[1005]

At a more granular level, parties will also often debate what individual authorities can and cannot be added to the record, with the hope that this expanded or restricted corpus of authorities will determinative in the outcome. This is common in investment arbitration, where developments in the law typically arise quicker, and sometimes result in requests for unavailable authorities: for example, in *Koch v. Venezuela*, the claimant tried to obtain a jurisdictional finding adverse to the state in the unrelated *Longreef v. Venezuela* case, but the tribunal refused to order Venezuela to produce it.[1006]

In short, international lawyers fight and debate about what should and should not enter the corpus of authorities that should resolve a legal dispute. International law, in last analysis, is often nothing more than this corpus, and legal argumentation a debate about its scope and extent.

1004 See *Sociedad Anónima Eduardo Vieira v. Chile*, ICSID Case No. ARB/04/7, Decision of the ad hoc Committee of the Application for Annulment by the Claimant (10 December 2010), at §77. The investor also pointed out that this award had nearly been annulled, given that an ad hoc committee in that case only upheld the award by majority, and this should somehow discount its authoritativeness. On this point, however, see above, Chapter III, Section 2, subsection D.

1005 *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Decision on Annulment (22 August 2018), at §99.

1006 See *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award (30 October 2017), at §§1.63-1.65.

Chapter IX – Conclusions

"the black-letter man may be the man of the present, but the man of the future is the man of statistics."

Holmes, *The Path of the Law*

In their seminal article on the use of legal data analysis in international scholarship, Urška Šadl and Henrik Palmer Olsen argued that:

> […] quantitative methods, such as corpus linguistics and citation network analysis, ensure the reproducibility , generalizability , and empirical validity of doctrinal studies. They add to the transparency of legal methodology while substantially clarifying the legal method. They can provide empirical evidence to validate hunches and prove legal intuitions correct.[1007]

At more than 200 pages, this foray into the citation practice of five international courts and tribunals attempted to do just this.

The previous chapters have analysed an exhaustive Dataset of citations in nearly all known disputes before the International Court of Justice, the Iran-US Claims Tribunal, the International Tribunal for the Law of the Sea, WTO panels and investment arbitration tribunals. The thesis extends our understanding beyond the existing literature with respect to the role and relevance of two types of authorities in international dispute settlement, precedents and teachings.

At many points, the "hunches" and "legal intuitions" of scholars were found to be correct, at least to the extent that the empirical analysis – acknowledging its limits – is not disproved by future analyses.

1007 Šadl, U. and H. P. Olsen, "Can Quantitative Methods Complement Doctrinal Legal Studies? Using Citation Network and Corpus Linguistic Analysis to Understand International Courts" (2017) *Leiden Journal of International Law* 327–49

That many of these intuitions were confirmed does not discount the value of the exercise. Data analyses typically elicit higher expectations for novelty and surprise than warranted. Yet it is often just as good, if not better, if these analyses merely confirm what everyone knew – or, better, what everyone thought they knew.

In other respects, this thesis reveals novel findings that the previous literature has not broached. In particular, this thesis was especially interested in variation of authoritativeness across different authorities, and in what makes some of them more – sometimes much more – cited than others. Scholars and practitioners know there are "beacons" and "flicker" in the set of authorities they could possibly cite or study; most legal practitioners would concur on the "landmark" cases as well as the most authoritative scholars in their fields. Yet, there is no clear way to distinguish these landmarks from other cases, no evident "authority" to vouchsafe the authoritativeness of certain authorities over others. "Persuasiveness", in particular, fails to satisfactorily answer the question of what makes some authorities not only more authoritative or cited, but significantly so.

The analyses performed at Chapter III, relying on an exhaustive Dataset of citations to authorities, therefore innovated in investigating some likely determinants of the authoritativeness of authorities. This chapter evidences that some categories of authorities (precedents over teachings) typically command greater authoritativeness; and that this quality also varies depending on an authority's author, its language or age. This latter criterion is particularly important, as a "rich-get-richer" phenomenon is at play to ensure that already-authoritative authorities steadily and disproportionately gain in authoritativeness over time. By contrast, other possible candidates, such as the time spent or the number of procedural events that occurred in a given case, seemingly do not have an impact on a precedent's later authoritativeness.

These analyses are all the more important now that authorities are ubiquitous in international legal arguments. Ubiquity that does not, however, involve uniformity. Chapters IV, V and VI have investigated the citation practices of different protagonists in international disputes, and found that they differ in line with some expected strategic considerations.

Courts and tribunals are expected to give reasons for their findings. There are several ways for them to do so, however, and the exercise is mostly shaped by the recipient of these reasons. In this respect, the Dataset indicates that, to various degrees, the courts and tribunals studied here write their decisions and rely on authorities for audiences broader than the parties to a given dispute.

As opposed to the parties or individual judges, courts and tribunals will rely on a more limited set of authorities, of higher authoritativeness in general, and presumably more familiar to their respective audiences. They will also take care of embedding their findings in their existing jurisprudence, whether that jurisprudence was or was not cited by the parties. In line with a scholarship that found all international courts and tribunals to move further from a dispute settlement mindset to a greater concern for international law and governance, finally, the citation practice of the courts and tribunals studied here seem to converge in this respect.

The citation practice of individual judges, meanwhile, is likely driven by different considerations. Writing an individual opinion, in itself, is a strategic move for these judges, although it is unclear if some of the strategic goals likely pursued by this exercise are really within reach: there is little evidence that dissenting opinions for instance undermine the reasoning of a majority decision, nor that these opinions acquire their own authoritativeness for future legal debates. The citation practice of individual judges, besides, display no particular distinction between dissenting and concurring opinions. The fact, however, that party-appointed judges cite more authorities in favour of the party appointing them, as well as more opinions by other judges, indicate that citing in individual opinions is partly a social exercise, aimed perhaps at raising one's profile (for instance, on the basis of self-citations) or at building coalitions of like-minded judges.

Parties, meanwhile, are under pressure of citing as much as possible: to keep up with the opposite party's own corpus of supporting authorities, and lest they overlook any authority that could, perhaps, prove key to the ultimate outcome. In particular, parties are prone to cite authorities by the decision-makers themselves. While there is little evidence that this is a successful strategy, citing more unique authorities than the opposing party, to some extent, helps to prevail in any given dispute – indicating that a "kitchen-sink" approach to citations may be a reasonable course of action.

Whereas anything can go in the "kitchen sink", however, is debatable, as Chapters VII and VIII indicated, what can or cannot be cited is, perhaps increasingly, a matter of contention. International courts, between themselves, are notably wary of citing external precedent and authorities, despite the threat of fragmentation in international law. The experience of the ICJ is telling in this respect, as its partial opening to external authorities was made on its terms and limits.

As Chapter VIII concluded, this is sensible: what can or cannot be cited, ultimately, reflects the boundaries of what is or not the law to be applied – or at least, taken into account – in any given

dispute. In this context, citing anything has systemic effects beyond the scope of a single case; a citation is a signal that endorses the authoritativeness of some categories of authorities over others. As a result, parties, judges, and courts are engaged in a constant struggle to define the scope of citable authorities. The latter in particular walk a tight rope, as citing more broadly could in theory enhance their reasoning a given case – at the cost, however, of expanding the legal debate in future cases, and perhaps reducing their discretion.

The practice of citing authorities in international dispute settlement is an important object of study and enriches international legal scholarship. Far from pertaining only to the legal *craft*, and varying from dispute to dispute, a "distant reading" of this practice displays its patterns and variations, but also its important legal implications. Beyond the day-to-day dispute between parties as to what is or is not a proper authority, and the mundane argumentative practices aiming at the authoritativeness of any given authority in any given case, there is a systemic phenomenon at play that is relevant for the very boundaries of what is or is not international legal argument – and international law.

The key to these debates, perhaps, may reside in clearer indications as to the range of proper and improper authorities in international dispute settlement. Whether these can validly, usefully, and definitively be delineated *a priori*, however, is a question for another thesis.

Annex I – Topics

The topic analysis described in Chapter II identified 150 topics in the Dataset. This number was set semi-arbitrarily after several trials to identify a number that would do justice to the expected breadth and diversity of topics to be expected in the Dataset. The algorithm returned a number of key words associated with each topic. I manually tagged these topics according to what I deemed the most accurate idea linking these key words together. Often, different sets of keywords pertained to a single topic.

Several topics, not reproduced below, were impossible to tag with accuracy and labelled as "other"; these topics were then ignored when tagging individual paragraphs with reference to the most likely topic of that paragraph. Some topics are associated with more than one cluster below, which likely reflect nuances in these topics in the Dataset.

The topics and their keys are as follow, in alphabetical order.

Topic	Keys
Advisory Opinion	opinion advisory question court request legal case judicial give questions para present opinions reports jurisdiction political icj organ pp proceedings
Annulment	ad hoc tribunal annulment excess law powers committee manifest decision icsid jurisdiction apply power applicable parties error judges failure judge
Annulment	annulment icsid stay award committee hoc ad decision enforcement rule procedure scb hk tanesco fundamental application committees departure proceedings party
Annulment	reasons tribunal committee annulment award ad hoc state decision reasoning failure contradictory requirement icsid point ground stated conclusion follow based
Arbitrariness	treatment arbitrary standard fair equitable discriminatory measures conduct unreasonable investment investor arbitrariness measure reasonable state unfair elsi foreign rational standards
Argument	argument claim argues support claims case fact position based failed alleged arguments asserts submits contends basis rejected memorial evidence legal
Argument	fact case question position made time point view clear situation matter action make effect present reason put argument circumstances simply

Bank	bank payment account funds credit amount banks guarantee security transfer interest letter loan pay banking payments exchange made debt
Challenge	arbitrator icsid case impartiality independence arbitration challenge party arbitrators disqualification lack proposal parties facts counsel kohler independent professor decision ubs
Compliance	original measure article dsb measures proceedings comply panel rulings recommendations compliance ec proceeding dispute para claims dsu claim wto scope
Consular	states united court judgment mexico nationals obligation review rights paragraph consular reconsideration avena article state interpretation federal result mexican execution
Contract	contract contractual breach treaty clause bit claims obligations tribunal umbrella claim party rights sgs breaches agreement violation investment state contracts
Contract	contract equipment payment work performance amount invoices claimant force contracts services letter termination majeure project contractual majority reprinted goods paid
Contract	nioc contract contracts agreement claimant osco party equipment joint parties oil payment hcc certificate agreements insurance claim procurement clearance amount
Control	entity government control public governmental authority entities body state private activities commercial legal controlled agency owned functions conduct procurement single
Costs	costs party arbitration expenses legal fees tribunal incurred award bear case claimant proceedings pay cost parties circumstances icsid respondent amount
Couterclaim	claim counterclaim tribunal claims counterclaims jurisdiction contract claimant filed amendment based social respondent contracts paragraph statement dismissed transaction arise party
Customary	international law customary rule practice general rules principle tribunals treaty state principles custom states lex treaties decisions juris existence legal
Customs	customs duties tariff duty import measures ec ii ordinary measure price parts hs para products issue heading specific charges classification
Damages	damages loss compensation damage losses award suffered tribunal claim claimant lost caused breach result profits awarded amount incurred moral injury
Declaration	jurisdiction declaration reservation declarations case compulsory paragraph made acceptance clause unilateral reservations effect force consent legal intention court present parties
Delimitation	delimitation line para equidistance case equitable relevant method circumstances maritime coasts continental shelf area result boundary court special median areas
Delimitation	boundary maritime frontier court para map line delimitation case cameroon nigeria judgment agreement maps dispute area temple land cambodia parties
Delimitation	continental shelf sea delimitation rights territorial maritime zone natural areas para coastal exclusive miles area economic prolongation waters nautical law

Delimitation	line coast point boundary islands island area territorial maritime deg sea waters north miles east channel south points part water
Denial of Justice	justice denial law judicial court international courts decision tribunal process due national procedural emphasis added administration result judgment failure system
Development	economic interests countries international development country system political policy developing purpose important interest importance world protection legal role social states
Discrimination	treatment discrimination investors circumstances foreign national discriminatory investments investor nafta accorded measure domestic nationality investment ca favourable favorable based intent
Discrimination	discrimination xx measure chapeau unjustifiable arbitrary countries restriction applied conditions disguised trade manner para tyres international prevail application gatt ban
Dispute	dispute existence legal case parties claim views party application court matter para fact law conflict disagreement judgment determination interpretation exists
Dispute	dispute dsu wto panel settlement para panels agreements covered ec adopted system parties procedures rights disputes reports provisions party dsb
Domestic	court courts decision law decisions domestic tribunal proceedings international judicial judgment appeal review administrative national case local claim justice tribunals
Due Process	process due rights opportunity procedural procedure proceedings parties fundamental fair legal heard fairness notice provide present reasonable proceeding claims conduct
Dumping	information confidential facts parties interested authority investigating investigation para essential dumping provide disclosure provided authorities data party determination basis ec
Dumping	dumping usdoc review sunset determination reviews determinations likelihood duty administrative anti original investigation order para injury continuation margins resistant investigations
Dumping	dumping anti duties duty vi margin countervailing amount para gatt investigation imposition assessment exporter ad scm investigations specific action determination
Dumping	dumping investigating investigation authority producers authorities evidence information para determination facts exporters ec ad examination producer objective exporter rolled individual
Dumping	industry domestic imports injury factors data analysis production increase market investigation period usitc ec relevant producers determination trends para increased
Dumping	dumping zeroing comparison methodology export product transactions average margins margin normal para ec transaction weighted comparisons investigation sentence ad price
Dumping	imports injury factors dumped effects domestic analysis causal industry para investigating determination authority caused increased causation link usitc injurious subject

Dumping	price prices export para differences product domestic normal comparison market sales comparability undercutting authority investigating suppression pattern country adjustment significant
Enforcement	award tribunal arbitral awards arbitration enforcement tribunals parties decision international decisions final rendered icc binding arbitrators courts state arbitrator party
Enforcement	tribunal award request decision filed claim iran settlement claims rules case refusal registrars dec chamber paragraph final foremost full jurisdiction
Environment	environmental environment harm impact principle damage water uruguay para activities river obligation precautionary development international transboundary protection significant assessment resources
Equity	law international principle principles legal general rights rule rules fundamental equity recognized concept jus obligations justice equality case application doctrine
Estoppel	estoppel spirits tax distilled alcohol ii pisco soju party alcoholic applied taxation shochu whisky beverages content conduct made taxes supra
Evidence	evidence statements submitted facts record fact case made presented statement support documents testimony witness sufficient alleged weight information based proof
Evidence	documents document information inferences adverse produce evidence requested production inference request submitted failure draw provide party order produced possession relevant
Exhaustion of remedies	remedies local justice denial international effective exhaustion courts claim judicial system means claims remedy law requirement tribunal rule claimant exhaust
Exports	export item financing edc aircraft eu costs rates market interest credit para oecd terms profit production rate regional records commercial
Expropriation	expropriation property rights investment measures deprivation indirect tribunal taking interference investor measure effect economic law state government expropriated owner actions
Expropriation	compensation expropriation unlawful property taking standard lawful law date expropriated full market investment international fair payment tribunal case nationalization amount
Expropriation	property claimant properties iran expropriation ownership iranian mr shares decision respondent tribunal cc foundation date real expropriated revolutionary estate riahi
Facts	population people war persons native local life authorities forced territory made notam labour country area members men children civil part
Forum	jurisdiction contract clause disputes tribunal claims forum courts parties article selection settlement arising iranian ii paragraph competent clauses dispute declaration
Genocide	genocide group icty intent judgment chamber para court trial convention acts crime part committed criminal prosecutor destruction crimes case genocidal

Good Faith	faith good protection security obligation full standard due diligence physical principle legal investment state exercise duty provide protect host international
Governing Law	law international rules applicable legal domestic municipal principles case laws relevant apply provisions accordance national applied tribunal application general treaty
Human Rights	human rights international pp law cf case state inter protection de iacthr icj justice present time opinion individuals life legal
Immunity	immunity international criminal crimes state law jurisdiction arrest foreign warrant belgium case court territory committed courts immunities prosecution drc national
Inherent Powers	power exercise powers judicial authority act functions inherent function action competence organ decisions international law organs sovereign decision rights respect
Interest	interest rate award compound date awarded payment simple amount compensation rates tribunal claimant damages post tribunals investment due commercial case
Interpretation	term provision interpretation provisions scope meaning context language reference text terms specific phrase general view definition clear word application refers
Interpretation	meaning term context ordinary interpretation purpose terms treaty object word light interpreted text words accordance practice definition provision parties relevant
Interpretation	treaty convention article parties interpretation treaties international law agreement rules states provisions party vienna contracting application art force state accordance
Interpretation	interpretation treaty principle interpreted meaning text provisions provision effect parties purpose rule words treaties intention terms object give general result
Interpretation	text interpretation meaning travaux version means conclusion supplementary treaty history preparatoires negotiating english preparatory work bit texts siege translation article
Intervention	case court legal interest intervention decision party rights intervene parties judgment interests state proceedings affected application nature states present subject
Investment	investment icsid definition contribution bit economic tribunal risk test host development criteria term investments meaning duration made contract tribunals arb
Investment	claimant mining permit license tribunal government law project found rights revocation granted actions business permits decree environmental federal concession issued
Investment	investment bonds transaction icsid tribunal operation economic investments bit made security territory financial entitlements sovereign funds csob part banka case
IP	eu trips trademark rights ect ec protection trademarks registration law property intellectual ecj subject member intra registered bridgestone tfeu gi
Judicial Economy	panel claims measure dispute make findings para measures economy gatt issue judicial ec recommendations wto order respect panels inconsistent recommendation

Jurisdiction	jurisdiction tribunal merits objection objections preliminary jurisdictional case admissibility claims claim question decision issue raised issues dispute proceedings competence respondent
Jurisdiction	arbitration icsid consent dispute bit jurisdiction tribunal investor investment parties disputes requirement agreement state arbitral international treaty courts arbitrate offer
Jurisdiction	claims tribunal declaration settlement states iran article united paragraph claim jurisdiction government ii vii claimant january case nationals republic islamic
Jurisdiction	jurisdiction court case ratione paragraph proceedings question para parties cases competence basis article present dispute statute personae provisional judgment measures
Jurisdiction	jurisdiction case application proceedings para court date principle applicant dispute time present icj jurisprudence filing condition pp filed institution international
Legality	investment investor investments tribunal bit icsid protection treaty host law made investors state foreign jurisdiction international abuse requirement purpose arbitration
Legality	conduct criminal tribunal corruption fraud allegations law alleged evidence arbitration faith illegal case public respondent illegality investigation claimant violation proceedings
Legality	investor investment foreign state host regulations act para investments tribunal approved government administrative manner plan approval business treatment transparency investors
Legitimate Expectations	expectations legitimate investor investment legal framework fair treatment equitable host state regulatory standard made expectation investors tribunal reasonable specific foreign
Mandate	mandate mandates territory trusteeship league south system mandatory africa territories supervision pp resolution administration obligations nations international trust rights agreement
Measure	measure application measures general para dispute challenged wto rule prospective norm existence settlement conduct challenge panel issue instruments ec applied
Measure	administration ec customs laws administrative regulations gatt para application uniform measure measures decisions manner general panel substantive requirement reasonable legal
Measure	measure safeguard imports unforeseen injury developments xix increased measures usitc competent remedy adjustment report conditions application authorities applied investigation extent
Measure	measure cool tbt tuna products para dolphin regulatory impact legitimate detrimental mexico safe origin distinction technical livestock objective regulation dolphins
MFN	bit clause mfn treaty dispute provisions tribunal treatment settlement investors arbitration treaties provision resolution clauses investments bits investment protection nation
Nationality	nationality nationals protection national foreign state diplomatic control law person claim company persons corporate case dual international rights claims legal

Nationality	nationality claimant states effective united dominant tribunal relevant national period claim evidence iranian iran dual citizen date nationals citizenship time
Necessity	necessity state essential measures xi international security obligations treaty law interests defense bit ilc application emergency breach defence interest countermeasures
Negotiations	dispute settlement agreement negotiations parties disputes negotiation agreed settled arbitration solution matter means negotiate settle obligation good diplomatic present view
Nuclear	nuclear weapons force armed international threat law defence military disarmament war attack weapon prohibition intervention pp principle states humanitarian rmi
Nullification	ec suspension dsu concessions measure impairment dsb nullification article level violation wto obligations compliance arbitrator inconsistent authorization determination iii countermeasures
Obligation	obligation obligations ii provisions requirements paragraph iii set respect specific provision article general violation vi conditions comply substantive requirement part
Obligation	gatt wto trade ec provisions obligations agreements para agreement commitments part tariff rights measures xxiv concessions ii iii interpretation paragraph
Obligation	wto legislation inconsistent mandatory law obligations practice discretionary administrative provisions action section measure consistent panel para discretion distinction legislative laws
Obligation	xx gatt measure measures compliance laws regulations para secure defence inconsistent justified provisions exceptions requirements exception analysis paragraph xiv wto
Prima Facie Jurisdiction	jurisdiction tribunal facts facie prima merits case alleged claims claimant jurisdictional claim bit test provisions stage treaty dispute allegations basis
Principles A and B	states united iran tribunal declarations algiers general claim properties iranian claims principle courts court paragraph litigation assets obligation order case
Procedure	respondent claimant claimants memorial tribunal reply counter hearing rejoinder article argues para submits post contends statement paras transcript citing day
Procedure	submission para written paras question response statement argues meeting submits referring oral substantive opening notes citing party ec refers considers
Procedure	hearing parties request filed proceedings submissions submitted submission oral case party requested written order evidence submit file time comments dated
Procedure	panel request measures consultations measure reference terms para establishment issue identified dispute ec dsu specific scope legal subsequent included requests
Products	products iii imported domestic treatment gatt measure favourable para conditions product internal competitive origin goods competition sale requirement ec panel
Products	products product competitive iii directly likeness domestic imported ec para market end substitutable consumers characteristics physical relationship case sentence competition

Products	ec product tbt technical regulation products characteristics requirements measure para seal regulations eu mandatory definition labelling tpp packaging document compliance
Proof	burden proof party case evidence facie prima establish claim prove complaining presumption proving bears sufficient fact established para provision rule
Provisional Measures	measures provisional rights interim order request dispute proceedings case harm irreparable tribunal party relief decision requested prejudice urgency parties para
Public Policy	public measures health policy measure protect tobacco human protection objective ban purpose objectives life morals legitimate concerns environmental mtbe ethanol
Quantum	market price increase industry costs prices cent business cost economic sales high million capacity rate higher share significant demand production
Quantum	valuation profits method future dcf market based million tribunal damages cash investment lost approach rate fair date project expert amount
Quotas	goods xiii services iii sale allocation purchase quota trade substantial shares trq suppliers rights tariff timber customs arrangements ec supplying
Ratione Temporis	date force dispute entry acts time prior events treaty occurred breach act conduct facts continuing bit entered case jurisdiction alleged
Ratione Temporis	nafta loss tribunal damage knowledge breach time period claimant claim limitation investor rl limitations incurred continuing acquired alleged measure date
Reasonable Period	period time reasonable years months date year delay days implementation case periods month notification end long relevant circumstances limit required
Remedy	act reparation compensation international damage restitution case principle wrongful law damages consequences illegal situation breach committed obligation full caused internationally
Res Judicata	res judicata judgment decision tribunal parties principle binding final issue case decided effect identity decisions proceedings operative force question request
Restriction	measure para objective trade alternative contribution restrictive measures analysis technical ii proposed necessity cool issue regulation degree pursued tbt legitimate
Restriction	import xi measure importation products gatt restrictions measures restriction imports para trade licensing panel effect limiting requirement requirements quantitative export
Restriction	export domestic conservation xx restrictions measures production natural resources quota china supply quotas consumption measure rare panel para foreign exhaustible
Risk	risk scientific assessment evidence sps measure relevant para sufficient ec measures insufficient panel based level basis international information objective protection
Risk	sps measures measure para protection level panel alop relevant ec international products sanitary risk disease eu oie phytosanitary standards procedures
Risk	risk hormones assessment ec scientific para panel meat experts evidence sps oestradiol jecfa effects potential risks growth treated adverse studies

Services	services service gats suppliers supply gambling measure xvii measures treatment para cpc gas distribution trade commitments sector xvi natural specific
Shareholders	investment claims company bit tribunal investor investments rights indirect shareholders claim treaty case companies shares icsid directly arbitration claimants shareholder
Shareholders	shares ownership company owned corporation claim claimant control interest stock held companies shareholders legal share evidence entity percent capital claims
Shareholders	shares company sale market price assets purchase transaction business privatization companies paid sales ii transactions fair capital ownership share million
Shareholders	company control shareholders companies directors management appointed bankruptcy board appointment government managers rights controlled shareholder assets manager director action majority
Standard of Review	panel evidence facts para review authority objective assessment determination standard dsu panels relevant authorities investigating ec explanation conclusions record factual
Standard of Treatment	standard treatment international fair equitable law minimum customary nafta protection tribunal investment standards content treaties foreign bit security full tribunals
Standard of Treatment	standard international law breach tribunal high threshold minimum violation nafta treatment customary standards domestic arbitrariness conduct process manifest lack tribunals
Standard of Treatment	treatment standard process conduct fair equitable lack unfair claimant arbitrary due judicial tribunal minimum faith transparency discriminatory breach grossly unjust
State Responsibility	state responsibility international acts law ilc act conduct articles responsible wrongful draft commission internationally attributable states article attribution actions commentary
Subsidies	government benefit market scm financial contribution para prices benchmark iv country subsidy recipient private provision conditions goods usdoc analysis benchmarks
Subsidies	subsidy export subsidies scm para contingent granting prohibited de programme enterprises products contingency specificity performance commitments facto fact granted footnote
Subsidies	subsidies effects subsidy ec panel market scm adverse para lca prejudice msf la member sales product analysis subsidized price effect
Tax	tax taxes income taxation revenue vat due ii rate payment foreign fsc measure payments rules subject exemption paid transactions fiscal
Territory	territory sovereignty title costa rica territorial islands nicaragua case island possidetis uti court colonial para effectivites state british honduras occupation
Time	time circumstances situation years conditions period force change termination continued continue fact events changed result end crisis long date place
UN Resolution	united nations resolution general council security assembly charter resolutions states international court secretary article adopted members member organization doc peace

Unclean Hands	doctrine patent hands law clean utility promise principle patents unclean invention cases case applied application requirement claims international courts disclosure
Use of Force	oil doc attacks platforms commerce war shipping vessels rights gti pipeline government mines gas jva attack peru neutral crude ships
Vessels	vessels article flag sea freedom fishing seas paragraph convention navigation high ship vessel itlos coastal state rights commerce jurisdiction states
Waiver	claim arbitration waiver tribunal nafta cafta claimant claims notice dr jurisdiction proceedings investor requirement consent requirements submission compliance respondent jurisdictional
Yugoslavia	fry court yugoslavia united nations membership serbia genocide application convention party para bosnia legal judgment republic vis admission federal status
Yugoslavia	icty applicant croatia chamber trial croatian serb forces jna crimes judgment para serbs respondent military committed serbian gotovina operation krajina

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