THE NEED FOR CONSISTENCY IN INTERNATIONAL INVESTMENT ARBITRATION AWARDS:

A Case Study of Awards Rendered Under the International Centre for Settlement of Investment Disputes

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SUPERVISED BY
Professor Alan Rycroft

Dissertation presented for the approval of Senate in part fulfillment of the requirements for the degree of Master of Laws in Commercial Law at the University of Cape Town.

May 14, 2010

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I hereby declare that I have read and understood the regulations governing submission of the Master of Laws dissertations including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Signature

Signed by candidate

Laurent Mbonigaba

Date

May 14, 2010

DEDICATIONS

To my parents and siblings
You have always been there for me
Thank you

To the Almighty God
Thank you for all you have done
I owe it all to you

ACHNOWLEDGEMENTS

I would like to thank all the UCT Law Faculty staff for your contribution towards the successful completion of my studies.

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Table of Contents

	Pages
Abbreviations	**Vii**
Instruments and Case Law	**Viii**
Chapter I GENERAL INTRODUCTION	**1**
Chapter II THE DOCTRINE OF PRECEDENT	**4**
1. The notion of precedent	**4**
1.1 The functions of precedent	4
1.2 The doctrine of precedent in national courts systems	5
1.2.1 The doctrine of precedent in common law system	5
1.2.1.1 The courts hierarchy	6
1.2.1.2 Publication of courts decisions	6
1.2.2 The doctrine of precedent in civil law system	7
1.3 The doctrine of precedent in international courts and tribunals	8
1.4 The interest for the doctrine of precedent in investor-state arbitration	10
1.4.1 No rule of precedent in international commercial arbitration	10
1.4.2 The particularity of the investor-state arbitration	11
1.4.2.1 The public interest	11
1.4.2.2 Similarity of issues	13
Chapter III THE RELATIVE CONSISTENCY IN ICSID AWARDS	**14**
1. Coherence in ICSID awards	**14**
1.1 Case law on 'fair and equitable treatment'	14
1.2 Case law on the distinction between treaty and contract claims	16
2. Inconsistencies in ICSID awards	**18**
2.1 The state of necessity defense	18
2.1.1 CMS v Argentina	18
2.1.1.1. CMS' claims	19
2.1.1.2 Argentina's defence	20
2.1.1.2 The tribunal's decision	20
2.1.2 *LG & E v Argentina*	21
2.1.2.1 Reasons for the differences in the conclusions of the two tribunals	22
	23
2.1.3 Subsequent cases	
2.1.3.1 *Enron v Argentina*	23

2.1.3.2 *Sempra v Argentina* 24

3. **Discrepancies in BITs interpretation: the 'umbrella clause'** **25**
   - 3.1 *SGS v Philippines* 25
   - 3.2 *SGS v Pakistan* 26
   - 3.3 Subsequent decisions 28

4. **The need for consistency** **29**

Chapter IV **31**
ACHIEVING CONSISTENCY IN ICSID AWARDS

1. **Obstacles to consistency in investor-state arbitral awards** **31**
   - 1.1 No formal rule of precedent 31
   - 1.2 Lack of an appeal system 32
   - 1.3 Confidentiality of arbitral proceedings 32
   - 1.4 The lack of consolidation in multi-party arbitration 35

2. **Approach to achieving consistency** **37**
   - 2.1 The appeals system facility option 37
     - 2.1.1 The desire to establish an appeals mechanism 38
     - 2.1.2 Advantages of an appellate facility 39
     - 2.1.3 Disadvantages of an appellate body 40
       - 2.1.3.1 The establishment of an appeals facility would be against the principle of finality 40
       - 2.1.3.2 The establishment an appellate body would lengthen procedures in time and increase costs 42
     - 2.1.4 The features of the suggested ICSID Appeals facility 43
     - 2.1.5 Structure of an ICSID appeals facility 43
     - 2.1.6 The scope of review of the appellate facility 43
     - 2.1.7 The efficacy of an ICSID appeals facility 44
     - 2.1.8 Obstacles to the implementation of an ICSID appeals facility 45

3. **Other suggested alternatives to achieving consistency** 46
   - 3.1 The preliminary rulings **46**
   - 3.2 Strengthening the power of precedent **47**

Chapter V: Conclusion **49**

Bibliography **51**

Abbreviations

BIT	Bilateral Investment Treaty
ECJ	European Court of Justice
FTA	Free Trade Agreement
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Convention for Settlement of Investment Disputes
ILC	International Law Commission
LCIA	London Court of Arbitration
MFN	Most Favoured Nation
MIA	Multilateral Investment Agreements
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organisation
SCC	Stockholm Chamber of Commerce
TEC	Treaty establishing the European Community
UNCITRAL	United Nation Commission for International Trade Law
WTO	World Trade Organisation

Instruments and Case Law

International Conventions and Treaties

The International Law Commission (ILC) Draft Articles on responsibility of States for Internationally wrongful acts.

The Statute of the International Court of Justice (ICJ).

The Washington Convention on International Centre for Settlement of Investment Disputes (ICSID).

International Arbitration Rules

ICC Arbitration Rules.

ICSID Arbitration Rules.

ICSID Additional Facilities.

LCIA Arbitration Rules.

UNCITRAL Arbitration Rules.

Bilateral Treaty Agreements (BITs)

US-Argentine BIT.

US-Rwanda BIT.

Swiss-Philippines BIT.

Swiss-Pakistan BIT.

Free Trade Agreements (FTAs)

US-Chile FTA.

US-Morocco FTA.

Cases

AES Corporation v The Argentine Republic ICSID case No ARB/02/17 Decision on jurisdiction (26 April 2005).

Aguas Argentinas et al v The Argentine Republic ICSID case No ARB/03/19 Order in response to a petition for transparency and participation as *amicus curiae* (19 May 2005).

Aguas del Tunari S.A. v. Republic of Bolivia ICSID Case No ARB/02/3 Decision on respondent's objection to jurisdiction (21 October 2005).

Axen v Federal Republic of Germany (1981) European Commission of Human Rights Report of 14 December 1981 B 57.

CME Czech Republic BV v Czech Republic Partial Award (13 September 2001).

CMS Gas Transmission Company v the Argentine Republic ICSID case No ARB/01/8 Award (12 May 2005).

CMS Gas Transmission Company v Argentine Republic ICSID Case No ARB/01/8 Decision on the application for annulment (25 September 2007).

Cameroon v Nigeria, Preliminary objections judgment ICJ Rep (1998).

Compañia de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic ICSID case No ARB/97/3 Decision on Annulment (3 July 2002).

Compañia de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic ICSID case No ARB/97/3 Final award (August 20 2007).

El Paso Energy International Company v the Argentine Republic ICSID case No ARB/03/15 Decision on jurisdiction (27 April 2006).

Enron Corporation Ponderosa Assets L P v Argentine Republic ICSID Case No ARB/01/3 AWARD (22 May 2007).

Gas Natural SDG SA v the Argentine Republic ICSID Case No ARB/03/10 Decision of the tribunal on preliminary question on jurisdiction (17 June 2005).

Glamis Gold Ltd v United States of America Award (June 8 2009).

Joy Mining Machinery Limited v The Arab Republic of Egypt Award on jurisdiction ICSID Case No ARB/03/11 (August 6 2004).

Lanco International v Argentine Republic Preliminary decision on jurisdiction (8 December 1998).

Lauder v. Czech Republic Final Award (3 September 2002).

LG&E International Inc. v Argentine Republic ICSID Case No ARB/02/1 Decision on liability (3 October 2006).

Methanex Corporation v United States UNCITRAL (NAFTA) Decision on petitions from third parties to intervene as *amici curiae* (15 January 2001).

Mondev International Ltd v United States Award ICSID Case No ARB (AF)/99/2 (October 11, 2002).

Neer L F H and Neer P (USA) v United Mexican States Reports of International Arbitral Awards IV (15 October 1926).

Técnicas Medioambientales Tecmed SA v United Mexican States ICSID case No ARB (AF)/00/2 Award (29 May 2003).

Saipem v Bangladesh ICSID case No ARB/05/07 Decision on jurisdiction and recommendation on provisional measures (21 March 2007).

Sempra Energy International v Argentine Republic ICSID case No ARB/02/16 Award (28 September 2007).

SGS Société Générale de Surveillance SA v Republic of the Philippines ICSID Case No ARB/02/6 Decision on jurisdiction (29 January 2004).

SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan ICSID case No ARB/01/13 Decision on objections to jurisdiction (6 August 2003).

Société Générale de Surveillance SA v Republic of Philippines, Decision on jurisdiction (29 January 2004).

Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic ICSID case No ARB/03/19 Order in response to a petition for transparency and participation as *amicus curiae* (19 May 2005).

Foreign Legislations

UK Arbitration Act 1996.

US Bipartisan Trade Promotion Authority Act of 2002.

Chapter I

GENERAL INTRODUCTION

> Reliance on past decisions is a fundamental feature of any orderly decision process. Drawing on the experience of the past decisions plays an important role in securing the necessary uniformity and stability of the law. The need for a coherent case law is evident. It strengthens the predictability of decisions and enhances authority.[1]

Legal theory suggests that the rule of law is only the rule of law if it is consistently applied so as to be predictable.[2] In common law jurisdictions, predictability is guaranteed by judicial systems through their reliance on precedent (*stare decisis*) and in civil law traditions through a *de facto* case law.[3] In recent years there has been an increasing number of diverging decisions within the investor-state arbitration system.[4] Such discrepancies in the disputes settlement system have the potential to jeopardize the investor-state arbitration system by failing to respond to the expectations of investors and the host states.[5] Besides, a discomfort is felt in the field of international investment arbitration due to the inconsistencies of arbitral awards. Parties to international investment arbitrations have often expressed dissatisfaction with this state of affairs particularly on the lack of an appellate body competent to review investment awards.[6]

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[1] Schreuer C and Weineger M 'Conversation across cases: is there a doctrine of precedent in investment arbitration?' (2007). Available at http://www.univie.ac.at/intlaw/conv_across_90.pdf [accessed 10 January 2010].

[2] Kaufmann-Kohler G 'Is consistency a myth?' in Gaillard E and Banifatemi Y (eds) *Precedent in international Arbitration* (2009) 137 at 144.

[3] Reinisch A 'The role of precedent in ICSID arbitration'. Available at http://investmentarbitration.univie.ac.at/fileadmin/user_upload/int_beziehungen/Personal/Publikationen_Reinisch/role_precedents_icsid_arbitrationaayb_2008.pdf [accessed 10 August 2009].

[4] Schreuer C 'Preliminary rulings in investment arbitrations' in Sauvant KP and Chiswick-Patterson M (eds) *Appeals mechanism in international investment disputes* (2008) at 209; See also *infra* Chapter III.

[5] As expressed by Susan D Franck, '[w]ithout the clarity and consistency of both the rules of law and their application, there is a detrimental impact upon those governed by the rules and their willingness and ability to adhere to such rules....' see Franck SD 'The legitimacy crisis in investment treaty arbitration: Privatizing public international law through inconsistent decisions' (2005) 73 *Fordham Law Review* at 1584.

[6] Tams CJ 'An appealing option? The debate about an ICSID appellate structure'. Available at http://edoc.bibliothek.uni-halle.de/servlets/MCRFileNodeServlet/HALCoRe_derivate_00000887/Heft57.pdf [accessed 11 August 2009].

Various solutions have been set forth to put an end or at least to trim down this problem of inconsistencies and the lack of coherence in tribunals' decisions within the investor-state disputes settlement. The most evoked solutions include the reliance on precedent and the creation of a centralized body to ensure consistency.[7]

As commonly asserted, there is no formal rule of precedent in international law.[8] In the specific case of international investment arbitration under analysis in this paper, some commentators exclude the doctrine of precedent within the International Center of Settlement of Investment Disputes (ICSID) arbitration system, submitting that an award is 'binding on parties and on no-one else'[9], whereas others argue that precedent in international arbitration is the main tool which promotes efficiency.[10]

There has been an apparent tendency by arbitrators to refer to previous decisions in investment arbitration to support their own decisions. This trend may be viewed as a possible way of achieving consistency in investment arbitration awards.[11] Despite the existence of such a practice, there is no formal rule requiring arbitrators to refer to previous cases. Some arbitrators as a matter of fact ignore the reasoning of earlier awards. Given that there is no appellate mechanism in investment arbitration, the issue of consistency in arbitral decisions remains problematic.

This study therefore seeks to highlight the existing inconsistencies in investor-state arbitral awards and to investigate how this problem can be solved. Different options to achieve consistency will therefore be explored and discussed. The ensuing Chapter analyzes the doctrine of precedent as a requirement for consistency and investigates whether it could be used in

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[7] See Chapter IV of this Study.
[8] McLachlan C, Shore L and Weiniger M, *International investment arbitration* (2007) at 71; Kaufmann-Kohler G 'Interpretation of treaties: How do arbitral tribunal interpret dispute settlement provisions embodied in investment treaties?' in Mistelis LA and Lew JDM (eds) *Pervasive problems in international arbitration* (2006) 257 at 258; Redfern A and Hunter M *Law and Practice of International Commercial Arbitration* 4ed (2004) at 30; Dimsey M *The resolution of international investment disputes* (2008) at 41.
[9] Schreuer H C *The ICSID Convention: A commentary* (2001) at 1082.
[10] Kaufmann-Kohler (note 2) at 147.
[11] Wälde T 'Separate opinion in the arbitration under Chapter XI of the NAFTA and the UNCITRAL Arbitration Rules: Thunderbird v Mexico'. Available at *http://ita.law.uvic.ca/documents/ThunderbirdSeparateOpinion.pdf* [accessed 11 August 2009].

handling inconsistencies in international investment arbitral awards (Chapter II). Chapter III illustrates the need for consistency in investor-state arbitral awards. Emphasis is laid, on the one hand, on the existing trend of investment arbitrators to refer to previous decisions, which generates a relative consistency of awards, and on the other, on the existing inconsistencies in the investment arbitral awards. Chapter IV evaluates the options already suggested by scholars for resolving the inconsistencies and concludes the study with a proposal of a practical option to achieve consistency.

Chapter II

THE DOCTRINE OF PRECEDENT

This Chapter gives a brief overview of the notion of the doctrine of precedent and outlines its use in different legal systems. The ensuing section interrogates the notion of precedent in common law and the civil law systems and in international arbitration, for a better understanding on whether and to what extent this doctrine can apply in the international arena. The last section focuses on the particularity of the investment arbitration where there is heavier reliance on previous decisions than in international commercial arbitration.

1. The notion of precedent

'Precedent' or *stare decisis* (or in its unabridged form *stare decis et non quieta movere*) means 'to stand by the things decided and not to disturb settled points'.[12] Bearing in mind the fundamental virtues attributed to the doctrine of precedent, namely the consistency of treatment, legal certainty and efficiency in decision making,[13] the ensuing discussion will identify the functions of the doctrine of precedent and shed light on how it is construed and applied under the common and civil law systems and in international arbitration.

1.1 The functions of precedent

The doctrine of precedent plays an important role in legal systems where it is followed. By applying the rule of precedent, judges contribute to the establishment of a strong legal system which ensures that 'the law has mechanisms that enable it to adjust to the changing needs of the community',[14] and helps 'to prevent the wild deviations in the law so that it is sufficiently stable for members of the public to plan their affairs and anticipate the legal consequences of their

[12] Garner AB *Black's Law Dictionary* 9ed (2009) at 1537.

[13] Duxbury N *The nature and authority of precedent* (2008) at 35-36; Born GB *International commercial arbitration* (2009) at 2960.

[14] Tai-Heng Cheng 'Precedent and control in investment treaty arbitration' in Bjorklund KA et al (eds) *Investment treaty law current issues III remedies in international investment law emerging jurisprudence of international investment law* (2009) 149 at153-4.

actions'.[15] The legal system that follows the doctrine of precedent also contributes to ensuring that 'judges make decisions within the scope of their authority'[16] and that 'the system corrects deviations caused by abuses of power and authority'.[17] It also makes sure that 'the law provides the community with tests to determine if each judicial decision has complied with accepted of reasoning as well as whether the judicial system as a whole is operating properly'.[18] This however does not always guarantee consistency. Despite the doctrine of precedent, different adjudicators bring to bear their unique insights, prejudices and backgrounds which result in deviations and inconsistencies. But published judgments and awards encourage comparison and critique of the different approaches.

1.2 The doctrine of precedent in national courts systems

1.2.1 The doctrine of precedent in common law system

The doctrine of precedent (as it is known in the common law system) refers to 'an adjudged case or decision of a court of justice, considered as furnishing a rule or authority for the determination of an identical or similar case afterwards arising or of a similar question of law'. [19]
The concept of 'precedent' in English law covers two closely connected ideas: in a broad sense precedent 'involves treating previous judicial decisions as authoritative statements of the law, which can serve as good legal reasons for subsequent decisions';[20] and in a narrow sense, 'precedent...requires specific courts to treat certain previous decisions, notably of superior courts as a binding reason'.[21]

Two key elements of the common law system have played an important role in the development of the doctrine of precedent, namely the hierarchy of courts and the publication of court decisions through the printed press.[22] These shall be discussed respectively.

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[15] Tai-Heng Cheng (note 14) at 153-4.
[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] Garner AB *Black's Law Dictionary* 6ed (1990) at 1176.
[20] Bell J '*Sources of Law*' in P Birks (ed) *English Private Law I* (2000) 29 cited by Hondius E *Precedent and the law* (2007) at 11.
[21] Ibid.
[22] Ibid at 10.

1.2.1.1 The courts hierarchy

Within the common law system, the doctrine of precedent dictates that the lower courts respect the decisions made by superior courts. A hierarchical structure of courts implies that the greatest authority is placed at the highest level, and some degree of subordination characterizes the lower courts.[23] Lower courts are therefore bound by the precedents of the upper courts. Precedents of the highest courts are the most important and the most authoritative 'because they are from the apex of the judicial system'.[24] In principle, higher courts may control and revise what happened at levels below.[25] It must be noted, however, that precedents are not absolute; they can be overruled by courts retaining the powers to rethink previous precedent in light of new legal and other developments.[26]

1.2.1.2 Publication of courts decisions

In the common law system, case reporting has been of great importance in the development of the doctrine of precedent. Throughout the legal history of the common law system, precedent is linked to publication.[27] A judgment may actually become a precedent only when it is known not only by the parties to the single case but also to other courts, to lawyers and virtually to the general public.[28] It is argued that 'without reporting it is difficult to know of the relevant cases and use them for persuasion of the court'.[29] Moreover, it was argued in the same vein that:

> Cases that are not public will not only be known to a smaller group of professionals, but they also lack an essential quality, that of exposure to the forces of transparency, i.e. critical discussion by the relevant professional communities (primary judges, advocates, and then academics and journalistic media).[30]

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[23] Taruffo M 'Institutional factors influencing precedents' in MacCormick and Summers *Interpreting precedents: A comparative study* (1997) 437 at 438.
[24] Ibid.
[25] Ibid.
[26] Born (note 13) at 2959.
[27] Wälde T 'Confidential awards as precedent in arbitration: dynamics and implication of awards publication' in Gaillard and Banifatemi (note 2) at 115.
[28] Taruffo (note 23) at 451.
[29] Wälde (note 27) at 116.
[30] Ibid.

1.2.2 The doctrine of precedent in civil law system

The doctrine of precedent as known in common law systems does not formally exist in the civil law tradition. Courts in civil law jurisdictions normally refer themselves to a codified statutory authority. Nonetheless, despite the absence of a formal doctrine of precedent in civil law system, reference to earlier decisions is not unfamiliar. Courts in civil law system apply doctrines that parallel the principle of *stare decisis* variously referred to as *jurisprudence constante*, (persisting jurisprudence) in France and Switzerland, *ständige Rechtsprechung* in Germany, or *doctrina legal* in Spain.[31] The doctrine of *jurisprudence constante* is similar to the doctrine of *stare decisis* with the exception that it does not command strict adherence to a legal principle applied on one occasion in the past.[32]

In France, reference to earlier decisions is observed in the instances where the *Cour de Cassassion* (the Supreme Court) relies on its own rules that it has itself set, qualifying them of principles.[33] Besides, it is widely asserted in France that 'a series of decisions adopting the same rule (jurisprudence) is a source of law (*source de droit*) which judges (or arbitrators) may refer to'.[34]

In Germany, it was noted that:

> The interpretation and completion [of the law] by the courts creates directly binding law for the specific case only. No court is bound to interpret the law in the same way in another case. However, courts will do so, if they are convinced of the accuracy of the previously held interpretation and completion. Doing so, they also serve the principle of equal treatment (Article 3 of the Constitution) and legal certainty and contribute to consistency, foreseeability and stability.[35]

In short, although the concept of binding precedent as known in common law is not formally recognized in civil law systems, the notion of *jurisprudence constante* whereby earlier cases serve as persuasive authority is recognized.

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[31] Born (note 13) at 2959; Kaufmann-Kohler G 'Arbitral Precedent: Dream, Necessity or Excuse?'(2006) 23: 3 *Arbitration International* 357 at 360.
[32] Garner (note 12) at 859.
[33] My translation for *'[L]a Cour de Cassassion s'appuie maintenant sur ses propres règles, qu'elle a elle-même énoncées, les qualifiant de "principes"'* Philippe Malaurie ' Les précédents et le droit : Rapport Français' in Hondius (note 20) at 144-5.
[34] Born (note 13) at 2958.
[35] K Larenz & M Wolf *Allgemeiner Teil des Bürgerlichen Rechts* (2004) cited by Born (note 13) at 2952.

Having had a brief view of the doctrine of precedent in the two main legal traditions, it is important to see how and to what extent this doctrine is used in international courts and tribunals.

1.3 The doctrine of precedent in international courts and tribunals

Authors often argue that the doctrine of precedent is not applicable in international courts or tribunals. Some contend that 'it is a truism to say that there is no system of binding precedent in international law'.[36] This rejection of precedent in this area of law is usually based on the interpretation of some international legal instruments, the most referred to being Articles 38 and 59 of the Statute of the International Court of Justice (ICJ). Article 38 (d) states that:

> [T]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: ... subject to the provisions of Article 59, judicial decisions ... as subsidiary means for the determination of rules of law.

Article 59 further states that '[t]he decision of the Court has no binding force except between the parties and in respect of that particular case'. This latter provision seems to limit the scope of Article 38 to the parties and to the case at hand. These two provisions suggest that a formal rule of precedent is excluded in the ICJ.[37]

Despite this apparent exclusion of the doctrine of precedent in international law, practice shows that international courts do often rely on their *de facto* case law, whereby they refer themselves to their earlier decisions. For instance, in a case opposing Cameroon and Nigeria on a land and maritime boundary issue, the ICJ tribunal referred to prior cases in the following manner: '[t]here can be no question of holding Nigeria to decisions reached by the Court in previous cases. The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases'.[38] In the same way, the World Trade Organisation (WTO) Appellate Body held that prior decisions 'create expectation among Members and therefore should be taken

[36] See McLachlan, Shore and Weiniger (note 8) at 71; See also Likosky MB and Sugarman D 'Precedent in International law, international courts and international tribunals' in Hondius (note 20) 491at 491.
[37] Kaufman-Kohler (note 31) at 362-65, 373.
[38] *Cameroon v Nigeria*, Preliminary objections judgment ICJ Rep (11 June 1998) 275 at 291 para 28.

into account where they are relevant to any dispute'.[39] In another decision, the WTO Appellate Body commented that 'absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case'.[40]

The ICSID Convention excludes the binding force of previous decisions.[41] In terms of Article 53(1) of the ICSID convention, '[t]he awards shall be binding on the parties....' It was argued that this provision should be construed as limiting the binding force of the tribunal's decision to the only parties to the dispute at hand. According to Christoph Schreuer '[n]othing in the Convention's *travaux préparatoires* suggests that a doctrine of *stare decisis* should be applied to ICSID arbitration'.[42] However, the practice shows a trend of reference to earlier decisions by the tribunals. From among a number of existing cases[43], the *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* case[44] (referred to as *Vivendi* case) illustrates how tribunals refer to earlier awards to support their decisions. In that case, Argentina questioned whether the participation of shareholders in a domestically incorporated company constituted an 'investment'. The tribunal rejected Argentina's contention arguing that the very objection which Argentina raised in that case 'has been made numerous times, never, so far as the Tribunal has been aware, with success'.[45]

From the foregoing, it is clear that arbitrators can follow the reasoning from the previous decisions which they find useful to the case at hand. Also, it was observed that reference to previous decisions responds to the parties' expectations. As it was observed by Gary B Born, 'the reasons that gave rise to rules of *stare decisis* and *jurisprudence constante* in national courts

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[39] Report of the WTO Appellate Body 'United States import prohibition of certain shrimp and shrimp products' WT/DS58/AB/R (12 October 1998) para 108 cited in Born (note13) at 2961.
[40] Report of the WTO Appellate Body *United States Final anti- dumping measures on stainless steel,* WT/DS344/AB/R (30 April 2008) para 160 cited in Born (note13) at 2961.
[41] Schreuer H C et al *The ICSID convention: a commentary* 2nd ed (2009) at 1101.
[42] Ibid.
[43] A detailed analysis of the cases where tribunals have referred to previous cases is made in Chapter III.
[44] *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* Decision on jurisdiction ICSID Case No ARB/97/3.
[45] *Gas Natural SDG SA v the Argentine Republic* ICSID Case No ARB/03/10 Decision of the tribunal on preliminary question on jurisdiction (17 June 2005) cited in *Vivendi* case (note 44) para 94.

–parties' expectations, the need for predictable rules, enhancing judicial integrity and efficiency–all apply with at least equal force in international settings'.[46]

1.4 The interest for the doctrine of precedent in investor-state arbitration

Whereas a concern for consistency in international investment arbitral awards has been expressed, some commentators have questioned whether there is a compelling need for consistency of decisions in an international arbitration.[47] This question seems logical in the context of a private international commercial arbitration. However, the public character of the investor-state arbitration seems to call on the efforts to obtain the consistency of awards, so as to foster predictability, one of the stakeholders' expectations.[48] The following thus attempts to clarify the interest of the doctrine of precedent in the investment arbitration (in contrast to international commercial arbitration where private parties' dispute is based on a private contract).

1.4.1 No rule of precedent in international commercial arbitration

As previously noted, it is widely asserted that the doctrine of precedent as known in common law does not apply in international arbitration.[49] Although reference to previous decisions may be performed by arbitrators in international commercial arbitration[50], the strictly private nature of commercial disputes generally presumes that each award in international commercial arbitration stands on its own.[51] However, a relatively more pronounced *de facto* precedent is observed in investment arbitration and tends to be justified by the particular nature of the investment arbitration, distinguishing it from international commercial arbitration.[52]

[46] Born (note 13) at 2960.
[47] Legum B 'Option to establish an appellate mechanism for investment disputes' in Sauvant and Chiswick-Patterson (note 4) at 231,234-35.
[48] See Franck (note 5) at 1584.
[49] McLachlan, Shore and Weiniger (note 8) at 71.
[50] See Born (note 13) at 2966.
[51] Redfern and Hunter (note 8) at 30.
[52] Kaufmann-Kohler G 'In search of transparency and consistency: ICSID reform proposal'. Available at *http://www.lk-k.com/data/document/search-transparency-and-consistency-icsid-reform-proposals-transnational-dispute-management.pdf* [accessed 14 August 2009].

1.4.2 The particularity of the investor-state arbitration

Although investment arbitration dispute settlement is based on the model of private international commercial arbitration, it differs from most commercial arbitrations.[53] Investment arbitration differs from commercial arbitration in that investment arbitration involves issues of major public interest.[54] The similarity of issues in the relations between the investors and the home-State also constitutes an area of distinction of investment arbitration from commercial arbitration in general.

1.4.2.1 The public interest

Investment arbitration proceedings often involve issues of public interest.[55] In investment arbitration proceedings, the lawfulness of regulatory and administrative action of a State is often at issue.[56] Whereas proceedings in commercial arbitration are mainly held in private, the public interest in investment arbitration 'calls for transparency in the proceedings and consistency in the results'.[57]

Contrary to normal practice in private arbitration, transparency 'implies opening the doors of the hearing room'.[58] This may obviously conflict with the party autonomy, a fundamental principle in arbitration[59] (whereby parties are allowed to decide on the procedures to be followed in arbitration proceedings and on the confidentiality of proceedings).[60] However, public access to proceedings on adjudications involving public interest is perceived as a fundamental feature in international investment arbitration and should therefore be taken into account. It was argued that 'if adjudication –above all in public law –were not fully open and transparent, it would be immune from public scrutiny and matters affecting the community at large could routinely be decided in secret'.[61] In addition, within the investor-state arbitration, public interest requires

[53] Kaufmann-Kohler (note 52).
[54] Kaufmann-Kohler (note 52); Blackaby N 'Public interest and investment treaty arbitration'. Available at *http://www.transnational-dispute-management.com/samples/freearticles/tv1-1-article_56.htm* [accessed 5 March 2010].
[55] Dimsey (note 8) at 38; Kaufmann-Kohler (note 52).
[56] Dimsey (note 8) at 38.
[57] Kaufmann-Kohler (note 52).
[58] Ibid.
[59] This element of party autonomy is enshrined in different sets of arbitration rules that are incorporated into investment treaties including the ICSID Rules, the ICSID Additional Facilities, the UNCITRAL Rules, the ICC Rules to mention a few.
[60] Born (note 13) at 2255.
[61] Gus Van Harten *Investment treaty arbitration and public law* (2008) at 159.

more transparency. The resort to confidentiality in this area is perceived as a setback to public interest. Reliance on confidentiality by investor-state as it is often practiced in commercial arbitration has been significantly criticized by Non-Governmental Organizations (NGOs) on the ground that 'many investor-related disputes arise from the application of government regulations in areas of public concern'.[62] A significant critique made by an NGO on the confidentiality of investor-related arbitration stated:

> While such confidentiality may be attractive for investors seeking to exercise their rights away from the glare of public scrutiny, it ought to be deeply worrying to the sustainable development community. As far as can be ascertained, emerging disputes under bilateral investment treaties appear to be targeting government regulations in key areas of public policy such as water, energy, environment and health. Despite this, the resolution of such disputes is left in the hands of secretive tribunals that take no account of the wider public interests at stake, nor of the various safeguards available under domestic legal systems. Clearly, this system, which may have been well-suited for purely commercial arbitration, is deeply unsatisfactory in an era where investment agreements are starting to be wielded as trump cards against sensitive public policies.[63]

This kind of concern of public interest has been raised in a number of cases. The first case where a non-disputing party participation in an investor-state arbitration as *amicus curiae* (friend of the court) was allowed by a tribunal is the *Methanex v United States*[64] case between a Canadian company (investor), and the State of California. This case raised the public attention as the human health and environment issues were at stake.[65] Three US based NGOs: Bluewater Network, Communities for a Better Environment and the Centre for International Environmental Law filed a request to the tribunal requesting for participation in the arbitration proceedings as *amici curiae.* Despite the investor's opposition to the *amici,*[66] the tribunal accepted the NGOs' participation, in line with Article 15(1) of the United Nations Commission for International Trade Law (UNCITRAL) Arbitration Rules, albeit limited to submissions in writing.[67] Later in 2003 the tribunal accepted, through a procedural order, that the hearings on the merits would be

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[62] Dugan CF et al *Investor-state arbitration* (2008) at 706.

[63] Peterson L 'Changing investment litigation bit by BIT'. Available at *http://www.iisd.org/pdf/2001/trade_inv_litigation.pdf* [accessed 15 January 2010].

[64] *Methanex Corporation v United States* UNCITRAL (NAFTA) Decision on petitions from third parties to intervene as *amici curiae* (15 January 2001). Available at *http://ita.law.uvic.ca/documents/Methanex-AmiciCuriae.pdf* [accessed 5 March 2010].

[65] Ibid para 8.

[66] Methanex argued on this point that arbitration should be held *in camera* according to Article 25 (4) UNCITRAL Arbitration Rules.

[67] *Methanex Corporation v United States (*note 64) para 53.

open to the public.[68] This Methanex case is believed to have triggered the 'transition of international investment arbitrations from a secret and secretive process into a more transparent, accessible and thus accountable process'.[69]

In the ICSID, the tribunal in *Aguas Argentinas et al v Argentina*[70] case allowed the participation of five NGOs. These NGOs claimed the existence of public interest and the fundamental rights of people living in the area affected by the dispute in the case. Thus, contrary to the international commercial arbitration where only private parties are concerned, the public interest in investor-state arbitration raises the third party's interest in the outcome of the tribunal's decision, and therefore the need for consistency of arbitral decisions.

1.4.2.2 Similarity of issues

In investor-state arbitration, a state party may have similar obligations towards multiple investors. Although Bilateral Investment Treaties (BITs) are signed specifically between the two parties, namely the home State of the investor and the host State, some common issues such as the definition and interpretation of the terms 'investment', 'investor', 'expropriation', 'compensation' as well as 'Most Favoured Nation (MFN) clauses' and 'umbrella clauses', will usually come up in many investment cases.[71] A persisting and coherent interpretation might respond to the expectation of the investment actors. These special features of investor-stated arbitration underscore the particularity of the investment arbitration compared to international commercial arbitration and therefore justify the need to ensure consistency of arbitral awards in this field.

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[68] Mann H 'The final decision in Methanex v United States: some new wine in some new bottles'. Available at *http://www.iisd.org/pdf/2005/commentary_methanex.pdf* [accessed 2 March 2010].
[69] Ibid.
[70] *Aguas Argentinas et al v The Argentine Republic* ICSID case No ARB/03/19 Order in response to a petition for transparency and participation as *amicus curiae* (19 May 2005). Available at *http://www.escr-net.org/usr_doc/ICSIDAmicus_June05_English.pdf* [accessed 5 March 2010].
[71] Karl-Heinz B 'International commercial arbitration: introductory remarks' in Gaillard and Banifatemi (note 2) 17 at 23.

Chapter III

THE RELATIVE CONSISTENCY IN ICSID AWARDS

There is a wide trend of referring to earlier decisions in ICSID arbitral proceedings. A number of cases show that arbitrators are increasingly relying upon the reasoning employed in earlier tribunals' decisions, while in some other cases, such a trend is absent. This Chapter will therefore shed light on cases where, on the one hand, the consistency of awards was maintained, and on the other hand, where such a practice was abandoned. It also discusses the need for consistency in investor-state arbitration.

1. Coherence in ICSID awards

A number of ICSID cases show an increasing practice by arbitrators to rely upon the reasoning employed in earlier decisions. Some of the cases which are briefly illustrated below developed on the issues of 'fair and equitable treatment' and on the distinction between treaty claims and contract-based claims.

1.1 Case law on 'fair and equitable treatment'

A series of concurring cases have developed on the determination of 'unfair and inequitable treatment'. In *Neer v Mexico*,[72] the element of 'bad faith' was required to qualify the liability of the host State where it violated the fair and equitable treatment standard. The Commission in the *Neer* case held that:

> [T]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.[73]

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[72] *L F H Neer and Pauline Neer (USA) v United Mexican States* Reports of International Arbitral Awards Vol IV (15 October 1926). Available at *http://untreaty.un.org/cod/riaa/cases/vol_IV/60-66.pdf* [accessed 29 February 2010].
[73] Ibid (note 72) at 61-2.

In 2002, the tribunal in *Mondev International Ltd v United States*[74] case reversed the requirement of 'bad faith' as formulated in the *Neer* case in the following terms: '[t]o the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith'.[75]

This reversal was later followed in subsequent cases. The tribunal in the *Técnicas Medioambientales Tecmed SA v United Mexican States*[76] case cited the *Mondev* case to support it decision stating that:

> The Arbitral Tribunal finds that the commitment of fair and equitable treatment included in Article 4(1) of the Agreement is an expression and part of the bona fide principle recognized in international law, although bad faith from the State is not required for its violation.[77]

In the *CMS v Argentina*[78]case, the tribunal held in the same line that a deliberate intention to ignore an obligation and bad faith can aggravate the situation but are not an essential element required for the fair and equitable treatment standard to be breached.[79] In 2009, the tribunal in the *Glamis v USA* case said that '[t]he Tribunal emphasizes that, although bad faith may often be present in such a determination and its presence certainly will be determinative of a violation, a finding of bad faith is not a requirement for a breach of Article 1105(1)'.[80]

This sequence of decisions shows that tribunals have maintained the trend of interpreting the requirement to qualify the violation of the fair and equitable treatment standard.

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[74] *Mondev International Ltd v United States* Award ICSID Case No ARB (AF)/99/2 (October 11, 2002).
[75] Ibid para 116.
[76] *Técnicas Medioambientales Tecmed SA v United Mexican States* ICSID case No ARB (AF)/00/2 Award (29 May 2003).
[77] Ibid para 153.
[78] *CMS Gas Transmission Company v the Argentine Republic* ICSID case No ARB/01/8 Award (12 May 2005). Available at http://ita.law.uvic.ca/documents/CMS_FinalAward_000.pdf [accessed 5 February 2010].
[79] Ibid para 280.
[80] *Glamis Gold Ltd v United States of America* Award (June 8 2009) para 22. Available at http://ita.law.uvic.ca/documents/Glamis_Award_001.pdf [accessed 6 February 2010].

1.2 Case law on the distinction between treaty and contract claims

In terms of Article 25[81] of the ICSID Convention, any legal dispute arising directly out of an investment falls in the scope of the tribunal's jurisdiction. In some cases, foreign investors may conclude contracts with host-states or their constituencies for instance in the form of concession, and chose the national courts as competent forums. In cases of breach of contract, an investor may have both contract and treaty claims against the host-state.[82]

Drawing a clear line between treaty claims and contract claims has been a difficult task for arbitrators when assessing their jurisdiction.[83] This distinction between treaty claims and contract claims becomes more difficult when the investment contract contains an exclusive choice of court or an arbitration clause.[84] The distinction between treaty claims and contract claims consisted for arbitrators, in solving the jurisdictional competence, specifically in determining when and to what extent an investor could resort to investment arbitration for claims arising from contracts containing jurisdiction clauses in favour of national remedies. Two opposing views illustrate a strong division between those who believe BIT claims should be separated from contractual claims and those who want to closely relate the two.[85]Despite this divergence, a line of consistent decisions has prevailed.

In *Lanco v Argentina*[86], the tribunal held in favour of the claimant that the exclusive jurisdiction clause in favour of national courts did not preclude the submission of claims to ICSID. The tribunal admitted that actions taken by the home state that violated the contract, contravened the provisions of the BIT and could therefore be submitted to international dispute settlement.[87] However, the tribunal did not make a clear distinction between the contract claims and treaty

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[81] In terms of Article 25 (1): The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

[82] Yannaca-Small K 'Improving the system of investor-state dispute settlement: An overview' in *Working papers on international investment* OECD (2006) para 93. Available at *http://www.oecd.org/dataoecd/3/59/36052284.pdf* [accessed 6 March 2010].

[83] Kaufman-Kohler (note 8) 257 at 262.

[84] Ibid at 263.

[85] Crawford J 'Treaty and contract in investment arbitration'. Available at *http://www.lcil.cam.ac.uk/Media/lectures/pdf/Freshfields%20Lecture%202007.pdf* [accessed 6 March 2010].

[86] See *Lanco International v Argentine Republic* Preliminary decision on jurisdiction (8 December 1998). Available at *http://ita.law.uvic.ca/documents/Lanco-Final.pdf* [accessed 28 January 2010].

[87] Ibid para 23-25.

claims. This issue was addressed by the tribunal in the *Vivendi v Argentina*[88] case. The tribunal drew a clear line between the two types of claims and solved the forum issue in these words:

> A state may breach a treaty without breaching a contract, and *vice versa,* and this is certainly true of these provisions of the BIT....whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract....[89]

The *Vivendi* annulment committee concurred with the claimants saying that 'the fact that the investment concerns a concession contract made with Tucumán, a province of Argentina ...does not mean that the dispute falls outside the scope of the BIT'.[90] This view was upheld by the tribunal in the final award of the same case. The tribunal averred that:

> [a] state may breach a treaty without breaching a contract; it may also breach a treaty at the same time it breaches a contract. And, in the latter case it is permissible for the Tribunal to consider such alleged contractual breaches, not for the purpose of determining whether a party has incurred liability under domestic law, but to the extent necessary to analyse and determine whether there has been a breach of the Treaty. In doing so, the Tribunal would in no way be exercising jurisdiction over the contract, it would simply be taking into account the parties behaviour under and in relation to the terms of the contract in determining whether there has been a breach of a distinct standard of international law, as reflected in... the BIT.[91]

In *Joy Mining v Egypt*[92] the tribunal also held in the same line that:

> In this context, it could not be held that an umbrella clause inserted in the Treaty, and not very prominently, could have the effect of transforming all contract disputes into investment disputes under the Treaty, unless of course there would be a clear violation of the Treaty rights and obligations or a violation of contract rights of such a magnitude as to trigger the Treaty protection, which is not the case. The connection between the Contract and the Treaty is the missing link that prevents any such effect. This might be perfectly different in other cases where that link is found to exist, but certainly it is not the case here.[93]

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[88] *Compañia de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* ICSID case No ARB/97/3 Decision on Annulment (3 July 2002).
[89] Ibid para 95-96.
[90] Ibid para 75.
[91] *Compañia de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* ICSID case No ARB/97/3 Final award (August 20 2007) para 7.3.10. Available at *http://ita.law.uvic.ca/documents/VivendiAwardEnglish.pdf* [accessed 29 February 2010].
[92] *Joy Mining Machinery Limited v The Arab Republic of Egypt* ICSID Case No ARB/03/11 Award on jurisdiction (August 6 2004). Available at *http://ita.law.uvic.ca/documents/JoyMining_Egypt.pdf* [accessed February 29 2010].
[93] Ibid para 81.

A consistent position was taken by the *CMS* tribunal where it said:

> Regarding the merits of the argument, however, the Tribunal believes the Respondent is correct in arguing that not all contract breaches result in breaches of the Treaty. The standard of protection of the treaty will be engaged only when there is a specific breach of treaty rights and obligations or a violation of contract rights protected under the treaty. Purely commercial aspects of a contract might not be protected by the treaty in some situations, but the protection is likely to be available when there is significant interference by governments or public agencies with the rights of the investor.[94]

2. Inconsistencies in ICSID awards

In contrast with the observed trend for arbitrators to refer to prior decisions as described above, ICSID tribunals have at many times reached opposing conclusions despite the similarity of facts and circumstances. This was the case with the various Argentine cases where the Argentine Government resorted to the 'state of necessity' defense to justify the measures taken to deal with the financial crisis. Inconsistencies have also been observed in the matter of 'umbrella clauses'. The ensuing sub-sections will deal with each of these two areas.

2.1 The state of necessity defense

2.1.1 CMS v Argentina

Towards the 1990s, the government of Argentina embarked on economic reforms putting in place policies and a legal framework enticing foreign investors. Among the substantial measures taken was the liberalization of sectors of economy, amongst others the gas sector. For that purpose, in 1991, Argentina enacted the Currency Convertibility Law and a Decree pegging the Argentine currency to the United States dollar.[95] The CMS Gas transmission Company (CMS), a US incorporated Company, purchased 29.42 percent of shares in the privatized Gas Company, the *Transportadora de Gas del Norte* (TGN).

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[94] *CMS Gas Transmission Company v Argentine Republic* (note 78) para 299.
[95] See Law No 23. 928 of 1991 and Decree No 2.128 of 1991.

Later in 1999, following a major economic and financial crisis, Argentina took a number of national emergency measures resulting in the temporary suspension and subsequently in the termination of some investor's contractual rights, including the total freezing of the tariffs adjustment, the devaluation of the Argentine currency (the peso), affecting the guarantees given to the investors.[96] In CMS's view, this situation had an adverse impact on its business and breached the guarantees which protected its investment in TGN.[97] Thereafter, CMS filed a request for arbitration before the ICSID. The filed request concerned the alleged suspension by Argentina of the tariff adjustment formula for TGN, in which CMS had an investment.[98]

2.1.1.1 CMS' claims

On the 26th of July 2001, CMS sued the State of Argentina before the ICSID[99] for breach of obligations under the US-Argentine BIT particularly those provided for under Articles II (2)[100] and IV[101] of the BIT. CMS claimed that the suspension of the tariff adjustment formula by Argentina, and its amendment of the regulatory regime under which TGN's tariffs were calculated (in US dollars), amounted to an expropriation of CMS's shares under Article IV of the BIT. Moreover, CMS contended thus that Argentina violated its right to a fair and equitable treatment standard under Article II(2)(a), and to a non-discriminatory and non-arbitrary treatment standard under Article II(2)(b).[102] CMS further alleged that Argentina had breached the umbrella

[96] *CMS Gas Transmission Company v the Argentine Republic* (note 78) para 59-63.
[97] Ibid para 69.
[98] Ibid para 68.
[99] *CMS Gas Transmission Company v the Argentine Republic* (note 78) para 4.
[100] In terms of Article II (2) of the US-Argentine BIT: a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law. b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For the purposes of dispute resolution under Articles VII and VIII, a measure may be arbitrary or discriminatory notwithstanding the opportunity to review such measure in the courts or administrative tribunals of a Party. c) Each Party shall observe any obligation it may have entered into with regard to investments.
[101] Article IV defines generally the circumstances under which an investor may be expropriated. Article IV (3) provides that: Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses.
[102] *CMS Gas Transmission Company v the Argentine* (note78) para 88.

clause by not respecting the obligations it had entered into in connection with CMS's investment, as provided for in Article II(2)(c) of the BIT.[103]

2.1.1.2 Argentina's defence

The government of Argentina denied any liability with regard the CMS's claims and contended that 'in the event the tribunal should come to the conclusion that there was a breach of the Treaty [it] should be exempted from liability'.[104] It therefore raised the defense of 'state of necessity' under Article 25 of the International Law Commission (ILC)[105] and invoked the state of emergency under Article XI of the BIT.[106]

2.1.1.2 The tribunal's decision

In May 2005, the tribunal on the one hand rejected CMS' claims of expropriation under Article IV and of discriminatory and arbitrary treatment under Article II(2)(b) of the BIT. On the other, however, it ruled that Argentina had 'breached its obligations to accord the investor fair and equitable treatment guaranteed in Article II(2)(a) of the Treaty and to observe the obligations entered into with regard to the investment guaranteed in Article II(2)(c) of the Treaty'.[107] Thus, Argentina's defense of 'state of necessity' was not successful. The tribunal was of the opinion that the conditions required for the application of the defense of state of necessity under Article 25 ILC were not met. The tribunal said:

> Tribunal is persuaded that the situation was difficult enough to justify the government taking action to prevent a worsening of the situation and the danger of total economic collapse. But neither does the relative effect of the crisis allow here for a finding in terms of preclusion of wrongfulness... [108] The Tribunal is convinced that the crisis was indeed severe and the argument that nothing important happened is not tenable. However, neither could it be held that wrongfulness should be precluded as a matter of course under the circumstances.[109]

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[103] *CMS Gas Transmission Company v the Argentine Republic* (note 78) para 88.
[104] Ibid para 298, 304.
[105] See International Law Commission Draft Articles on responsibility of States for Internationally wrongful acts.
[106] Article XI of the US-Argentine BIT provides: 'This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests'.
[107] *CMS Gas Transmission Company v the Argentine Republic* (note 78) 472 (1).
[108] Ibid para 322.
[109] Ibid para 320.

Moreover, according to the tribunal, the measures taken by Argentina in response to the crisis were not the only means available to justify the state of necessity.[110] The tribunal also averred that the emergency defence under Article XI of the BIT was not applicable.[111]

2.1.2 LG & E v Argentina

In 2002 the *LG&E v Argentina*[112]case arose with virtually identical facts[113] and based on the same BIT[114] as that relied upon by the *CMS* case. Like in the *CMS* case, the issues in *LG&E* derived from the financial crisis of 2001-2002 and the Argentina's subsequent legislative measures in response to the economic crisis. LG&E sued Argentina for breach of the provisions of Article II under the US-Argentina BIT.[115] LG&E identified four measures unilaterally taken by Argentina in violation to its protection standards, namely the suspension and abolishment of the United States Producer Price Index (US PPI) adjustment, freezing the gas-distribution tariffs, and abandonment of the calculation of the tariffs in dollars.[116]

Despite the similarities between *LG&E* and *CMS* cases, the *LG&E* tribunal reached a decision completely different to the *CMS* tribunal's conclusions regarding the defense of state of necessity. The tribunal in *LG&E* recognized Argentina's defense of state of necessity in these words: 'the Tribunal recognizes that satisfaction of the state of necessity standard as it exists in international law (reflected in Article 25 of the ILC's Draft Articles on State Responsibility) supports the Tribunal's conclusion'.[117] Moreover, contrary to the *CMS* tribunal, the *LG&E*

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[110] *CMS Gas Transmission Company v the Argentine Republic* (note 78) para 324.

[111] Ibid para 373.

[112] *LG&E International Inc. v Argentine Republic* ICSID Case No ARB/02/1 Decision on liability (3 October 2006). Available at *http://ita.law.uvic.ca/documents/ARB021_LGE-Decision-on-Liability-en.pdf* [accessed 11 February 2010].

[113] See Reinisch A 'The proliferation of international dispute settlement mechanisms: the threat of fragmentation vs. the promise of a more effective system? Some reflections from the perspective of investment arbitration'. Available at *http://iis-db.stanford.edu/pubs/22660/Proliferation_of_DS_Mechanisms.pdf* [accessed 28 February 2010]; Waibel M 'Two worlds of necessity in ICSID arbitration: CMS and LG&E' (2007) 20 *Leiden Journal of International Law* 637 at 637.

[114] Being a US incorporated company, LG&E founded its claim on the US-Argentina BIT.

[115] *LG&E International Inc v Argentine Republic* (note 112) para 72.

[116] Ibid para 220.

[117] Ibid para 245.

tribunal accepted Argentina's argument that the measures taken were the only means available to respond to the crisis.[118]

2.1.2.1 Reasons for the differences in the conclusions of the two tribunals

Both *CMS* and *LG&E* tribunals embraced the issue of determination of Argentina's alleged liability by examining its defenses of emergency and state of necessity under Article XI of the BIT and the International customary law respectively. However, despite the similarities in the facts of the two cases, tribunals reached diverging conclusions. The tribunals in the two cases adopted different approaches in their analysis of Argentina's defense of state of necessity. The *CMS* tribunal approached Argentina's defense of state of necessity firstly by testing it against the conditions set out in Article 25 of the ILC,[119] and lastly to the provisions of article XI[120] of the BIT. The *CMS* tribunal's approach was criticized for ignoring the principle of *lex specialis* by which it should have first considered the provisions of Article XI of the BIT before considering any other external source of law external.[121]

In contrast, the *LG&E* tribunal first relied on the provisions of the BIT and only considered Article 25 of ILC Draft Articles on a subsidiary basis. It was argued that the approach adopted by the *LG&E* tribunal was a sound one[122] by the fact that it first considered the provisions of the BIT before looking at the ILC provisions. It was argued that 'it is...common sense in

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[118] *LG&E International Inc v Argentine Republic* (note 112) para 239.
[119] Article 25 ILC provides: 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity.
[120] Article XI of the US-Argentina BIT provides: [t]his Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests'.
[121] *CMS Gas Transmission Company v Argentine Republic* ICSID Case No ARB/01/8 Decision on the application for annulment (25 September 2007) para 130-136; See also Forji AG 'Drawing the right lessons from ICSID jurisprudence on the doctrine of necessity' *(2010) 76 Arbitration 1* Sweet & Maxwell (February 2010) 44 at 51.
[122] Forji (note 121) at 51; See also Burke-White WW 'The Argentine Financial Crisis: State liability under BITs and legitimacy of the ICSID system'. Available at *http://lsr.nellco.org/cgi/viewcontent.cgi?article=1207&context=upenn_wps* [accessed 1 March 2010].

international law that treaty law (BIT) should prevail over customary international law (ILC Articles)'.[123]

The *LG&E* tribunal did not take into account the *CMS*'s tribunal approach of the state of necessity defense and was criticized on that point, on the ground that it ignored the prevailing practice within the ICSID arbitration whereby tribunals rely on their persuasive authority.[124] Some scholars argued that the *LG&E* tribunal's reference to *CMS* 'would likely have strengthened the adequacy of reasoning provided in the state of necessity section and would have removed the burden of untangling the contradictions between these two awards on future arbitrators'.[125]

2.1.3 Subsequent cases

Subsequent to the *CMS* and *LG&E* cases, a number of cases with similar facts and based on the same BIT have been adjudicated by different arbitral tribunals under the ICSID. Some of those cases are briefly analyzed below with specific focus on their approach on the state of necessity defense.

2.1.3.1 Enron v Argentina

In *Enron v Argentina,*[126] the tribunal first considered Article XI of the BIT but, like the *CMS* tribunal, it applied the Article 25 of the ILC after it established the lack of definition of what was to be understood by 'essential security interest' under the Article XI of the BIT.[127] The *Enron* tribunal ultimately found that Argentina's defense of state of necessity could not be effectively invoked. In the tribunal's words:

> The Tribunal explained above that it would consider the requirement of Article 25 of the Articles on State Responsibility as to the act not seriously impairing an essential interest of the State towards which the obligation exists in the context of the Treaty obligations.

[123] Forji (note 121) at 51.
[124] Waibel (note 113) at 647; Also, as was expressed by Rocío Digón 'even though there is no *stare decisis* in international arbitration, it is common practice for arbitral awards under investment treaties to compare and distinguish themselves from previously issued awards'. See Digón R 'The decision on liability in LG&E v Argentina' in Aguillar Alvarez G and Reisman WM (eds) *The reasons requirement in international investment arbitration: critical case studies* (2008) 117 at 145.
[125] Such as Digón (note 124) at 145.
[126] *Enron Corporation Ponderosa Assets L P v Argentine Republic* ICSID Case No ARB/01/3 AWARD (22 May 2007) available at http://ita.law.uvic.ca/documents/Enron-Award.pdf [accessed 1 March 2010].
[127] Ibid para 333.

> In light of the discussion above about changing interpretations, it does not appear that the invocation by Argentina of Article XI, or state of necessity generally, would be taken by the other party to mean that such impairment does arise.[128]

Despite the presence of the same arbitrator in both the *Enron* and the *LG&E* cases[129] the former tribunal refrained from referring to the latter when considering the state of necessity. This was also criticized by some authors.[130] It is argued that given the similarity of the facts and the closeness in time of the two cases '*LG&E* should clearly have referred more extensively to *CMS*.[131]

2.1.3.2 Sempra v Argentina

In its proceedings, the *Sempra v Argentina*[132] tribunal referring to the *CMS* (where two of its members had participated) compared the *Sempra* case to the *CMS, Enron* and *LG&E* cases and deduced that there was a difference in the assessment of the facts.[133] The tribunal concluded that *Sempra* tribunal '[was] not any more persuaded than the *CMS* and *Enron* tribunals about the crisis justifying the operation of emergency and necessity',[134] therefore adopting the *CMS* position. Although the *Sempra* award came out three days after the *CMS ad hoc* annulment committee's decision on the Argentina's application for annulment, the *Sempra* tribunal did not consider the outcome of the earlier case. Yet the annulment committee had strongly criticized the previous *CMS* award where it stressed that the errors made by *CMS* tribunal 'could have had a decisive impact on the operative part of the Award'.[135]

It is important here to consider the *CMS ad hoc* annulment committee's contention that the *CMS* tribunal had made two errors in its decision regarding the Argentina's defense of necessity.

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[128] *Enron Corporation Ponderosa Assets L P v Argentine Republic* (note 126) para 341.

[129] The ICJ judge Francisco Rezek served as Argentina-appointed arbitrator in both cases.

[130] Waibel M (note113) at 647; Tsatsos A 'ICSID jurisprudence: between homogeneity and heterogeneity, a call for appeal?' Available at *http://edoc.hu-berlin.de/oa/articles/reJUhoqzJnndU/PDF/26Jz9jyXMFTXc.pdf* [accessed 26 February 2010].

[131] Waibel (note 113) at 647.

[132] *Sempra Energy International v Argentine Republic* ICSID case No ARB/02/16 Award (28 September 2007) available at *http://ita.law.uvic.ca/documents/SempraAward.pdf* [accessed 2 March 2010].

[133] *Sempra Energy International v Argentine Republic* para 346.

[134] Ibid [*Sempra Energy International v Argentine Republic*] para 346.

[135] *CMS Gas Transmission Company v Argentine Republic* ICSID Case No ARB/01/8 Decision on the application for annulment (25 September 2007) para 135.

Firstly, the committee argued that the *CMS* tribunal had made a manifest error of law by assimilating conditions necessary for the implementation of Article XI of the BIT to those concerning the existence of the state of necessity under customary international law.[136] Secondly, the committee noted that *CMS* tribunal made another error by failing to follow the *lex specialis* principle by applying the customary international law (Article 25 ILC) instead of the Article XI of the BIT. The committee said:

> If, on the contrary, state of necessity in customary international law goes to the issue of responsibility, it would be a secondary rule of international law ... In this case, the Tribunal would have been under an obligation to consider first whether there had been any breach of the BIT and whether such a breach was excluded by Article XI. Only if it concluded that there was conduct not in conformity with the Treaty would it have had to consider whether Argentina's responsibility could be precluded in whole or in part under customary international law.[137]

3. Discrepancies in BITs interpretation: the 'umbrella clause'

An umbrella clause is basically a 'provision in an investment protection treaty that guarantees the observation of obligations assumed by the host state vis-à-vis the investor'.[138] The salient feature of the umbrella clauses is that they 'add the compliance with investment contracts, or other undertakings of the host State to the BIT's substantive standards'.[139] The interpretation of the umbrella claüses has, in some cases, divided tribunals and lead to different decisions.

3.1 SGS v Philippines

In the *SGS v Philippiness*[140]case, the *Société Générale de Surveillance* (SGS) had concluded a contract with the Philippines Bureau of Customs (BOC) on pre-shipment inspection services. A contractual clause in the agreement regarding the forum selection subjected all claims concerning disputes in connection with the parties' obligations to the Philippines' jurisdiction. Article 12 of the agreement between SGS and BOC provided that:

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[136] *CMS Gas Transmission Company v Argentine Republic* (note 121) para 128, 130.
[137] Ibid para 134.
[138] Dolzer R and Schreuer C *Principles of international investment law* (2009) at 153; Sornarajah M *The international law on foreign investment* 2nd ed (2004) at 248.
[139] Schreuer C 'Travelling the BIT route of waiting periods, umbrella clauses and forks in the road' (2004) 5 2 *Journal of World Investment and Trade* 231 at 250.
[140] *SGS Société Générale de Surveillance SA v Republic of the Philippines* ICSID Case No ARB/02/6 Decision on jurisdiction (29 January 2004) available at *http://ita.law.uvic.ca/documents/SGSvPhil-final_001.pdf* [accessed 3 February 2010].

> The provisions of this Agreement shall be governed in all respects by and construed in accordance with the laws of the Philippines. All actions concerning disputes in connection with the obligations of either party to this Agreement shall be filed at the Regional Trial Courts of Makati or Manila.[141]

The SGS claim before the ICSID arose from some contractual unpaid amounts of money. SGS alleged that by refusing to pay the amounts due, the Philippines was in breach of the Swiss-Philippines BIT.[142] The SGS founded its claim on the provisions of the BIT, especially Article X(2) on the 'umbrella clause'. The umbrella clause in Article X(2) of the Swiss-Philippines BIT provided that 'Each party shall observe any obligation it has assumed with regard to specific investment in its territory by investors of the other contracting party'.[143]

In its decision on jurisdiction the *SGS v Philippines* tribunal rejected the Philippines' argument that 'Article X (2)...should be interpreted as being limited to obligations under other international law instruments'.[144] It asserted that 'Article X(2) means what is says',[145] therefore upholding the classic position that the umbrella clause 'elevates the contract claims to treaty claims'.[146]

The tribunal said: '...Article X (2) makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments'.[147]

3.2 SGS v Pakistan

A different position from that of the *SGS v Philippines* had been taken earlier in *SGS v Pakistan*[148] case. In this case, the umbrella clause in the Swiss-Pakistan BIT provided that: 'Either contracting party shall constantly guarantee the observance of the commitments it has

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[141] Article 12 of the comprehensive import supervision service (CISS) Agreement between SGS and BOC.
[142] *SGS Société Générale de Surveillance SA v Republic of the Philippines* (note 140) para 16.
[143] Article X(2) Swiss-Philippines BIT.
[144] *SGS Société Générale de Surveillance SA v Republic of the Philippines* (note 140) para 118.
[145] Ibid para119.
[146] Schreuer (note 139) at 250-51; Dolzer and Schreuer (note 138) at 154.
[147] *SGS Société Générale de Surveillance SA v Republic of the Philippines* (note 140) para 128.
[148] *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* ICSID case No ARB/01/13 Decision on objections to jurisdiction (6 August 2003) available *http://ita.law.uvic.ca/documents/SGSvPakistan-decision_000.pdf* [accessed 3 February 2010].

entered into with respect to the investments of the other contracting party'[149]. The tribunal in *SGS v Pakistan* 'departed fundamentally from the conventional understanding of the clause'.[150] In its decision on objection to jurisdiction, the tribunal said:

> A treaty interpreter must of course seek to give effect to the object and purpose projected by that Article and by the BIT as a whole. That object and purpose must be ascertained, in the first instance, from the text itself of Article 11 and the rest of the BIT. Applying these familiar norms of customary international law on treaty interpretation, we do not find a convincing basis for accepting the Claimant's contention that Article 11 of the BIT has had the effect of entitling ... SGS, in the face of a valid forum selection contract clause, to "elevate" its claims grounded solely in a contract ... to claims grounded on the BIT, and accordingly to bring such contract claims to this Tribunal for resolution and decision.[151]

The main reasons for divergence between the *SGS v Pakistan* and *SGS v Philippines* cases are due to the different methods adopted by the two tribunals in the interpretation of the BIT. Whereas the treaties are normally interpreted in accordance with the principles set out in Articles 31 of the Vienna Convention on the Law and Treaties,[152] (a position adopted by the *SGS v Philippines* tribunal, which reached the decision in line with the conventional construction of the umbrella clause), the *SGS v Pakistan* tribunal took a quite different approach. Referring to a World Trade Organisation case,[153] the tribunal circumvented the conventional method of Treaty interpretation and used the maxim *in dubio pars mitior est sequenda* (in case of doubt, the milder part must be followed[154]) to support its restrictive interpretation of the umbrella clause and averred:

> The Tribunal is not saying that States may not agree with each other in a BIT that henceforth, all breaches of each State's contracts with investors of the other State are forthwith converted into and to be treated as breaches of the BIT. What the Tribunal is stressing is that in this case, there is no clear and persuasive evidence that such was in fact the intention of both Switzerland and Pakistan in adopting Article 11 of the BIT. Pakistan for its part in effect denies that, in concluding the BIT, it had any such intention....We believe and so hold that, in the circumstances of this case, SGS's claim about Article 11 of the BIT must be rejected.[155]

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[149] Article 11 Swiss-Pakistan BIT.
[150] Dolzer and Schreuer (note 138) at 155.
[151] *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* (note 146) para 165.
[152] Weiniger M 'Jurisdictional challenges in BIT arbitrations' in Mistelis and Lew (note 8) at 254.
[153] *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* (note 148) para 171.
[154] Haight L et al *World dictionary of foreign expressions* (1999) at 182.
[155] *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* (note 148) para 173.

According to the *SGS v Pakistan* tribunal, the conventional understanding would have a far-reaching impact on the sovereignty of the host state, which could not be presumed without a clearly shared intent of the contracting parties to the Swiss-Pakistan BIT.[156]

The differences of the tribunals' views could also be attributed to the different wordings of the umbrella clauses in the BITs.[157] Departing from the *SGS v Pakistan* tribunal's view, the *SGS v Philippines* tribunal noted that 'the Swiss-Pakistan BIT was formulated in different and rather vaguer terms than Article X(2) of the Swiss-Philippines BIT'.[158]

3.3 Subsequent decisions

These diverging views on the interpretation of umbrella clauses persisted along some subsequent tribunals decisions. On the one hand, the tribunal in *El Paso v Argentina*[159] case upheld the restrictive view of the *SGS v Pakistan* tribunal that an umbrella clause could not elevate any contractual claims into breaches of international law. In fact, the tribunal in *El Paso* said:

> These far-reaching consequences of a broad interpretation of the so-called umbrella clauses, quite destructive of the distinction between national legal orders and the international legal order, have been well understood and clearly explained by the first tribunal which dealt with the issue of the so-called 'umbrella clause' in the *SGS v. Pakistan* case and which insisted on the theoretical problems faced. It would be strange indeed if the acceptance of a BIT entailed an international liability of the State going far beyond the obligation to respect the standards of protection of foreign investments embodied in the Treaty and rendered it liable for any violation of any commitment in national or international law 'with regard to investments.[160]

On the other hand the tribunal in *LG&E v Argentina* upheld the traditional position adopted by the *SGS v Philippines* tribunal. It held that Argentina's suspension and termination of certain undertakings amounted to international liability under the umbrella clause in the treaty.[161]

[156] *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* (note 148) para 167.
[157] See Dimsey (note 8) at 55.
[158] *SGS Société Générale de Surveillance SA v Republic of the Philippines* (note 140) para119.
[159] *El Paso energy international company v the Argentine Republic* ICSID case No ARB/03/15 Decision on jurisdiction (27 April 2006) available at http://ita.law.uvic.ca/documents/elpasoEN.pdf [accessed 12 January 2010].
[160] Ibid para 82.
[161] *LG&E International Inc v Argentine Republic* (note 112) para 170-171, 175.

4. The need for consistency

As illustrated in this study, the tribunals' decisions impact on the reasonable expectations of parties to the disputes (both the investor and the host state). In addition, third parties may have an interest in the outcome of the awards. It is in this way that investor-state arbitration, although founded on similar principles as those of the international commercial arbitration distinguishes itself from it. However, despite the apparent trend for arbitrators to follow earlier tribunals' decisions in some cases, there are still discrepancies in some cases where tribunals have failed to follow previous decisions.

Inconsistencies in investment arbitration awards have been a subject of debate amongst authors seeking the way on how it could be resolved.[162] Some authors, however, argued that the need for consistency is over-rated, stating that 'there is no need to be alarmed about inconsistent *obiter dicta*. Irreconcilable differences in *rationes decidendi* have been far rarer than supposed'.[163] Other scholars even argued that the quest for consistency is 'a dangerous illusion'.[164] According to Jan Paulsson, 'when critics of international arbitration bemoan the lack of consistency and coherence, they are blaming the process for failing to achieve the impossible'.[165] He goes on and predicts that the problem of inconsistency in investment arbitration could be achieved through the process of 'natural correction'.[166] He says that:

> If I may now venture a new prediction, it is that after a sustained flurry of decisions over the past decades we are already likely to see a second wave, or rather a second generation, of investment awards. Its principal characteristics will be consolidation of dominant trends; the continued isolation of perplexing outliers among awards; and thus, quite simply, more consistent awards.[167]

Other commentators, however, disagree arguing that 'there is a significant risk that simply waiting for consistency to emerge will not produce the results hoped for because certain fundamental disagreements will remain'.[168] Referring to the current problems of inconsistencies

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[162] See Warner H and Sheppard A 'Appeals and challenges to investment treaty awards: Is it time for an international appellate system?' (2005) 2:2 *Transnational Dispute Management*; Sauvant and Chiswick-Patterson (note 4) at 209.
[163] Paulsson J 'Avoiding unintended consequences' in Sauvant and Chiswick-Patterson (note 4) 241 at 241.
[164] Gaillard E 'ICSID annulment: procedural review' in Warner and Sheppard (note162) at 38.
[165] Paulsson (note 163) at 245.
[166] Ibid at 253.
[167] Ibid.
[168] Kaufmann-Kohler (note 2) at 145.

in investor-state arbitration, one commentator contends that 'unless the criticisms of the current system are addressed (either more modestly or in the grand plan), this new child of the arbitration world may be stunted in its growth'.[169]

The lack of consistency in investment arbitration is therefore a contentious issue, and one would argue that it needs to be addressed. A number of suggestions on how this issue should be addressed will be considered in the ensuing Chapter.

[169] Blackaby (note 54).

Chapter IV

ACHIEVING CONSISTENCY IN ICSID AWARDS

The discussion in the previous Chapter reveals the commonly held position that there is no system of precedent in international arbitration.[170] An arbitral tribunal is not bound by earlier arbitral decisions.[171] This is essentially due to the very nature of the arbitration. While the litigation system has an infrastructure ensuring consistency, arbitration presents some inherent characteristics that constitute an impediment to the consistency of decisions rendered by arbitral tribunals. These intrinsic characteristics of arbitration are, amongst others, the confidentiality of arbitral proceedings, the absence of formal rule of precedent, the absence of appeals mechanism and the absence of consolidation. This chapter therefore will highlight the main obstacles to consistency and explore the current means suggested to achieve consistency of the ICSID arbitral awards.

1. Obstacles to consistency in investor-state arbitral awards

1.1 No formal rule of precedent

In international commercial arbitration, a tribunal has jurisdiction to consider a particular dispute before it without necessarily referring to other tribunals or awards. Authors argue that the notion of precedent has no place in international commercial arbitration, even in investment arbitration:

> Precedent should not play a role in arbitration. It is inherently contrary to the very core role of arbitration which is to solve ONE dispute between parties who have agreed upon that mean [sic] of resolving it for that particular transaction. Even in "investment arbitration" precedent should not play a role. Arb[itration] Tribunals are independent and if they quote from other awards it is only a matter of persuasion, never a matter of precedent.[172]

This position is shared by ICSID tribunals. In *SGS v Philippines* the tribunal commented that:

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[170] See supra note 8.
[171] See the provision of Article 38 of ICJ statutes; *SGS v Republic of Philippines* (note 138) para 97.
[172] Likosky MB and Sugerman D'Precedent in international law, international courts and international tribunals' in Hondius (note 20) 491at 497.

> [T]here is no doctrine of precedent in international law if by precedent is meant the binding effect of a single decision. There is no hierarchy of international tribunals and if there were, there is no good reason for allowing the first tribunal to resolve the issues for all later tribunals.[173]

It should be noted, however, that although the doctrine of precedent is in fact rejected, tribunals in investment arbitration often refer to earlier decisions. In *Saipem v Bangladesh*, the tribunal stated that 'The tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals'.[174]

1.2 Lack of an appeal system

Under the ordinary courts, the judicial mistakes occurring at the lower levels of the judicial hierarchy can be corrected through the appeal systems by higher courts. The appellate mechanism serves 'to ensure or at least aid the development of a consistent body of law and enable legal certainty and transparency to be upheld'.[175] However, such a system of appeal does not exist in international arbitration. It is argued that 'by agreeing to arbitration, parties could be regarded as accepting that they were foregoing the right to appeal a decision'.[176]

1.3 Confidentiality of arbitral proceedings

Confidentiality is one of the fundamental principles of arbitration and often constitutes a decisive factor in the choice of arbitration as a method of dispute resolution in preference to the litigation.[177] Although most national legislations on international arbitration and the UNCITRAL Model Law on International Commercial Arbitration are silent on the issue of confidentiality, party autonomy with regard to the confidentiality of international arbitral proceedings is generally recognized.[178] Parties to the dispute may choose whether the award

[173] *SGS v Republic of Philippines* (note 140) para 97.
[174] See *Saipem v Bangladesh* ICSID case No ARB/05/07 Decision on jurisdiction and recommendation on provisional measures (21 March 2007) para 67.
[175] Dimsey (note 8) at 158.
[176] Ibid.
[177] Ibid at 36.
[178] Born (note13) at 2255.

should be made public or not. For instance, Article 32(5) of the UNCITRAL Arbitration Rules[179] and the Article 30.3 of the London Court of International Arbitration (LCIA)[180] subject publication of the award to the consent of the parties.

Any limitations imposed on the publication of arbitral awards may foster incoherence among arbitral decisions. While parties may on the one hand, limit the degree of confidentiality of the arbitral proceedings, publicity of proceedings in litigation is, on the other hand, perceived as of essential importance. In *Axen v Federal Republic of Germany* the European court of Human Rights commented on the rationale for Article 6 of the European Convention on Human Rights (right to a fair trial) saying:

> The public nature of the proceedings helps to ensure a fair trial by protecting the litigant against arbitrary decisions and enabling society to control the administration of justice.... Combined with the public pronouncement of the judgment, the public nature of hearings serves to ensure that the public is duly informed...It should consequently contribute to ensuring confidence in the administration of justice.[181]

In a legal system which embraces judicial precedent, the rationale of publicity can be extended to the need to develop the law from judicial reasoning and to allow legal practitioners to practice their profession with access to published law reports.[182] It follows that the confidentiality of arbitral awards constitutes a setback to the potential reference to earlier tribunal decisions and therefore a source of inconsistency.

Non-disputing parties, particularly NGOs, have often decried confidentiality in investor-state arbitration as an obstacle.[183] The ICSID arbitration has positively considered and recognized the importance of the requests by non-disputing parties to address their submission to the tribunal. In

[179] In terms of the Article 32(5) of the UNCITRAL arbitration rules, '[t]he award may be made public only with the consent of both parties'.
[180] Article 30.3 of the LCIA provides that '[t]he LCIA Court does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal'.
[181] *Axen v Federal Republic of Germany (1981)* European Commission of Human Rights Report of 14 December 1981 B 57.
[182] Veeder VV 'The transparency of international arbitration: process and substance' in Mistelis and Lew (note 8) 89 at 90.
[183] See Peterson L (note 63).

Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic[184] the tribunal recognized the value of *amicus curiae* intervention on the ground that their submission would help the tribunal arrive at a correct decision and to increase the legitimacy of the investor-state arbitration process. The tribunal averred:

> Given the public interest in the subject matter of this case, it is possible that appropriate nonparties may be able to afford the Tribunal perspectives, arguments, and expertise that will help it arrive at a correct decision. Rather than to reject offers of such assistance peremptorily, the Tribunal, while taking care to preserve the procedural and substantive rights of the disputing parties and the orderly and efficient conduct of the arbitration, believes it is appropriate to consider carefully whether to accept or reject such offers.

The acceptance of *amicus* submissions would have the additional desirable consequence of increasing the transparency of investor-state arbitration. Public acceptance of the legitimacy of international arbitral processes, particularly when they involve states and matters of public interest, is strengthened by increased openness and increased knowledge as to how these processes function. It is this imperative that has led to increased transparency in the arbitral processes of the WTO and the North American Free Trade Agreement (NAFTA). Through the participation of appropriate representatives of civil society in appropriate cases, the public will gain increased understanding of ICSID processes.[185] The tribunal held, therefore, that it was appropriate to let the applying non-disputing parties to make *amicus curiae* submissions.[186]

However, a different view was expressed in the *Aguas del Tunari S.A. v. Republic of Bolivia* case where non-disputing parties were denied participation as *amicus curiae*. The tribunal said:

> [T]he Tribunal's unanimous opinion that your core requests are beyond the power or the authority of the Tribunal to grant. The interplay of the two treaties involved (the Convention on the Settlement of Investment Disputes and the 1992 Bilateral Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and Bolivia) and the consensual nature of arbitration places the control of the issues you raise with the parties, not the Tribunal. In particular, it is manifestly clear to the Tribunal that it does not, absent the agreement of the Parties, have the power to join a non-party to the

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[184] *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic* ICSID case No ARB/03/19 Order in response to a petition for transparency and participation as *amicus curiae* (19 May 2005) available at *http://ita.law.uvic.ca/documents/suezMay19EN.pdf* [accessed 15 January 2010].

[185] Ibid para 21-22.

[186] Ibid para 23.

> proceedings; to provide access to hearings to non-parties and, a fortiori, to the public generally; or to make the documents of the proceedings public.[187]

This issue was later settled within the ICSID. It is properly addressed under the Article 37(2) of the Arbitration Rules as revised in 2006 which provides that:

> After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which: (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding. The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

Other arbitration rules like UNCITRAL, ICC, and LCIA which are often resorted to for investment arbitration lack such express provisions on *amicus curiae*. Therefore, it goes without say that an express provision allowing non-party submissions either in the treaty or in the arbitration rules is necessary.[188]

1.4 The lack of consolidation in multi-party arbitration

The problem of conflicting awards in international arbitration may also arise owing to the lack of consolidation of parallel proceedings. When several parties are involved in a dispute, it is usually considered desirable that the issues should be dealt with the same proceedings rather than in a series of separate proceedings.[189] Therefore, conflicting decisions on the same issues of law and fact would be avoided, given that all the issues are determined by the same tribunal at the same time.[190]

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[187] *Aguas del Tunari S.A. v. Republic of Bolivia* ICSID Case No ARB/02/3 Decision on respondent's objection to jurisdiction (21 October 2005) para 17.

[188] Marshall F 'Defining New Institutional Options for investor-state dispute settlement'. Available at *http://www.iisd.org/pdf/2009/defining_new_institutional_options.pdf* [accessed 15 March 2010].

[189] Redfern and Hunter (note 8) at 200.

[190] Ibid.

A good illustration of the conflicting decisions due to the lack of consolidation is found in the *CME v Czech Republic*[191] and *Lauder v Czech Republic*[192] cases. An American citizen, Lauder held 30 percent shares of CME, a Dutch company, which in turn held 99 percent of the shares of CTNS, a Czech TV company. After the company proved to be very successful, Mr. Zelezny an influential TV journalist and a Czech businessman had a disagreement with Lauder. Through the efforts of Zelezny, the Czech government revoked the CTN's TV license. Thereafter, Lauder in his capacity as a US investor initiated UNCITRAL arbitration proceedings in London under the US/Czech BIT. Six months later, CME started arbitration proceedings against the Czech Republic under the Netherlands/Czech BIT. Lauder was therefore present in the two proceedings. Although the BITs and arbitration rules used were different in the two cases, the facts to be considered by the tribunals were the same. In its award issued in September 2001 the London based tribunal dismissed all of Lauder's claims. The Stockholm tribunal, however, found that the CME claims were well founded. It held that the Czech Republic had breached the fair and equitable treatment obligation and awarded damages to CME.[193]

Whereas the national courts are allowed to join additional parties or order the consolidation of separate sets of proceedings, arbitrators have no such powers. In England it was suggested, in 1996, that the tribunal or the court be given the power in the Arbitration Act to order consolidation of proceedings,[194] this suggestion was rejected by the Advisory Committee on Arbitration Law. The committee's reaction to the suggestion was as follows:

> In our view it would amount to a negation of the principle of party autonomy to give the tribunal or the Court power to order consolidation or concurrent hearings. Indeed it would to our minds go far towards frustrating the agreement of the parties to have their own tribunal for their own disputes. Further difficulties could well arise, such as the disclosure of documents from one arbitration to another. Accordingly, we would be opposed to giving the tribunal or the Court this power. However, if the parties agree to invest the tribunal with such a power, then we would have no objection.[195]

[191] *CME Czech Republic BV v Czech Republic* Partial Award (13 September 2001). Available at http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf [accessed 15 December 2009].
[192] *Lauder v. Czech Republic* Final Award (3 September 2002) .Available at http://ita.law.uvic.ca/documents/LauderAward.pdf [accessed 15 December 2009].
[193] *CME Czech Republic BV v Czech Republic* (note 191) para 624.
[194] In England, when the 1996 Arbitration Act was being drafted, it was suggested that there should be a provision in the Act that would empower either the tribunal or the court (or both) to order consolidation.
[195] 'Report on the Arbitration Bill by the Departmental Advisory Committee on Arbitration Law' February 1996 at para 180.cited in Redfern and Hunter (note 8) at 174.

In sum, such inconsistencies in decision making constitute a tremendous matter of concern in investor-state arbitration and need to be addressed. It would make sense that the two cases be arbitrated by the same arbitral panel, but this will always depend upon the willingness of parties.

2. Approach to achieving consistency

As underlined in the preceding sections the existence of inconsistencies in ICSID awards is evident. The *SGS* cases on the interpretation of the 'umbrella clauses', the *CMS* and *LG&E* cases on the Argentina's 'state of necessity' defense and the *CME* and *Lauder* cases have clearly demonstrated how tribunals can reach different decisions on similar or identical facts. The establishment of an appeals mechanism would seemingly be logical to put right these inconsistencies and foster coherence of tribunals' decisions. However, other factors are to be considered to determine whether an appeals facility is to be adopted and a choice should be made as to whether an appeals mechanism would be preferred to arbitration system as in the current status.

The ensuing discussion looks at the basis of the establishment of the envisioned appeals facility and evaluates the advantages and disadvantages of its establishment; explores its features; evaluates its efficacy; and looks at its obstacles to its establishment. The discussion lastly looks at other possible alternatives to safeguard consistency in ICSID awards.

2.1 The appeals system facility option

The suggestion to create an appeals facility within the ICSID was put forward in October 2004 in a discussion paper entitled 'Possible improvements of the framework for ICSID arbitration'.[196] Such an appeals facility would be intended to ensure coherence and consistency in ICSID decisions and other investor-state arbitration initiated under investment treaties.[197]

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[196] ICSID secretariat *Possible improvements of the framework for ICSID arbitration* Discussion paper (22 October 2004) para 20.
[197] Ibid para 6.

2.1.1 The desire to establish an appeals mechanism

The need for the establishment of an appeals facility is manifest. Some countries have expressed it through their bilateral or multilateral investments treaties. In the US for instance, the Senate expressed the need for establishment of an appellate mechanism indicating that:

> [N]egotiators should seek to establish a single appellate body to review decisions in investor-state disputes. As the United States enters into more investment agreements and the number of investor-state disputes grows, the need for consistency of interpretation of common terms –such as expropriation and fair and equitable treatment– will grow. Absent such consistency, key terms may be given different meanings depending on which arbitrators are appointed to interpret them. This will detract from the predictability of rights conferred under investment agreements. A single appellate mechanism to review the decisions of arbitral panels under various investment agreements should help to address this issue and minimize the risk of aberrant interpretations.[198]

Consequently, the US Free Trade Agreements (FTA) and Model BITs now include a provision for an appellate mechanism. For instance the US-Chile FTA contains the following provision:

> Within three years after the date of entry into force of the Agreement, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 10.25 in arbitrations commenced after they establish the appellate body or similar mechanism.[199]

Likewise, the Model US BITs provide:

> Within three years after the date of entry into force of this Treaty, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article...in arbitrations commenced after they establish the appellate body or similar mechanism.[200]

This aspiration is relatively observed within the ICSID members. According to the ICSID Secretariat, by mid-2005, several such treaties had been signed by about 20 countries, most of which are contracting states of the ICSID convention, with provisions on an appeals mechanism.[201]

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[198] Bipartisan Trade Promotion Authority Act of 2002: US Senate Report No 107-139 (February 2002) at 16.
[199] See Annex 10-H of the US-Chile FTA signed on 6 June 2003.
[200] See for example the Annex 10-D of the US-Morocco Free Trade agreement was signed on 15 June 2004; Annex D of the US-Rwanda BIT signed on the19 February 2008.
[201] ICSID Secretariat (note 196) para 20.

However, despite the perceived problem of inconsistencies, most of the ICSID Administrative council members and other contributors who provided comments on the discussion paper considered that the establishment of an appeals facility was premature.[202] The enthusiasm with which the issue was approached seemed to fade away within the ICSID Secretariat. Nevertheless, the debate is still alive amongst the legal community and generates different views. Whereas some commentators aver that inconsistent decisions 'pose a real threat to the success of the ICSID system, if not its continued existence',[203] some argue that they are 'just a fact of life'.[204] Moreover, while some commentators back the finality of international arbitration,[205] others support the correctness of decisions.[206] This difference of views on the establishment of an appellate body was noted by a commentator who said:

> Defenders of the status quo rightly note that adding more meat to the process will only increase already high arbitration costs and make it more difficult for claimants, other than the largest corporations, to make claims, or for small country respondents to be able to defend claims. Advocates for change suggest these reforms are merely the mark of a maturing system and that for consistency in the development of the law to be maintained, and hence the legitimacy of the overall process, these changes are a necessity.[207]

Following these opposed views by experts and practitioners in arbitration domain, it is worth pointing out the pros and cons of the establishment of an appellate facility whereby the differences of views are expressed. This approach in combination with other considerations will help in evaluating whether the appeals facility option is viable or not.

2.1.2 Advantages of an appellate facility

Some commentators argue that the establishment of an appeals facility would be beneficial to the international investment arbitration system while others do not see any compelling need for such a facility.[208] The advantages expected from the establishment of an ICSID appeals facility as contemplated above would be to avoid inconsistencies in arbitral awards. This would

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202 ICSID Secretariat *Suggested changes to the ICSID rules and regulations* Working paper (12 May 2005) para 4.
203 Kalb J 'Creating an ICSID appellate body' (2005) 10 *UCLA J Int'l L & Foreign Aff* 179 at 196.
204 Gill J 'Inconsistent decisions: An issue to be addressed or a fact of life?' in Warner and Sheppard (note162) at 15.
205 See Gaillard (note 164) at 38.
206 See Lauterpacht E *Aspects of the administration of international justice* (1991) at 110.
207 Whitsitt E 'Interview: NAFTA fifteen years later: the successes, failures and future prospects of Chapter 11'. Available at www.investmenttreatynews.org/documents/p/111/download.aspx [accessed 24 March 2010].
208 For the details on this discussion, see Warner and Sheppard (note162).

consequently respond to the need for predictability and objectivity in decision making.[209] It is argued that an appellate facility would provide for the 'consistency of decisions, predictability of the law, objectivity in making decisions as to the meaning of investment provisions, and in providing sensitivity to legitimate governmental concerns'.[210] An appellate mechanism would also promote correct decision making and legal reasoning.[211]

2.1.3 Disadvantages of an appellate body

Some commentators contend that the establishment of an appeals facility within the ICSID would generate more problems than solutions.[212] Although the appellate body would solve the problem of inconsistency and enhance the correctness of decisions, other major problems might emerge out of it. The major hitches cited include the fact that an appellate body would go against the principle of finality implied in Article 53 of ICSID Convention. Moreover, the establishment of such a body would face the difficulty of getting consensual agreement by all ICSID signatories needed to make changes in the Convention for the establishment of the appellate body.

2.1.3.1 The establishment of an appeals facility would be against the principle of finality

The principle of finality in international arbitration refers to the efficiency of the arbitration mechanism in terms of expeditious and economical settlement of disputes[213] (by the fact that they are binding and final for parties and not subject to appeals or ordinary challenges).[214] This principle is enshrined in Article 53 of the ICSID Convention whereby the award is binding on the parties and is not to be subject to any appeal or to any other remedy except those provided for in the Convention.

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[209] Bishop D 'The case for an appellate panel and its scope of review' in Warner and Sheppard (note162) at 10.
[210] Ibid.
[211] Franck (note 5) at 1606.
[212] Barton Legum's point of view on the establishment of an appeals facility was a pessimistic one. He commented that 'the cure ...could be far worse than the disease'. See Legum (note 47) at 238.
[213] Schreuer C 'Annulment revisited' (2003) 30:2 *Legal Issues of Economic Integration* 103 at 103.
[214] Lalive P 'Absolute finality of arbitral awards ?'. Available at *http://www.arbitration-icca.org/media/0/12641359550680/lalive_absolute_finality.pdf* [accessed 24 March 2010].

The ICSID Convention provides for review of the award in limited conditions.[215] Article 51 provides for revision in case of 'of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered, that fact was unknown to the tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence'. As for the Article 52(1), it sets out grounds whereby either party may apply for annulment of the award, specifically in the following grounds: the tribunal was not properly constituted; the tribunal has manifestly exceeded its powers; there was corruption on the part of a member of the tribunal; there has been a serious departure from a fundamental rule of procedure; and the award has failed to state the reasons on which it is based.

These grounds for annulment are limited to procedural defects of the arbitration proceedings and do not give rise to the appeal option. Whereas an appeal, concerned with substantive correctness of the decision would modify the decision or replace it with its own view, annulment can only invalidate the decision without replacing it, partly or wholly and send it back to another tribunal for a new decision.[216] The ICSID *ad hoc* annulment committees have emphasized that annulment was different from appeal. An award bearing mistakes will not be modified by the annulment committee except on the grounds defined in the Article 52. For instance, in *CMS v Argentina*, the *ad hoc* annulment committee desisted from considering the errors made by the tribunal in its award because the former was not acting as a court of appeal.[217]

The review of ICSID awards is limited to the grounds enunciated in article 52(1) and does not deal with the correctness as a matter of substance. Therefore, legal errors in awards cannot be corrected under the ICSID. The possibility of inconsistent awards is an accepted reality at ICSID, and the correctness of decisions has been sacrificed for the sake of finality.[218] It is argued in this vein that 'the desire to see a dispute settled is often regarded as more important than the substantive correctness of the decision'.[219] This approach is, however, challenged due to the element of 'public interest' present in investor-state arbitration. Whereas finality may be well justified in international commercial arbitration (between private parties), a question remains as

[215] See Articles 51 and 52 of the ICSID Convention.
[216] Johnson T 'ICSID annulment: Factual review' in Warner and Sheppard (note162) at 32.
[217] *CMS v Argentina* Annulment (note 135) para 135.
[218] Franck (note 5) at 1548.
[219] Schreuer (note 213) at 104.

to whether 'judicial practice of States will or should always accept to 'close its eyes' and to recognize and enforce some (manifestly) erroneous, ill-conceived and badly motivated Awards'.[220] In any case, the present status of the ICSID Convention is pro finality and manifestly excludes an appeals option.

2.1.3.2 The establishment an appellate body would lengthen procedures in time and increase costs

Another disadvantage of the establishment of an appeals facility, linked to the finality, is the increase of the amount of time and consequently the cost of doing so. Whereas the objective of finality is to avoid delays in obtaining the final decision by limiting the grounds for review, adding an appeals facility to the arbitration process in order to achieve correctness would increase the time to get the final decision and consequently undermine the finality benefit of arbitration.[221] However, in some instances, it may be more desirable for parties (the investor and the host-state) and the investment arbitration to have correct decisions than finality. As was noted:

> [F]or the unsuccessful investor, an adverse final award is obviously adversely final and the result or reasoning of the award can act as a defect of precedent for other investors facing the same issues. Thus finality may be less desirable for the investor and investment arbitration than getting the answer right. For the host state, an adverse award may inflict a crippling financial blow made much less palatable if the award is made only by two of three private arbitrators without any review of its merits. Likewise for a state, an award's reasoning may also become an important defect of precedent in future disputes under the same or similar investment law or BIT without being a legal precedent at all. Here again, finality seems to be less desirable than just getting it right.[222]

An appellate body would therefore allow parties to have the flawed decision corrected on appeal. However, the establishment of an appeals facility would undoubtedly constitute a drawback to the investor-state arbitration in that it would bring about extra delays. Scholars observe that 'whatever its design, an appeals structure would not reduce but increase the amount of time

[220] Lalive (note 214).
[221] Laird I and Askew R 'Finality versus consistency: does investor-state arbitration need an appellate body?' in (2005)7:2 *The Journal of Appellate Practice and Process* 285 at 298.
[222] Veeder V V 'The necessary safeguards of an appellate system' in Warner and Sheppard (note162) at 6.

lapsing before a definite decision on the merits'.[223] This would affect negatively the claimants or investor-states with shallow pockets.[224]

2.1.4 The features of the suggested ICSID Appeals facility

This subsection will critically look on how the suggested appeals facility for ICSID would look like, what should be its scope, and its *modus operandi.*

2.1.5 Structure of an ICSID appeals facility

A tentative appellate facility structure basically modelled on the WTO appellate body was submitted in the ICSID discussion paper.[225] It was proposed that the Appeals panel would be composed of 15 persons elected by the ICSID Administrative Council. Like the WTO Appellate Body, the term of panellists would be staggered: eight would serve for a three-year term while the remaining seven would be given a six-year term.[226] Other commentators have suggested that the panel would work as a standing body, on a permanent basis, where they would be using their expertise, focussing on their institutional knowledge.[227]

2.1.6 The scope of review of the appellate facility

The appeals facility would deal with challenges of awards referred to it by parties. It has been suggested that the ICSID appellate mechanism could be engineered along the lines of the ICSID *ad hoc* annulment panels, but with wider limits.[228] The scope of review would be to handle any of the five grounds for annulment of awards as set out in the Article 52 of the ICSID Convention and the cases of a clear error of law.[229] Serious errors of fact would also be deferred to the

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[223] Tams CJ 'Is There a need for an ICSID appellate structure?' in Hofmann R and Tams CJ (eds) *The international convention for the settlement of investment disputes: taking stock after 40 years* (2007) 223 at 228.
[224] See Wälde T 'Alternatives for obtaining greater consistency in investment arbitration: An appellate institution after the WTO, authoritative treaty arbitration or mandatory consolidation?' in Warner and Sheppard (note162) at 75; Whitsitt (note 207) at 7.
[225] See ICSID Secretariat (note 196).
[226] ICSID Secretariat (note 196) Annex para 5.
[227] Franck (note 5) at 1607.
[228] Nigel Blackaby 'Public interest and investment treaty arbitration'. Available at *http://www.transnational-dispute-management.com/samples/freearticles/tv1-1-article_56.htm* [accessed 28 February 2010].
[229] ICSID secretariat (note 196) Annex para 7.

appeals facility. As it was suggested, this ground of 'serious errors' would have to be 'narrowly defined to preserve appropriate deference to the findings of fact of the arbitral tribunal'.[230]

2.1.7 The efficacy of an ICSID appeals facility

Theoretically, an appeals facility for ICSID would respond to the contemplated need of consistency of arbitral awards by correcting, at the second level, the flawed decisions rendered on the first level by arbitral tribunals. In fact, the WTO appellate body on which the investor-state appeals facility would emulate is widely recognized for its success in maintaining consistency and predictability.[231] However, it should be borne in mind that the ICSID and WTO are not quite similar. The world trade law disputes context of the WTO is different from the state-investor arbitration context. Whereas the WTO deals with state-to-state arbitrations based on a limited number of legal texts, the investor-state arbitration is based on a multitude of BITs[232] and Multilateral Investment Agreements (MIA). Moreover, there are various investor-state arbitrations taking place in different arbitration tribunals outside the ICSID context. These are, amongst others, those taking place in NAFTA under chapter 11, and those taking place under some institutional or *ad hoc* arbitrations such as the ICC Rules, UNCITRAL Rules, LCIA Rules, and SCC Rules. This means that an ICSID appeals facility would not encompass all investor-state arbitrations and the pursued objectives of the appeals facility might not be achieved.

As already mentioned, some countries have inserted in their BITs and MIAs provisions aiming at the establishment of an appellate mechanism. This means that a number of other appeals facilities may be established in addition to that of ICSID. This would also make it hard to achieve consistency as the various appellate bodies might reach different results.[233] As was noted, 'if appellate bodies are established on a particular rather than universal basis, this runs the risk of undermining the reasons for establishing such a system in the first place'.[234] A system

[230] ICSID secretariat (note 196) Annex para 7.
[231] Tams (note 223) at 237.
[232] The number of BITs at the end of 2008 was of 2676. See UNCTAD 'Recent developments in international investment agreements (2008–June 2009)' in *IIA Monitor* No 3 (2009) at 2. Available at http://www.unctad.org/en/docs/webdiaeia20098_en.pdf [accessed 28 March 2010].
[233] Tams (note 223) at 238.
[234] See Warner and Sheppard (note162) at 4.

with partial coverage of the wide range of treaties and disputes would be inadequate.[235] To be successful, an appellate body under the ICSID would, therefore need to be comprehensive.

2.1.8 Obstacles to the implementation of an ICSID appeals facility

The establishment of a single comprehensive appeals facility for investor-state arbitration under the ICSID entails the amendment of the ICSID convention. The ICSID Convention currently excludes any form of appeal proceeding under its Article 53. The amendment of Article 53 in order to establish an appeals facility could be done in terms of Articles 65 and 66 of the ICSID Convention. However, the conditions for the amendment seem to be stringent as they require the consensus of the parties to the instrument. According to Article 66[236] of the ICSID Convention, any amendment to its provisions would require the consensus of all contracting States. Considering the opposing views of scholars on the issue of the creation of an appeals facility, it may be deduced that a total consensus would be difficult to get from all the 144 ICSID contracting States. As it was noted, consensus on this point is unrealistic, at least in the short term.[237]

In addition to the contemplated disadvantages, the above mentioned obstacles to the implementation of a comprehensive ICSID appeals facility make the option of an appellate body not easily achievable.

3. Other suggested alternatives to achieving consistency

The proposed appeals facility is at the moment practically not easily achievable. However, the issue of inconsistencies in investor-state arbitration decisions remains. It is therefore sound to explore other possible avenues. Among the suggested alternatives to the appeals facility are firstly the preliminary rulings by an ICSID permanent consultative body and the secondly, strengthening the power of precedent.

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[235] Warner and Sheppard (note162) at 4.

[236] Article 66 of the ICSID Convention provides: '...the proposed amendment shall be circulated to all Contracting States for ratification, acceptance or approval. Each amendment shall enter into force 30 days after dispatch by the depositary of this Convention of a notification to Contracting States that all Contracting States have ratified, accepted or approved the amendment'.

[237] Tams (note 6) at 12-13.

3.1 The preliminary rulings

An option to refer to a permanent consultative body by any ICSID tribunal seeking for guidance about legal issues was suggested as another possible alternative to achieving consistency of investor-state tribunals' decisions.[238] This mechanism would work like the one under the Article 234 of the Treaty establishing the European Community (TEC) whereby national courts of Member States may refer matters of law for preliminary ruling to the European Court of Justice (ECJ). Article 234 of the TEC provides that:

> The [European] Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the [European] Court of Justice.

The ECJ therefore ensures the uniform interpretation of questions that relate to the European Community law. Preliminary rulings help to avoid divergence in interpretation and therefore foster the efficient application of the community law without recourse to appeals mechanism.[239]

In the same line, a central and permanent body would be created under ICSID to provide preliminary rulings. This body would rule on core issues of investment law submitted by investor-state tribunals. Whenever a tribunal is faced with an important question,[240] it would refer to the ICSID preliminary ruling body.

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[238] See Kaufmann-Kohler G 'Annulment of ICSID awards in contract and treaty arbitrations: are there differences?' Available at *http://www.lk-k.com/data/document/annulment-icsid-awards-contract-and-treaty-arbitrations-are-there-differences-annulment.pdf* [accessed 30 March 2010]; Schreuer (note 4) at 210-12; Beatens F and Mills A 'Investment Arbitration: a Wilderness of Single Instances?: Discussion'. Available at *http://www.lcil.cam.ac.uk/Media/25_anniversary/Investment_Arbitration_discussion.pdf* [accessed 29 March 2010]; Reinisch (note 113).

[239] Schreuer (note 4) at 211.

[240] As suggested by Christoph Schreuer, the question to be submitted to the preliminary ruling should be 'a fundamental issue of investment treaty application, a situation where the tribunal wants to depart from a "precedent" or where there are conflicting previous decisions'. See Schreuer C (note 4) at 211.

This idea presents a number of advantages over the appeals facility. Firstly, the preliminary rulings facility would be easy to establish. Unlike the appeals facility, the preliminary ruling body would not conflict with Article 53 of the Convention and would simply require an amendment of the ICSID arbitration rules.[241] Secondly, such a facility would not affect the principle of finality. Whereas the ICSID appeals facility was criticised because it would affect the principle of finality, a preliminary rulings facility would rather help prevent inconsistencies without resorting to appeal. The delays caused by this process would be much more limited than those that an appeal process would.[242] At the moment, there is no strong objection to this suggested system. However, its implementation is subject to the political will of the states involved,[243] which might be difficult to get.

3.2 Strengthening the power of precedent

The last alternative to maintaining consistency without resorting to a somewhat superior and centralized body either in the form of an appeal body or a preliminary ruling body would be an internal mechanism that would be followed by arbitrators. This mechanism would entail arbitrators taking into account previous tribunals' decisions on similar facts. As has been observed in this study, there is no formal rule of precedent in international arbitration. However, it has been noted that tribunals tend to refer to decisions made previous. Reference to previous decisions is now simplified by the fact that investment-related decisions are currently made available electronically[244] or published in various reports. Nevertheless, the availability of previous decisions is not enough. Arbitrators would need to consider them. Despite the absence of a formal rule of precedent, they would at least take them as persuasive. The tribunal in *AES v Argentina*[245] averred that:

> Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem; but decisions on jurisdiction dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order

[241] Tams (note 6) at 41.
[242] Schreuer (note 4) at 212.
[243] Reinisch (note 113).
[244] Awards (excerpts or complete version) are electronically published on various websites. These websites include amongst others: *www.investmentclaims.com*; *http://ita.law.uvic.ca*; *http://icsid.worldbank.org*.
[245] *AES Corporation v The Argentine Republic* ICSID case No ARB/02/17 Decision on jurisdiction (26 April 2005) available at *http://ita.law.uvic.ca/documents/AES-Argentina-Jurisdiction_001.pdf* [accessed 30 March 2010].

> to compare its own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solution.[246]

Tribunals will not always yield to the reasoning of the earlier tribunals. They may well reason differently and possibly reach different conclusions. A certain level of inconsistency is normal.[247] Although tribunals are free in their reasoning they could preserve consistency in arbitral awards by moving like birds in flocks, in formation, as was illustrated by a commentator who said '[t]hey are individually free, but they should watch each other's movements, and move in the same direction….'[248] This idea was also expressed by another commentator as follows:

> [A] consistent line of reasoning developing a principle and a particular interpretation of specific treaty obligations should be respected; if an authoritative jurisprudence evolves, it will acquire the character of customary international law and must be respected. A deviation from well and firmly established jurisprudence requires an extensively reasoned justification.[249]

Thus, maintaining reference to earlier decisions would develop a *de facto* precedent leading to *jurisprudence constante* as applied in civil law tradition. This kind of approach would help to avoid the wide divergences that characterize some investment arbitral awards (not subject to a common and unifying appeals' authority). [250]

[246] *AES Corporation v The Argentine Republic* (note 245) 30.
[247] Bishop (note 209) at 9.
[248] Beatens and Mills (note 238).
[249] Wälde (note 11) para 16.
[250] Ibid.

Chapter V

CONCLUSION

This study has demonstrated the problem of inconsistencies in the investor-state arbitration awards and that it is a serious concern for the survival of the overall investment arbitration system. The importance of consistency of arbitral awards has been underscored. It responds to the stakeholders' need for predictable rules, judicial integrity and efficiency of the arbitration system. As noted, the lack of clarity and consistency of both the rule and law would have a detrimental impact upon the stakeholders and their willingness and ability to adhere to such rules.[251] Owing to the particular nature of investment arbitration where the public interest is often at stake, the study has noted that consistency of arbitral decisions is inescapable.

The study revealed that despite the existence of a trend for arbitrators to refer to previous decisions, there is no formal rule of 'precedent' in international law and specifically in investor-state arbitration. Arbitrators have at times issued divergent awards on cases with similar or identical facts and on cases where it would have been reasonable and advantageous to have consistent awards.

The need for consistency has been raised by states and practitioners and was dealt with by the ICSID secretariat. The creation of an appeals facility for ICSID was found premature. Disadvantages and obstacles to the establishment of such a facility were contemplated. It was found that the establishment of an appeals facility would not be easy to achieve. However, the difficulty in dealing with the problem of inconsistency does not mean that the problem has gone away. The need to deal with the problem remains current and pertinent.

Various other avenues for dealing with the issue of inconsistency of arbitral awards have been suggested. The preliminary rulings option was seen as a possible route to go with good prospects to be achievable. It will need consideration by states involved for it to be functional. The last

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[251] Franck (note 5) at 1584.

option with better prospects would be the enhancement of reliance on precedents by arbitrators. Although there is no formal rule of binding precedent, arbitrators would strive to consider previous rulings on similar facts, and give reasons whenever they chose to depart from the earlier tribunal's position. As put by Thomas Wälde: '[a]wards should for reasons of legitimate expectation and legal certainty and consistency, not deviate from established jurisprudence except if there are significant new arguments and only with careful and detailed reasoning'.[252]

[252] Wälde T 'Confidential awards as precedent in arbitration: dynamics and implication of awards publication' in Gaillard and Banifatemi (note 2) 113 at 113.

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