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Rhetorical Strategies of Persuasion in the Reasoning of International Investment Arbitral Awards

1. Introduction

Over the last few decades, arbitration has gained increasing popularity as an alternative dispute resolution method (ADR) with many advantages over litigation. Among the benefits lie the ability to solve disputes swiftly, the confidentiality offered by arbitration practices and the binding nature of arbitral awards. Another advantage over litigation is that, whilst an arbitration process starts once the arbitrator has been selected, the litigation process depends on the court's availability, which can lead to considerable delays. Arbitration is also a private process between two parties, while litigation is usually conducted in a public courtroom. Other advantages of using arbitration instead of litigation include, for example, the choice of arbitral court, which will play a part in the plaintiffs' tactics in approaching a dispute.

Together with arbitration, globalisation has also witnessed a rapid spread in the last decades. It has affected the flow of international trade, finance and investment resulting into a progressive change in the legal panorama. The enormous volume of international business transactions seems to have pushed corporations to choose faster alternative methods for dispute resolution that can also provide companies with confidentiality, which is often necessary to maintain a good corporate image. The multiplied conflicts arising from these business transactions between corporations on the one hand, and between corporations and states on the other, has made Alternative

Dispute Resolution (ADR) play a key role in our society and adapt to a globalised context.

Against this background, the status of arbitrators is especially worthy of attention. Although their decision is autonomous and binding, the power of arbitrators does not derive from the authority of the state (as would be the case with judges in national courts) but from the parties and the commercial agreement they have previously entered into, and from the parties' consent to arbitration. The parties have the power to choose the arbitrator or panel of arbitrators, the applicable law, the arbitration venue and even the language. The arbitrators, on the other hand, have the authority to solve the dispute – but also the duty to justify their decisions explicitly, and the need to demonstrate to both parties that they have taken their different positions into account. Power and persuasion thus combine in arbitral awards, where the arbitrators endeavour to convince the readership of the suitability of the final decision made by the arbitrator or panel of arbitrators in a case. Unlike judges, arbitrators often hope that the parties concerned will engage them again in future disputes. In consequence, the entire arbitration process shifts from being dependent on national law to being a customisable process that originates in the will of the parties involved in the dispute.

2. Power and persuasion in legal discourse

In theory, power in arbitration practices originates not only from the regulations governing them, but also from the different choices made by the parties that have opted for arbitration as their preferred alternative dispute resolution (ADR) method. Power to resolve disputes is delegated to the arbitral tribunal. However, because arbitration is based on consensus, the arbitrator's role is different from that of the judge. This phenomenon has attracted the attention of linguists and discourse analysts, who have explored, among other aspects, the way in which arbitral discourses differ from the more

authoritative discourses employed by judges. The work by Bhatia (1993, 2004, 2012, 2015), Bhatia et al. (2003, 2011), Bhatia and Gotti (2006) strongly contribute to the development of critical genre analyses of arbitration practice and the influence of litigation on arbitration. Something all these scholars seem to agree on is the fact that persuasion appears to be more relevant for discourse construction in arbitral awards than in judgments.

Persuasion can be defined as "all linguistic behaviour that attempts either to change the thinking or behaviour of an audience or to strengthen its beliefs should the audience already agree" (Salmi-Tolonen 2005: 61). Salmi-Tolonen makes an incursion into legal discourse and adds that, in legal genres in particular, "persuasion is found implicitly in the manifestation of legal expertise and efficient methods of deduction. It is found explicitly in modalised expressions" (2005: 61). Perelman (1979) considers the concept of persuasion as a part of argumentation; that is, discourse, according to him, aims at persuasion and conviction regardless of its topic and audience. He also states that argumentation covers the whole range of discourse that aims at persuasion and conviction.

In consequence, persuasion is regarded as the main tool for the construction of argumentation (Foucault 1972; Dafouz 2003; Halmari/ Virtanen 2005). Indeed, the main purpose of both arbitration and litigation is that of presenting a solution built from argued evidence (Breeze 2016). Persuasion obviously seeks a goal, which here is to solve the conflict at hand in a way that is satisfactory, within the constraints of the situation, to both parties. Persuasion, then, should be reflected in the resources used by the authors of arbitral awards in order to achieve their goals. Arbitral awards respond to the generic obligation of describing a decision taken by the authoritative figure of an arbitrator or a panel of arbitrators. It is desirable that the audience (and particularly the parties) should at least be able to follow the argumentation and perceive that the decision has been reached according to appropriate criteria, even if they are not content with the outcome. The arbitrator's reputation will be enhanced if he/she can demonstrate that his/her decision is convincing, that is, if it is well founded and takes the appropriate issues and facts into consideration. Arbitrators therefore need to construct the argumentation leading to

their final decision carefully. They use different rhetorical strategies seeking to persuade the audience. Persuasion is thus present within the argumentation of the award, through the dialogic interaction with other texts and other discourses.

3. Method

This chapter explores rhetorical strategies of persuasion with mitigating and intensifying purposes following the notion of strategy as defined by Anna Cros (2001). She states that argumentative strategies "consist of the use of the procedures which the speaker feels the most appropriate to convince the addressee in a given communicative situation" (2001: 193). These strategies, then, are instantiated through tracks or markers that are related to the dialogistic function they perform in the discursive practices in question. The strategies employed by authors of investment arbitral awards will aim at fulfilling the functions demanded by their communicative purposes. In order to explore how discourse is socially constructed, one must pay attention to interactions with the audience made within a particular situational and socio-institutional context. In line with this idea, this study explores specific language instantiations showing how authors of awards interact with their audience.

According to Vázquez and Giner (2012), the generic structure of international investment arbitral awards contains the following moves: relevant facts, issues to be resolved, reasoning, conclusions and decision. The present researcher examined all the documents manually in order to find representative samples of texts that convey similar rhetorical strategies of persuasion within the reasoning move of investment arbitral awards. The 'reasoning' move shapes a solid argumentation that will give way to the 'decision' or final move in the award. The backgrounds and decisions of all awards have been taken into account when exploring the construction of each reasoning move. According to van Dijk (2005, 2008), a text should be seen in relation

to the world reality in which it was created. For this, qualitative research is a useful tool to analyse specific cases "in their temporal and local particularity" (Toulmin 2007 [1958], 1990). Following this frame of thought, it is most coherent to employ an analytical approach that respects these text-external variables. A corpus of fifteen arbitral awards spanning the years from 1987 to 2010 is used for the analysis (see Appendix). This time period witnessed a rapid process of globalization and, in particular, a progressive expansion of international investment arbitration practices. The selection was carried out randomly with the only condition that the awards were originally written in English and, therefore, within the context of globalization where English is the *lingua franca*. At the same time, the use of documents written in the original language enabled us to avoid translations, which might lead to misinterpretations of the various events occurring in each dispute, or of the author's intention.

Following the principle of interpersonality, language choices are made in order to establish and maintain personal relations. In addition to this, this enquiry also employs a multi-perspective approach to discourse analysis (Bhatia 2004). Bhatia's (2004) redefinition of genre as a configuration of text-internal and text-external resources states that the socio-institutional and situational contexts must be taken into consideration in genre analysis. In this line, sample texts are not only explored from a textual perspective but also from other dimensions such as generic structure, patterns of language in relation with power and the interaction between discourse and the social dimension (Fairclough 2010, 2014). The approach will fundamentally comprise genre-analytic, interpersonal and rhetorical principles. All these frameworks can complement each other in the exploration of persuasion in international investment arbitral awards, through a qualitative analysis.

4. Mitigating and intensifying strategies in legal genres

Maley (1995) analyses the speech contained within the process of resolution in adjudication and mediation, and the degree of intervention of third parties. In particular, she focuses a large part of her work on the presence of modality. She concludes that the mediator's ability to control the process and, as a result, to successfully administer the outcome, derives from "the use of heavily mitigated and modalized language that never confronts the parties but by suggestion and reframing moves the process and the topic in the desired direction. As third parties, they do have considerable power, [...] but it is informal and inexplicit" (1995: 107). She employs Halliday's (1985) distinction between modalities and, thus, classifies items under the labels of modalization and modulation depending on whether they express degrees of uncertainty as probability and usuality (modalization) or degrees of obligation and inclination (modulation). She concludes that mediators employ a wider range of modalization items for the requirements of mediation as institution. That is to say, high occurrence in modalization is due to the fact that the goals and ideology of the institutional setting of mediation require these third parties to be able to control the tension between the two parties in dispute, guiding them towards a solution and presenting this solution as chosen and desired by the parties at issue.

Arbitration operates under different premises from mediation, but some evidence suggests that arbitrators do have a preference for modalized assertions. With regard to the discourse in arbitral awards, Breeze (2016), for instance, examines how authors of concurring and dissenting opinions attached to investment arbitral awards use modalization, among other strategies, to emphasise agreement and downplay disagreement with a twofold objective: to maintain a positive relationship with their fellow arbitrators, while showing commitment to the party that appointed them. Vázquez (2014) explores interpersonality in World Intellectual Property Organisation (WIPO) domain name arbitral awards. He focuses on the dialogic expansion and contraction in the generic moves that convey the argumentation of the awards ('Parties' Contentions', 'Discussion' and 'Finding and Decision'). He notes that these moves intend to persuade the audience and do so by mediating between the writer's text and other related texts and also between the writer's position and

alternative positions. He concludes, among other aspects, that dialogue constitutes an authoritative approach to the discourse construction in domain name arbitral awards: in other words, "the way in which a phenomenon is framed for discussion impacts on how we understand it" (2014: 252).

5. The generic structure of international investment arbitral awards

The generic structure found in arbitral awards shows great similarity to Maley's (1985) exploration of judgments as linguistic genres. Based on the communicative purposes identified in these awards, it has been observed that investment arbitral samples present the following moves: issues to be resolved, reasoning, conclusions and decision (Vázquez/ Giner 2012). Arbitrators do not apply legal regulations to the facts of the case routinely. Instead, they reason the events in relation to the applicable law and, thus, consider the multiple options available to resolve the case. The reasoning is, therefore, an important part of the legal process, as it will create different solutions for the case, giving prevalence to the one that will constitute the final decision.

Although persuasion and, hence, rhetorical strategies, do not appear in the reasoning of awards solely, it is true that this generic move is connected to a communicative sub-purpose concerning the defence and refutation of different arguments. In consequence, we could expect this move to constitute an environment rich in intensifying and mitigating strategies that fulfil those particular purposes. In addition, these strategies rarely appear in isolation. On the contrary, they are combined with one another, showing different degrees of hedging and intensification. Attitude also works in combination with hedging and intensification to create a new reality, as will be seen in the following section. All these strategies work together to achieve the persuasive communicative sub-purpose of the

generic or rhetorical move while, in turn, displaying a justificatory function of language (Korner 2000).

From a pragma-dialectic perspective, van Eemeren et al. (2007) classified argumentative moves in argumentative discourse, offering an 'ideal model' for resolving differences of opinion, which they call 'critical discussion'. This model contains four different stages: the 'confrontation stage', the 'opening stage', the 'argumentation stage' and the 'concluding stage' (2007: 10). It is in the argumentation stage where the author shows the parties' arguments supporting previous standpoints. This is the stage on which the present analysis is based.

6. Rhetorical strategies of persuasion: intensification, hedging and attitude

Different classifications have been designed for the study of interpersonal meaning in written and oral interactions, which are related to the concept of modality. These include, for example, Martin's (2000) appraisal theory, the concept of stance by Conrad and Biber (2000) and Hunston and Thompson (2000), metadiscourse (Crismore 1983, Vande Kopple 1985, Crismore et al. 1993, Dafouz 2003, Hyland 2005), metalanguage (Ädel 2005) the positioning theory (Harre/van Langenhove 1999), the concept of point of view (Simpson 1993) or footing (Goffman 1981). However different they may be, all of them agree that evaluation or modality can be employed to persuade readers to see things in a particular way.

"Legal language is a product of the purpose it serves" (Orts 2015: 2). As a generic convention, arbitral awards intend to represent a construction of events that will lead to the binding ruling of the arbitrator. Therefore, authors of arbitral awards find the strategies of intensification and hedging profitable in constructing the line of argumentation that will support the final decisions. They allow them to give more or less strength to the arguments participating in the award. Hedging will facilitate lessening the confidence degree of the

sentence propositional content while intensification enhances the certainty degree of those sentences using it. These strategies together will work towards a logical, coherent construction of the argumentation, supporting the final decision. Authors of arbitral awards also express their feelings, in this way revealing the use of attitude as a rhetorical strategy. This aspect will often appear in combination with intensification, enabling the authors of awards to incorporate their feelings and ways of thinking into the arguments that favour the final decision.

6.1. Intensification

In the argumentation of a case, it becomes essential to intensify the arguments that favour the final decision and to lessen the ones that contradict its logic. Even though other viewpoints or alternative interpretations of the facts could have been described earlier in a case, there needs to be a 'dialogic contraction', as Martin and White (2005) state. There needs to be an enhancement of certain supporting arguments through the use of intensifying devices, words, expressions or even clauses, which show the author's strong commitment to the propositional content of the arguments or main ideas that are relevant to the case in question. As usually happens, the argumentation showing the most commitment on the part of authors is usually the one that ends up supporting the final conclusion. Otherwise, the final decision would appear incoherent and unfair. As Perelman (1979: 144) puts it, "to link an argumentation with premises that only show a slight commitment is as disastrous as hanging a heavy frame using a weak nail" [my translation]. Examples 1 to 4 below illustrate how this enhancement is done through expressions such as *by far, never*, *obviously* and *it cannot be disputed that*:

(1) 104. The total damages award of $500 million was *by far* the largest ever awarded in Mississippi. (The Loewen Group, Inc. and Raymond L. Loewen v. United States of America)[1]

(2) 158. [T]he United States sought orders that Mondev pay the Tribunal's costs and the legal expenses of the United States on the basis that its claim was unmeritorious and should *never* have been brought. (Mondev International Ltd. v. United States of America, ICSID Case No. ARB (AF)/99/2)

(3) 124. The Arbitral Tribunal *obviously* disapproves of this attitude, and observes that it comforts the conclusion that the annulment of the Concession Contract did not violate the Government of Mexico's obligations under NAFTA. (Robert Azinian, Kenneth Davitian & Ellen Baca v. The United Mexican States)

(4) 164. *It cannot be disputed that* Thunderbird knew when it chose to invest in gaming activities in Mexico that gambling was an illegal activity under Mexican law. (International Thunderbird Gaming Corporation v. The United Mexican States)

6.2. Hedging

In general terms, hedging has always been identified as a mitigating strategy used to weaken the author's commitment to the propositional content of his or her statements (Vande Kopple 1985, Crismore et al. 1993). Instantiations of hedging can be found in investment arbitral awards with a variety of context-dependent functions. In the present study, three different functions have been identified. The first one, hedging to open alternative viewpoints, is related to the inherent quality of hedging to express heteroglossia, or different voices. Hedging can be employed as a strategy to open alternative interpretations of the given facts of a case and, thus, provide a broader vision of events. As a consequence, the presence of a new pathway in the argumentation may have a different outcome to the one claimed by either of the parties of the case at issue. The second function of

1 All italics appearing in the examples are mine.

hedging in the discourse of arbitration is to delimit the boundaries where the propositional content of the statements is effective. In these cases, context-restricting hedging takes into place. A third function of hedging is related to its capability to weaken the degree of commitment expressed regarding the truth-value of the statements where it appears. Authors of arbitral awards may wish to convey a face-saving strategy that will allow them to retract themselves more easily in case of a future refutation of the argument.

6.2.1. Hedging to open alternative viewpoints

Hedging carries out some sense of openness in the vision of the author and the readership. It may suggest the possibility of adopting different interpretations of a given reality or fact to that readership. As Markkanen (1997) states:

> [Hedges] convey a sense of suggesting one way of interpreting a state of affairs or one way of looking at it, or one possible truth, while at the same time leaving space for other possibilities. These other possibilities, like the statements on the chosen alternatives, may concern states of the actual world, or states in terms of theoretical models, or in the interpreter's mind. The point is that the world that is looked at is rendered as potentially containing other possibilities. (1997: 121-122)

Martin and White (2005) distinguish between dialogic contraction and dialogic expansion in heteroglossia. Dialogic expansion stands for those formulations that make allowances for dialogic alternative positions, whereas dialogic contraction refers to those that fend off alternative voices. They also identify the concept of 'entertain' as the "dialogic expansiveness of modality and evidentiality" (2005: 104). That is, the writer wishes to indicate that his or her position is one of a number of possible ones, thus raising awareness of the existence of alternative views. By making use of expressions such as modal auxiliaries or modal attributes among others (*perhaps, probably, it's likely that, in my view,* etc), the writer is assessing the likelihood of the propositional content. Evidence or appearance-based postulations are also included within this category (e.g. *it appears*, *it seems*). However, the most defining condition to classify hedging according to its

function is by paying attention to the line of argumentation of each particular case. For labelling purposes, this enquiry has used the term of 'viewpoint-opening hedging'. Examples 5, 6 and 7 include expressions (*could possibly*, *might arguably*, *could*, *it appears likely that*) whose main function is to present the readers with an alternative interpretation of reality.

(5) 70. In the present case the only conduct which *could possibly* constitute a breach of any provision of Chapter 11 is that comprised by the decisions of the SJC and the Supreme Court of the United States. [...] [T]he fact that they related to preconduct which *might arguably* have violated obligations under NAFTA. (Mondev International Ltd. v. United States of America, ICSID Case No. ARB (AF)/99/2)

(6) 3. This clause *could*, in and of itself, give rise to a doubt inasmuch as it refers to the rules of conciliation and arbitration of the "International Chamber of Commerce, Zurich, Switzerland": the International Chamber of Commerce has its seat in Paris and there is no International Chamber of Commerce in Zurich. (ICC Arbitration Case No 5294 of 1988)

(7) 66. […] and because *it appears likely* that the Combinate is liable to indemnify Exporter. (ICC Arbitration Case No 5418 of 1987)

6.2.2. Hedging to restrict the context of commitment

Sometimes authors make a strong assertion and wish to restrict its applicability to a specific context through the use of softening strategies like 'context-restricting hedges'. They help authors be very specific in their utterances in order to avoid ambiguity or legal gaps, which can lead to future negation or refutation. Mauranen (1997) makes reference to this function of hedging as 'limited applicability' and gives examples such as *in some respects, at least*, etc. Accordingly, the expressions highlighted in italics, in examples 8 to 12, seek to put a limit on the area where a certain condition may be valid:

(8) 6. It is undoubtedly clear that, in the present case, the arbitration clause did not nominate the arbitrator directly but *only* provided for ICC arbitration, and that the arbitrator was pursuant to the ICC Rules nominated by the ICC. (ICC Arbitration Case No 5294 of 1988)

(9) 78. This is a matter of fact for the Tribunal to assess *in the light of the circumstances of the case* (Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica, Award, ICSID Case No. ARB/96/)

(10) 95. *In the circumstances of this case*, making the assessment that we have been invited to make and having considered the evidence submitted by the parties (Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica, Award, ICSID Case No. ARB/96/)

(11) 92. For these reasons, the Tribunal decides that it has jurisdiction over the claim under Articles 116 and 1122 *to the extent (but only to the extent)* that it concerns allegations of breach of Article 1105(1) by the decision of the United States courts. To that extent (*but only to that extent*) the claim is admissible. (Mondev International Ltd. v. United States of America, ICSID Case No. ARB (AF)/99/2)

(12) 68. They were *to that extent* "investments existing on the date of entry into force of this Agreement" (Mondev International Ltd. v. United States of America, ICSID Case No. ARB (AF)/99/2)

6.2.3. Hedging for face work

Hedging can also attenuate author commitment to the truth-value of a statement for face-saving purposes. Through hedging, authors can avoid possible confrontations with the readership by refraining from making straightforward assertions. In this sense, hedging constitutes an interpersonal strategy for personal protection. However, many times the use of hedging for face-saving does not imply that the author is uncertain about the propositional content affected. This strategy means that the author's assertion should be understood as a suggestion or an affirmation made tentatively, so that it is not considered as a statement of fact that is open to possible refutation (Markkanen 1997).

In the past decades, the motivation for the study of hedges has been very much influenced by the concept of 'politeness', as defined by Brown and Levinson (1987). They view the use of hedges as a prolific strategy for face-saving. Indeed, the use of hedges is very important for the writer, since they can reduce the risk of negation inherent in particular sentences. They contribute to making sentences more acceptable by mitigating one's commitment to the truth-value of a proposition. Thanks to them, a writer, if proved wrong, can argue

that the claim was only tentative or approximative, thus saving face. As Markkanen (1997) states:

> In some situations, the desire to protect oneself from the potential denial of one's claims may be greater than the desire to show deference to the addressee. The surer a speaker feels about his/her own position vis-a-vis the interlocutor, the less need there is for hedging for the purposes of self-protection. (Markkanen, 1997: 8).

In the discourse of international arbitral awards, the use of hedging for face-saving is definitely a necessary one, especially given the fact that arbitrators are appointed by the parties involved in the dispute who can easily object to a final outcome that is based on an extremely bold statement that leaves other realities behind. Hedging for face-saving is seen in examples 13 to 16 in italics:

(13) 77. The *probable* explanation for the absence of objection to the classbased appeals to the jury is that Loewen's counsel regarded the problem as inherent in the litigation. (The Loewen Group, Inc. and Raymond L. Loewen v. United States of America)

(14) 64. The jury *appears* not to have been concerned by O'Keefe's advertising campaign. (The Loewen Group, Inc. and Raymond L. Loewen v. United States of America)

(15) 430. As a result, the decision of the Municipality of Vilnius to refuse the conclusion of a JAA or a Cooperation Agreement with BP *could* be justified by the difference. (Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8)

(16) III. The Merits [...] 147. The Respondent's contentions *may* be summarized as follows: (Desert Line Projects LLC v The Republic of Yemen, ICSID Case No. ARB/05/17)

6.3. Expressing attitude

Attitude markers, following appraisal theory (Martin/White 2005), are used to express importance, frustration, agreement, consternation or astonishment, for example. Attitude markers, then, convey the writer's

affective attitude to the propositional content of utterances. In arbitral awards, arbitrators sometimes find it necessary to express their feelings and personal opinions towards the relevant facts or the issues to be resolved in the case. These facts or issues are, of course, motivated by the behaviour of the parties involved in the case at hand. The main function of attitudinal markers in the argumentation of arbitral awards is to draw or to construct a particular profile of the situation or the relevant matters. This construction will serve as a basis to support future conclusions within the award and, in consequence, its use will also benefit the final decision. The examples below (17-19) convey the author's opinion about relevant matters for the resolution of the case.

(17) 1. This is an *important and extremely difficult case*... (The Loewen Group, Inc. and Raymond L. Loewen v. United States of America)

(18) 70. It is *artificial* to split the O'Keefe strategy into three segments of nationality-based, race and class-based strategies. (The Loewen Group, Inc. and Raymond L. Loewen v. United States of America)

(19) 4. [...] [T]he trial judge repeatedly allowed O'Keefe's attorneys to make *extensive irrelevant and highly prejudicial references*... (The Loewen Group, Inc. and Raymond L. Loewen v. United States of America)

6.4. Gradability and combinability

Both hedging and intensification can convey different degrees depending on the markers selected by authors as well as the context where these appear. Authors of arbitral awards take into consideration the audience approval of the theses stated in the argumentation. They are aware of the fact that approval or agreement is gradable and that not all of the individuals within a particular audience need to show the same degree of approval of the theses presented. In the same manner, authors might not confer the same degree of acceptability on all those theses (van Eemeren 1987: 214). As a consequence, the arguments attached to certain theses may be more or less strong and the commitment the audience will show to them may also vary. Human

beings have different values and, in addition, they may show more or less commitment to some or others (Perelman 1979). Illustrations like the ones in the following examples denote different degrees in the 'dosage' of intensification administered to the propositional content at issue. While the first two instantiations – examples 20 and 21 – provide the propositional content with a high degree of intensification, example 22 shows a moderate degree of intensification.

(20) 116. [...] "The answer is *overwhelmingly affirmative*" (Desert Line Projects LLC v The Republic of Yemen, ICSID Case No. ARB/05/17)

(21) 166. Such presidential interventions *undoubtedly* created incentive for the Claimant to continue. (Desert Line Projects LLC v The Republic of Yemen, ICSID Case No. ARB/05/17).

(22) 49. Under international law, and for purposes of jurisdiction of this Tribunal, it is *well established that* actions of a political subdivision of federal state, such as the Province of Tucumán in the federal state of the Argentine Republic, are attributable to the central government. It is *equally clear* that the internal constitutional structure of a country cannot alter these obligations. (Compañía de Aguas del Aconquija S.A. & Compagnie Générale des Eaux v. Argentine Republic, ICSID Case No. ARB/97/3)

Another aspect to note is the fact that neither hedging nor intensification appears in isolation. In fact, they often appear as combos to construct a line of argumentation that accurately enhances the specific points in favour of the decision, or are used with other strategies giving as a result combinations that enhance the effect that attitude may cause in the readership. Hedging and intensification frequently appear in the samples together. This phenomenon seeks to present a certain viewpoint to either intensify it or abate it later on. As van Eemeren (1987) states, for an argumentation to take place it is necessary that a subject states an opinion concerning the fact that at least another individual can be or is in disagreement with it (see example 23 "the United States did not *really* contest…" and example 24: "*would or might* receive…"). Once it has been made clear that the interlocutor has a different opinion or point of view to the author or orator, is it, then, manifested that there exists a dispute or controversy (see example 23: "*in the Tribunal's view,* it is *certainly* open…" and

example 24: "*is no answer*"). This dispute constitutes a basis for argumentation, which will aim at the justification or refutation of opinions. Argumentation is, thus, designed to 'attack' or to 'defend' a particular argument or premise. It is considered as a constellation of pro-arguments and counter-arguments that seeks the approval of the audience.

(23) 82. [...] It may be noted that the United States did not *really* contest Mondev's standing under Article 1116, subject to the question whether it had actually suffered loss or damage. *In the Tribunal's view*, it is *certainly* open to Mondev to show that is has suffered loss or damage by reason of the decisions it complains of... (Mondev International Ltd. v. United States of America, ICSID Case No. ARB (AF)/99/2)

(24) 70. [...] The fact that an investor from another state, say New York, *would or might* receive the same treatment in a Mississippi court as Loewen received *is no answer* to a claim that the O'Keefe case as presented invited the jury to discriminate against Loewen as an outsider. (The Loewen Group, Inc. and Raymond L. Loewen v. United States of America)

Authors of arbitral awards may wish to express attitude with regard to the propositional content of a statement, adding intensification to it. Examples like *extensive moral damages*, *overwhelmingly affirmative* or *difficult if not impossible* (Desert Line Projects LLC v The Republic of Yemen, ICSID Case No. ARB/05/17) reveal that hybrid representations of these two rhetorical strategies – intensification and attitude – are not only possible but also effective in persuading the readership to share the author's opinion or attitude on the issue at hand. The present work identifies this fruitful combined strategy as 'intensified attitude', which is illustrated through examples 25, 26 and 27 below.

(25) 107. Likewise, the damages awarded in relation to the 1991 settlement agreement appear to be *grossly excessive*. (The Loewen Group, Inc. and Raymond L. Loewen v. United States of America)

(26) 105. Claimants had *a very strong case* for arguing that the damages awarded, both compensatory and punitive, were *excessive*. (The Loewen Group, Inc. and Raymond L. Loewen v. United States of America)

(27) 119. [...] whereas a project involving *hundreds of millions* of dollars, *considerable* technical and indeed security risks, as well as the mobilization of *vast* resources from the very country which had co-signed the BIT, leading to *objectives of national strategic importance in terms of* commercial and social integration, security, and cross-border flows of goods and services... (Desert Line Projects LLC v The Republic of Yemen, ICSID Case No. ARB/05/17)

7. Discussion and conclusions

The reasoning construction in investment arbitral awards can be understood to be a complex process with *a priori* contradictory conditions that need to be fulfilled. Awards must be operative in the sense of creating obligations upon one of the parties, but also effective as a promotional genre for arbitrators. On the one hand, the conventions of legal writing stipulate that arbitral awards should use precise language that sets out the facts and arguments in the most aseptic manner. Precise language avoids possible double interpretations and shows independence of the arbitrator from the parties. Firm, precise language is also indispensable for the accomplishment of the ultimate communicative goal of arbitral awards: to provide a final resolution.

However, let us not forget that arbitrators are appointed by both of the parties, even if only one of them initiated the case, which means that arbitrators partly 'owe' them their power. This equation places authors in a difficult position, where they have to explicitly show careful consideration of both of the parties' positions and the circumstances of their case, while deciding only in favour of one. The process of argumentation in the award must appear impartial and, thus must, at least apparently, dedicate equal attention to the arguments of both parties. In consequence, persuasion becomes a necessary requirement, even if it is not so specified by arbitral courts, in order to develop a convincing outcome in the award. The role of the arbitrator and even that of the parties involved, then, shape the distinct characteristic of the discourse of awards in contrast to judgments.

Unlike judges, who rely on the power the state grants them, arbitrators are third neutral parties that are hired to obtain a resolution to a dispute. In consequence, the reasoning in awards does not only fulfil the option of justifying the final decision before the law. Arbitrators also need to write a convincing, persuasive discourse that satisfies both parties to the extent that authors are building a promotional discourse for future 'clients'. After all, a convinced audience will more likely deem it appropriate to resort to that arbitrator again in future disputes. The discourse needs to be constructed in a way that seems coherent and common-sensical, but above all, fair.

Persuasion can be found in the use of rhetorical strategies. In the argumentative stages of the document, the reality related to the confrontation must be modelled to create intensified and weakened arguments, while new interpretations of that reality can be raised. Additionally, it is advisable that authors do not commit themselves equally to every assertion in the document. Authors should also stay cautious and avoid possible confrontations that could jeopardize their professional image in case any statement could give rise to future refutations. Stance is present in the reasoning of awards as well, which shows the authors' positioning with regard to the parties to the dispute. Indeed, although equal or similar attention is paid to both parties' arguments, not all of them are given the same weight, in order to fulfil the socio-pragmatic requirements of the genre.

Unavoidably, drafters of arbitral awards construct their argumentation to attain their specific goal: persuade their audience. In accordance with this, authors seem to carry out a process of discursive appropriation (Bhatia 2004) by which they make use of a wide range of rhetorical strategies of persuasion. These will help them convince the parties of the suitability of the final decision. Rhetorical strategies of persuasion such as hedging, intensification or expressing attitude intervene in the construction of the reasoning and filter a wide range of argument interpretations providing a single outcome that is strongly supported by both common sense and legal grounds. The reasoning in an arbitral award will construct a new reality in the context of international investment arbitration, which will show how the facts develop towards a logical end. Rhetorical strategies, then, will model the information that is considered significant in the eyes of the

authors, while convincing the readership of the suitability of the final decision.

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Appendix: International Investment Arbitral Awards

A.1. ICC Arbitral Awards

ICC Arbitration Case No 3572 of 1982 in Collection of ICC Arbitral Awards 1986-1990: Recueil des Sentences Arbitrales de la CCI 1986-1990 (compiled by S. Jarvin, Y. Derains and J.J. Arnaldez) (Kluwer Academic Publishers Group, The Hague 1994)
ICC Arbitration Case No 5418 of 1987 in Collection of ICC Arbitral Awards 1986-1990: Recueil des Sentences Arbitrales de la CCI 1986-1990 (compiled by S.

Jarvin, Y. Derains and J.J. Arnaldez) (Kluwer Academic Publishers Group, The Hague 1994)
ICC Arbitration Case No 5460 of 1987 in Collection of ICC Arbitral Awards 1986-1990: Recueil des Sentences Arbitrales de la CCI 1986-1990 (compiled by S. Jarvin, Y. Derains and J.J. Arnaldez) (Kluwer Academic Publishers Group, The Hague 1994)
ICC Arbitration Case No 4975 of 1988 in Collection of ICC Arbitral Awards 1986-1990: Recueil des Sentences Arbitrales de la CCI 1986-1990 (compiled by S. Jarvin, Y. Derains and J.J. Arnaldez) (Kluwer Academic Publishers Group, The Hague 1994)
ICC Arbitration Case No 5294 of 1988 in Collection of ICC Arbitral Awards 1986-1990: Recueil des Sentences Arbitrales de la CCI 1986-1990 (compiled by S. Jarvin, Y. Derains and J.J. Arnaldez) (Kluwer Academic Publishers Group, The Hague 1994)

A.2. ICSID Arbitral Awards

Compañía de Aguas del Aconquija S.A. & Compagnie Générale des Eaux v. Argentine Republic, ICSID Case No. ARB/97/3
Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica, Award, ICSID Case No. ARB/96/1 (United States/Costa Rica)
BG Group plc v Argentina, Ad hoc-UNCITRAL Arbitration Rules; Final Award, IIC 321, 2007
Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8
Desert Line Projects LLC v The Republic of Yemen, ICSID Case No. ARB/05/17

A.3. NAFTA Arbitral Awards

Robert Azinian, Kenneth Davitian & Ellen Baca v. The United Mexican States, ICSID Case No. ARB(AF)/97/2
Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1
Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2
The Loewen Group, Inc. and Raymond L. Loewen v. United States of America ICSID Case No. ARB(AF)/98/3
International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL Arbitral Award (Jan. 26, 2006)