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**The Problem of Inconsistency and Conflicting Awards**

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# **The Problem of Inconsistency and Conflicting Awards in Investment Arbitration \***

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## **1. Introduction**

International arbitration under bilateral investment treaties (**BITs**) and free trade agreements (**FTAs**) is the main modern mechanism for resolving international investment disputes between investors and host states. It has a number of advantages compared with previous methods that relied on the intervention of the investor's home state or recourse to national courts. However, in recent years, concerns have been raised about the appropriateness of arbitration in light of issues of inconsistency and conflicting awards in investment disputes. These are legitimate concerns, as the existence of conflicting decisions threatens the confidence and legal predictability required by international business transactions.

This paper will explore the problem of inconsistency in investor-state arbitration and evaluate various suggested solutions. While these proposed solutions have the potential to increase consistency in international investment arbitration, the feasibility of these proposals is doubtful. Instead, the value of previous decisions as persuasive precedent is recognised as a more desirable and pragmatic solution to the problem of inconsistency.

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## **2. The Problem of Inconsistencies**

In recent years, there has been a proliferation of investment dispute settlement mechanisms, largely resulting from the fact that most modern bilateral investment treaties allow investors to resolve claims through international investment arbitration, in particular through the International Centre for Settlement of Investment Disputes (**ICSID**). However, with this acceleration, investment arbitration has flourished in a particularly fragmented way leading to forum shopping and to a multiplication of decisions and awards. This has encouraged litigants to pursue claims before different fora. This has resulted in different courts and tribunals reaching different or sometimes even contradictory results with regard to similar or even identical issues. The problem of inconsistency is further compounded by the fact that parties attempting to remedy inconsistent decisions have limited appeal options that depend on the rules under which the arbitration was conducted. Also of concern are the economic and political implications of inconsistent decisions for investors and host states. Fundamentally, the decentralisation and fragmentation of investor-state arbitration is perceived as leading to inconsistency and a lack of predictability for investors and host states, thus undermining the ultimate purpose of investment treaties and the legitimacy of investment arbitration as a method of dispute resolution.

To complicate the picture, the issue of inconsistency is exacerbated by issues arising from parallel proceedings and conflicting awards. As a result of the large number of BITs currently in place, and the increasing globalisation of production and investment, investors seeking to pursue claims for damages often have a choice of fora. This availability of choice has encouraged parties to bring a claim before the forum considered most advantageous. Forum shopping increases the likelihood of the same facts being

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brought before parallel and multiple proceedings in different tribunals. Parallel proceedings litigated in different fora not only multiply costs and waste dispute settlement resources but also carry the risk of rendering conflicting decisions and awards, resulting in international business disputes becoming more unpredictable. The *CME/Lauder v. the Czech Republic* arbitrations (discussed below at 2.2(b)) and *CMS/LG&E v. Argentina* arbitrations (discussed below at 2.2(c)) demonstrate these dangers.

## 2.1 The cause of inconsistencies

There are three main ways in which inconsistency can arise in investment arbitration:<sup>1</sup>

- Different tribunals making different decisions about the same treaty.
- Different tribunals under different treaties making different decisions about similar facts and investment rights.
- Different tribunals under different treaties making different decisions about disputes involving the same facts.

While the above scenarios may generate conflicting awards, these inconsistencies are caused by the absence of a formal rule of precedent in investor-state arbitration. Tribunals in investment arbitration are not bound by previous decisions of other tribunals.<sup>2</sup> As such, tribunals are not prevented from reaching conclusions that might not be in conformity with earlier decisions.

## 2.2 Examples of inconsistencies

Three sets of awards demonstrate the implications of inconsistent and conflicting decisions rendered by investment tribunals. The *SGS* arbitrations, where two ICSID tribunals came to divergent assessments of the meaning of umbrella clauses, the *CME/Lauder v. Czech Republic* arbitrations, where the same dispute was arbitrated under two different bilateral investment agreements, and finally the *CMS/LG&E v. Argentina* arbitrations, where contradictory awards were rendered in very similar scenarios. However, this is not to say that, in practice, arbitral tribunals disregard altogether what other tribunals and/or international jurisdictions have said. Rather, these examples represent high profile instances of inconsistency that have been the subject of academic concern.<sup>3</sup>

### (a) The SGS Arbitrations

Investment tribunals may come to different conclusions concerning the same or similar legal issues. This is illustrated in the *SGS* arbitrations, where two ICSID proceedings initiated by the Swiss company SGS against Pakistan<sup>4</sup> and the Philippines,<sup>5</sup> came to opposing assessments regarding the meaning of umbrella clauses. This divergence was not the result of oversight but embodies a deliberate disagreement. The *SGS*

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<sup>1</sup> Susan D. Frank, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 *Fordham Law Review* 1521, 1545-1546.

<sup>2</sup> August Reinisch, 'The Role of Precedent in ICSID Arbitration' in Klausegger, Klein, et al. (ed) *Austrian Arbitration Yearbook* 495 (2008) 497.

<sup>3</sup> Frank Spoorenberg and Jorge E. Viñuales, 'Conflicting Decisions in International Arbitration' (2008) 8 *The Law and Practice of International Courts and Tribunals*, 95.

<sup>4</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (SGS v. Pakistan)* (2003) ICSID Case No. ARB/01/13.

<sup>5</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (SGS v. Philippines)* (2004) ICSID Case No. ARB/02/6.

v. *Philippines* tribunal justified its disagreement by expressly renouncing any system of binding precedent under the ICSID Convention or international law in general.<sup>6</sup>

(b) CME/Lauder v. Czech Republic

The problem of inconsistent decisions became a concern in the wake of the CME<sup>7</sup> and Lauder<sup>8</sup> awards, where seemingly similar facts led to different outcomes. Here the Czech Republic was subject to two different UNCITRAL proceedings concerning certain governmental measures with regard to a local company that owned a TV license. The claims were brought almost simultaneously by the ultimate controlling shareholder, a US investor, Lauder, under the US-Czech Republic BIT in London and by a Dutch company, CME, under the Netherlands-Czech Republic BIT in Stockholm. While the Czech Republic prevailed against Lauder, it was ordered to pay almost USD 300 million in compensation to CME. Attempts by the Czech Republic to set aside the second award through legal proceedings before Swedish courts were unsuccessful.<sup>9</sup>

While the Lauder Tribunal acknowledged the potential problem of conflicting awards in parallel proceedings, it reasoned that “*the second deciding court or arbitral tribunal could take this fact into consideration when assessing the final damage*”.<sup>10</sup> The CME Tribunal addressed these ramifications but found no bar to adjudicating the same dispute.<sup>11</sup>

(c) CMS/LG&E v. Argentina

Another example of investment tribunals reaching contradictory results on identical facts is found in the CMS/LG&E v Argentina arbitrations. The tribunals' difference in opinion was with regard to the question as to whether the situation during the Argentine economic crisis between 1999-2002 constituted a state of necessity. With approximately 40 ICSID proceedings brought against Argentina, there was a legitimate concern that multiple cases brought against a single country based on a single measure could lead to inconsistent awards.<sup>12</sup>

In the CMS<sup>13</sup> and LG&E<sup>14</sup> arbitrations against Argentina, the two tribunals reached opposite conclusions on the availability of the necessity defense despite almost identical facts and pleadings.<sup>15</sup> In *CMS v. Argentina*, a state of necessity was held to not have prevailed during the period in question because the

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<sup>6</sup> *SGS v. Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction of 29 January 2004, 8 ICSID Reports 97.

<sup>7</sup> *CME Czech Republic BV v. The Czech Republic (CME v. The Czech Republic)* (2001) UNCITRAL.

<sup>8</sup> *Lauder v. The Czech Republic (Lauder v. The Czech Republic)* (2001) UNCITRAL.

<sup>9</sup> *Czech Republic v. CME Czech Republic BV* (2003) Svea Court of Appeals, Appeal of Arbitration Award of 15 May 2003.

<sup>10</sup> *Lauder v. The Czech Republic* (2001) UNCITRAL, Final Award of 3 September 2001, 9 ICSID Reports 66, 172.

<sup>11</sup> *CME v. The Czech Republic* (2001) UNCITRAL, Partial Award of 13 September 2001, 9 ICSID Reports 121, 419.

<sup>12</sup> Organisation for Economic Co-operation and Development, 'Improving the system of investor-state dispute settlement: An overview' (Working Paper # 2006/1, OECD, 2006) 18.

<sup>13</sup> *CMS Gas Transmission Company v. The Argentine Republic (CMS v. The Argentine Republic)* (2005) ICSID Case No. ARB/01/8.

<sup>14</sup> *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic (LG&E v. The Argentine Republic)* (2007) ICSID Case No. ARB/02/1.

<sup>15</sup> Kathryn Khamsi, 'Part II Chapter 8: Compensation for Non-expropriatory Investment Treaty Breaches in the Argentine Gas Sector Cases: Issues and Implications' in Michael Waibel, Asha Kaushal, et al. (eds), *The Backlash against Investment Arbitration* (2010), 165.

situation was not severe enough to amount to necessity.<sup>16</sup> Less than a year later, *LG&E v. Argentina* tribunal found that the same situation did reach the level of a state of necessity.<sup>17</sup>

The potential consequences of these two contradictory awards may be far-reaching. Indeed, the availability and the extent of necessity may impact on other proceedings involving analogous situations.<sup>18</sup> Such contradictory awards diminish predictability in investment arbitrations. The difference between the approaches taken by the arbitral tribunals in *CMS* and *LG&E* is a good illustration of the consequences of no accepted principle of precedent as the *LG&E* tribunal made no reference in its award to the *CMS* award, despite the similarity between the two cases.

### 2.3 Inconsistencies: A double-edged sword

There is no way to entirely eliminate inconsistency in investment arbitration, rather, instances of inconsistencies should be expected as in any developed legal system. Further, in the absence of a system of precedent, well-reasoned and genuine disagreements between tribunals on particular issues of substantive law are to be expected. While consistency is desired, it is also true that “repeating decisions taken in other cases, without making the factual and legal distinctions” will affect “the integrity of the international system for the protection of investments”.<sup>19</sup> This risk of fragmentation should not be exaggerated. Inconsistency is a double-edged sword, while it leads to less predictable results, it also provides flexibility to consider each case on its own merits and ensures that outcomes are not negatively constrained by precedent.

While the developments represented by the *SGS, CME/Lauder v. Czech Republic* and *CMS/LG&E v. Argentina* arbitrations may be problematic, each case is ultimately fact-specific to a certain extent with respect to the arbitration clause contained in the relevant BIT, the precise wording of each clause and the nature of the treaty based claims.

For example, at first glance, the *CME/Lauder v. Czech Republic* arbitrations are a clear example of conflicting awards rendered on similar factual backgrounds. However, a careful analysis of the reasoning behind the two decisions reveals that they are not truly in conflict, at least not on issues of principle.<sup>20</sup> Both tribunals recognised that the Czech Republic had taken arbitrary and discriminatory measures which interfered with the property rights of the investor, measures which amounted to breaches of the BITs respectively applicable in each case.<sup>21</sup> The relevant distinction that led to the conflicting awards is attributed to the fact that in *Lauder*, the claimant failed to prove that the arbitrary measures caused damage to *Lauder's* personal property rights, whereas *CME* was able to prove and substantiate the losses incurred as an effect of the interference.<sup>22</sup> Thus, the conflicting awards rendered in the *CME/Lauder* cases were the result of legitimate factual distinctions. While perceived as being inconsistent, the outcome is unlikely to destroy confidence in international arbitration. If anything, the debate surrounding the cases places pressure on arbitrators to take account of previous decisions where similar facts are concerned.

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<sup>16</sup> *CMS v. The Argentine Republic* (2005) ICSID Case No. ARB/01/8, Award of 12 May 2005, 44 ILM 1205 (2005), 320-321.

<sup>17</sup> *LG&E v. The Argentine Republic* (2007) ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006, 46 ILM 40 (2007) 257.

<sup>18</sup> Frank Spoorenberg and Jorge E. Viñuales, 'Conflicting Decisions in International Arbitration' (2008) 8 *The Law and Practice of International Courts and Tribunals*, 94.

<sup>19</sup> Sir Gerald G. Fitzmaurice 'Some Problems Regarding the Formal Sources of International Law' in F. M. Van Asbeck (ed), *Symbolae Verzijl* (1958) 153, 172.

<sup>20</sup> Antonio Crivellaro, 'Consolidation of Arbitral and Court Proceedings in Investment Disputes' (2005) 4 *The Law and Practice of International Courts and Tribunals*, 371, 412.

<sup>21</sup> Antonio Crivellaro, 'Consolidation of Arbitral and Court Proceedings in Investment Disputes' (2005) 4 *The Law and Practice of International Courts and Tribunals*, 371, 412.

<sup>22</sup> Antonio Crivellaro, 'Consolidation of Arbitral and Court Proceedings in Investment Disputes' (2005) 4 *The Law and Practice of International Courts and Tribunals*, 371, 412.

Therefore, the problem lies not in rendering inconsistent decisions, but in superficial consideration of the principle in each award. Provided that previous decisions are considered on their merits and that good reason is given for a tribunal's departure from a previous decision, different outcomes on the same facts is not necessarily problematic.

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### 3. Solutions

A number of solutions to the problem of inconsistency in investor-state arbitration have been proposed, with commentators tending to advocate one of the following approaches:

- institutional reform through either the creation of an ICSID appellate mechanism for investment arbitration or preliminary references in investment matters;<sup>23</sup>
- non-institutional solutions to avoid parallel proceedings such as consolidation and the doctrines of *res judicata* and *lis pendens*;<sup>24</sup> and
- the development of persuasive precedent.<sup>25</sup>

The author's view is that all but the growing recognition of the value of previous decisions as persuasive precedent are undesirable and impractical for several reasons. Suggestions of institutional and non-institutional reform are generally too complicated and likely to adversely complicate arbitral procedure and increase costs. Moreover, they are politically difficult to implement given the existing debate about investor state proceedings generally. Finally, the ICSID reforms, even if achievable, will not address the problem of inconsistency where UNCITRAL Rules or other institutional rules are adopted.

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### 4. Institutional Reform

Many commentators have suggested some form of institutional reform in order to render investment law more coherent and reduce instances of inconsistent decisions by ICSID and other investment tribunals. There have been both suggestions to implement an ICSID appellate structure or in the alternative, a system of preliminary referral. These two methods and their drawbacks are outlined below.

#### (a) An ICSID Appellate Structure

The establishment of an appeals facility has been proposed as a solution to increasing consistency of decisions as it would open the possibility to review arbitral decisions. The proposal gained momentum in the investment arbitration community in the aftermath of the *Lauder/CME* arbitrations against the Czech

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<sup>23</sup> Christian Tams, 'An Appealing Option? The Debate about an ICSID Appellate Structure' (2007) 4(5) *Transnational Dispute Management*; Thomas Wälde, 'Alternatives for Obtaining Greater Consistency in Investment Arbitration: An Appellate Institution after the WTO, Authoritative Treaty Arbitration or Mandatory Consolidation?' (2005) 2(2) *Transnational Dispute Management* 75; Christopher Schreuer, 'Preliminary Rulings in Investment Arbitration' in Appeals Mechanism in Karl Sauvant (ed), *International Investment Disputes* (2008), 207.

<sup>24</sup> August Reinisch, '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' (Paper presented at Stanford University, July 2007); Valentina S. Vadi, 'Towards Arbitral Path Coherence & Judicial Borrowing: Persuasive Precedent in Investment Arbitration' (2008) 5(3) *Transnational Dispute Management*.

<sup>25</sup> Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' (2007) 23(3) *Arbitration International*; Carl-Sebastian Zoellner, 'Lightning Crashes or Mere Ray of Light? Recent Developments Regarding Transparency in ICSID Proceedings' (2006) 3(5), *Transnational Dispute Management*.

Republic.<sup>26</sup> At the time, a discussion paper of the ICSID Secretariat was circulated and there was wide debate about the creation of an appeals facility within the ICSID system.<sup>27</sup> The contemplated introduction of an appellate mechanism clearly departed from existing provisions in the ICSID Convention that provide for the annulment of awards by special *ad hoc* committees without wide powers of substantive review.

An appellate structure would provide a two fold solution. First, it improves the quality and consistency of awards through reconciling inconsistent decisions at the appeals stage through a more consistent and uniform interpretation of treaty provisions in investment arbitrations. Having a second tier decision maker would enhance the quality of awards. Secondly, there are currently no mechanisms for appeals in international arbitration and an appellate structure would fill the gap. Moreover, advocates in favour of an ICSID appellate structure contend that current annulment provisions are insufficient. The grounds under Art 53(1) of the ICSID Convention<sup>28</sup> of "Manifest Excess of Powers" and "Failure to State Reasons" on which an award may be annulled do not provide appropriate grounds for appeal as they do not allow for appeal on the basis of inconsistency *per se*.<sup>29</sup> Thus, the establishment of an institutional appellate body under the ICSID Convention is seen as preferable to alternatives such as expanding the scope of annulment grounds under Art 53(1) of the ICSID Convention.<sup>30</sup>

However, the proposal for an appellate mechanism to be included in ICSID arbitration was not pursued as it faced some significant drawbacks. The most significant of these is that it is politically unfeasible and overly ambitious to create a single comprehensive appeals facility. Article 53(1) of the ICSID Convention states that ICSID awards shall not be subject to any appeals. As such, creation of an appeals facility would run contrary to the intention of the original drafters of the ICSID Convention and would require amendment to the Convention. This would require the approval of each of the 143 convention countries, a very difficult outcome to achieve.

An attempt to introduce institutional reform that covers arbitrations outside of ICSID, for example in investor state arbitration run under UNCITRAL Rules, would be even more complex. The current debate surrounding confidentiality in the arbitration community is a clear indication of the political difficulties and contention that can arise in the context of reform in international law.

Moreover, the time, cost and trust involved in introducing an appeals facility runs counter to ICSID's object of resolving disputes quickly. Extending proceedings also increases the cost of the arbitration which is at odds with the overriding purpose and advantage of arbitration - that it is to be more cost effective than litigation for the parties. Additionally, an appeals facility may engender mistrust in the

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<sup>26</sup> August Reinisch, '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' (Paper presented at Stanford University, July 2007)

<sup>27</sup> ICSID Secretariat, '*Possible Improvements of the Framework for ICSID Arbitration*' Discussion Paper, 26 October 2004.

<sup>28</sup> ICSID Convention, art. 52(1) provides: 'Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.'

<sup>29</sup> Christina Knahr, 'Part II Chapter 7: Annulment and Its Role in the Context of Conflicting Awards in Michael Waibel, Asha Kaushal, et al. (eds), *The Backlash against Investment Arbitration* (2010) 151-163.

<sup>30</sup> Christina Knahr, 'Part II Chapter 7: Annulment and Its Role in the Context of Conflicting Awards in Michael Waibel, Asha Kaushal, et al. (eds), *The Backlash against Investment Arbitration* (2010) 151-163.

award at first instance. Evidence shows that ICSID participants continue to place confidence in a single level of arbitration and emphasise that the speedy resolution of disputes is important.

In light of these significant drawbacks, the case for establishing an appeals facility is not compelling. The difficulty and cost of reforming a functioning system to achieve speculative benefits is not justifiable. It is suggested more pragmatic reform is possible, and should be pursued instead of fundamental institutional changes that may destabilise the system.

(b) Preliminary Reference

An alternative and more feasible method to ensure the coherence of awards is the proposal to allow for a *preliminary reference* to a newly established international body whenever a tribunal is faced with an important question, while the original proceedings are still pending.<sup>31</sup>

If adapted to investment arbitration, preliminary references could provide for an interim procedure whether a tribunal is faced with a fundamental issues of investment treaty application where they want to depart from a "precedent" or where there are conflicting previous decisions. The tribunal could then suspend proceedings when the issue for referral arises, request a ruling and resume proceedings after the ruling has been delivered. It would then reach a decision on the basis of the guidance it has received through the preliminary ruling. This method would require the establishment of a central and permanent body that would be authorised to give preliminary rulings, which is not as ambitious as establishing a permanent court. A further advantage is that preliminary rulings would not contravene Article 53 of the ICSID Convention. This is perhaps a more preventative action rather than an appeals process which is reactionary and near impossible in light of Art 53(1) of the ICSID Convention.

This method has already been implemented with success in the European community with the Treaty Establishing the European Community (TEC). A domestic court in any member state may ask the European Court of Justice (ECJ) for a preliminary ruling on matters of Community Law with regard to the interpretation or validity of European Community Law. This is then binding on them in their final decision of the dispute. This method is provided for in Art 234 of TEC and can be used as a potential template for Investor Arbitration. Article 234 and the ECJ preliminary rulings have developed some of the most central concepts and principles of community law and promote the uniform interpretation and application of community law even before the judgement of the domestic court is rendered.

Despite the 'lighter' design of such system, the establishment of a permanent body authorized to give preliminary rulings on investment law issues would still require a number of legal steps that will be dependent on the political will of the States involved. A number of details would also need to be clarified in order to implement this method, in particular the circumstances under which a tribunal would request a preliminary ruling and whether it be under an obligation to do so as opposed to having the discretion to do so. Another key issue is whether any preliminary rulings would be binding on the tribunal or be merely recommendations. If the preliminary ruling is not binding then it seems that creating a body charged with giving the rulings is too onerous a task where more certainty of outcome cannot be guaranteed. On the other hand, binding preliminary rules pose the same drawbacks and concerns discussed above in relation to appellate mechanisms.

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<sup>31</sup> Christopher Schreuer, 'Preliminary Rulings in Investment Arbitration' in Appeals Mechanism in Karl Sauvant (ed), *International Investment Disputes* (2008) 1-5.

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## 5. Non-Institutional Solutions

### 5.1 *Res Judicata* and *Lis Pendens*

It has been suggested by several commentators that the doctrines of *res judicata* and *lis pendens* may provide assistance as a pragmatic solution to the problem of conflicting awards arising from inconsistent decisions and parallel proceedings.<sup>32</sup>

The doctrine of *res Judicata* operates to preclude the re-determination of disputes in subsequent proceedings between the same parties.<sup>33</sup> The principle is given effect in domestic law largely through two categories of estoppel. Cause of action estoppel precludes either party to a dispute from re-litigating the same cause of action against the other in separate proceedings. Issue estoppel prevents a party from re-litigating an issue which has already been decided in prior proceedings between the parties.<sup>34</sup> Common Law countries generally give effect to both cause of action estoppel and issue estoppel, whilst Civil Law jurisdictions tend to only apply cause of action estoppel.<sup>35</sup>

The doctrine of *lis pendens* operates with regard to pending proceedings. It provides that "proceedings over the same dispute cannot be commenced in a second forum if the action is already pending in another one".<sup>36</sup>

These doctrines, if applied in the context of investment arbitration, could provide grounds upon which a tribunal may dismiss proceedings where they require the adjudication of a dispute already decided in prior proceedings, or currently pending before another tribunal. What is required is that the proceedings concern the "same dispute". The broadly accepted "triple identity test" defines the "same dispute" as involving "the same subject matter or relief, the same legal grounds and the same parties."<sup>37</sup>

The fundamental flaw in the practical efficacy of *res judicata* and *lis pendens* is the strictness of this requirement. The narrow operation of the doctrines means that in practice they cannot be relied upon to safeguard against the duplication of proceedings. The most commonly cited illustration of these shortcomings is the conflicting awards arising out of the parallel proceedings in the *CME/Lauder v. Czech Republic* arbitrations. Here both the CME Tribunal and the Swedish Court of Appeal<sup>38</sup> held that the principal of *res judicata* could not preclude the validity of the CME award. The key feature of the reasoning was that, applying the strict test, the claimants in each arbitration were legally distinct. It did

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<sup>32</sup> August Reinisch, 'The Issues Raised by Parallel Proceedings and Possible Solutions' in Michael Waibel, Asha Kaushal, et al, (eds), *The Backlash against Investment Arbitration*, (2010) 113-126; Antonio Crivellaro, 'Consolidation of Arbitral and Court Proceedings in Investment Disputes' (2005) 4 *The Law and Practice of International Courts and Tribunals*, 371; Bernardo M. Cremades and Ignacio Madalena, Parallel Proceedings in International Arbitration, 24 *Arbitration International* 509 (2008).

<sup>33</sup> Nigel Blackaby, Constantine Partasides et al, *Redfern and Hunter on International Arbitration*, (Oxford University Press 2009) 560.

<sup>34</sup> Nigel Blackaby, Constantine Partasides et al, *Redfern and Hunter on International Arbitration*, (Oxford University Press 2009) 560.

<sup>35</sup> Nigel Blackaby, Constantine Partasides et al, *Redfern and Hunter on International Arbitration*, (Oxford University Press 2009) 560.

<sup>36</sup> Bernardo M. Cremades and Ignacio Madalena, Parallel Proceedings in International Arbitration, 24 *Arbitration International* 509 (2008) 3.

<sup>37</sup> International Law Association, 'Res Judicata and Arbitration' *Report of the Seventy-First Conference*, Berlin, 2004 available at <<http://www.ilahq.org>> accessed 23 March 2011.

<sup>38</sup> *Czech Republic v. CME Czech Republic BV* (2003) Svea Court of Appeals, Case no. T 8735-01, Appeal of Arbitration Award of 15 May 2003.

not matter that Lauder owned a significant share in CME and that the subject matter of the claims were substantially the same, given the similarity of the two BITs that were the basis of the claims.<sup>39</sup>

It is evident that the recognition by investment tribunals of the doctrines of *res judicata* and *lis pendens* may have some practical effectiveness as a remedy to the duplication of proceedings. However, the narrow applicability of these doctrines limits the extent to which they can provide a genuine solution. In practice, it will be rare to find parallel proceedings where the parties, claims and subject matter are identical. As such, a remedy which is more broadly applicable is required.

## 5.2 Consolidation of Proceedings

While *res judicata* and *lis pendens* may operate in a limited way to preclude re-hearing of the same dispute, consolidation of similar proceedings allows for related disputes to be heard together, eliminating the possibility that separate tribunals will reach inconsistent awards on similar facts.

Commentators have proposed that consolidation may be achieved either formally or informally.<sup>40</sup> Formal consolidation involves joining two separate proceedings to be heard by a single tribunal. Informal consolidation occurs when the same panel of arbitrators is constituted to hear two separate proceedings. While informal consolidation does not reduce the number of proceedings, it does provide the benefit of a more uniform interpretation and application of legal rules to each fact situation, improving the consistency and predictability of awards.<sup>41</sup>

Neither the ICSID Convention nor the ICSID Arbitration Rules contain any clear guidance relating to the formal consolidation of parallel arbitral proceedings.<sup>42</sup> In contrast, there has been a trend in investment treaty negotiation to include consolidation provisions in BITs and FTAs.<sup>43</sup> For example, Art 1126 of the North American Free Trade Agreement (NAFTA) provides for the consolidation of proceedings where a tribunal specially constituted to determine the question "is satisfied that claims have been submitted to arbitration...that have a question of law or fact in common."<sup>44</sup> NAFTA envisages that its investment provisions apply to "measures adopted or maintained by a [State] in relation to investors of another [State]..."<sup>45</sup> This notion of 'measures' is significant. Given this provision, Art 1126 should be read as allowing for consolidation where the question of "fact in common" is a single State measure.<sup>46</sup>

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<sup>39</sup> August Reinisch, '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' (Paper presented at Stanford University, July 2007) 120.

<sup>40</sup> Christian Tams, 'An Appealing Option? The Debate about an ICSID Appellate Structure' (2007) 4(5) *Transnational Dispute Management*, 44.

<sup>41</sup> Christian Tams, 'An Appealing Option? The Debate about an ICSID Appellate Structure' (2007) 4(5) *Transnational Dispute Management*, 44.

<sup>42</sup> Christian Tams, 'An Appealing Option? The Debate about an ICSID Appellate Structure' (2007) 4(5) *Transnational Dispute Management*, 44.

<sup>43</sup> Antonio Crivellaro, 'Consolidation of Arbitral and Court Proceedings in Investment Disputes' (2005) 4 *The Law and Practice of International Courts and Tribunals*, 371, 403.

<sup>44</sup> North American Free Trade Agreement (NAFTA), Art 1126(2).

<sup>45</sup> NAFTA, Art 1101.

<sup>46</sup> Antonio Crivellaro, 'Consolidation of Arbitral and Court Proceedings in Investment Disputes' (2005) 4 *The Law and Practice of International Courts and Tribunals*, 371, 408.

Several subsequent BITs and FTAs have adopted similar consolidation provisions premised on the rationale that "a State cannot be exposed to two opposite decisions in regard to a same measure."<sup>47</sup> In addition to NAFTA, the "same state measure" principle has been adopted in:

- Art 33 of the New United States Model BIT;
- Art 32 of the New Canada Model BIT;
- Art 10.24 of the Chile-US FTA;
- Art 10.24 of the Morocco-US FTA;
- Art 15.24 of the Singapore-US FTA; and
- Art G27 of the Canada-Chile FTA.

It is important to note that the criterion of "same-state measure" is much broader than the "same dispute" test used to determine the application of the principles of *res judicata* and *lis pendens*. This means that the aforementioned provisions will enable a much broader use of consolidation as a remedy to parallel proceedings than the doctrines of *res judicata* and *lis pendens*.<sup>48</sup> For example, *res judicata* and *lis pendens* did not apply in the *CME* and *Lauder* disputes, as discussed earlier. However, given that both arbitrations concerned claims arising from the same state measure, consolidation in this instance under the aforementioned treaty provisions would have been a clear option to mitigate the possibility of conflicting awards.<sup>49</sup>

Informal consolidation has been used quite effectively in a number of cases as a simple technique to overcome problems of inconsistency. *Camuzzi v Argentina*<sup>50</sup> and *Sempra v Argentina*<sup>51</sup> were two technically separate arbitrations in which the parties agreed to appoint the same panel of arbitrators to hear each dispute. Both tribunals reached the same conclusion and relied on very similar reasoning in deciding the question of their jurisdiction over their claims.<sup>52</sup> Furthermore, the ICSID Secretariat has played a role in facilitating informal consolidation of proceedings.<sup>53</sup> For example, in the *Salini v Morocco* arbitration<sup>54</sup> the ICSID Secretariat recommended that the parties appoint the same panel of arbitrators as had already been appointed in a parallel arbitration concerning Morocco and another Italian investor pursuant to the same BIT and concerning similar facts.<sup>55</sup> Although the procedures remained separate, the decisions reached by the identical tribunals were consistent.

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<sup>47</sup> Antonio Crivellaro, 'Consolidation of Arbitral and Court Proceedings in Investment Disputes' (2005) 4 *The Law and Practice of International Courts and Tribunals*, 371, 415.

<sup>48</sup> Antonio Crivellaro, 'Consolidation of Arbitral and Court Proceedings in Investment Disputes' (2005) 4 *The Law and Practice of International Courts and Tribunals*, 371, 414-415.

<sup>49</sup> Antonio Crivellaro, 'Consolidation of Arbitral and Court Proceedings in Investment Disputes' (2005) 4 *The Law and Practice of International Courts and Tribunals*, 371, 412-413.

<sup>50</sup> *Camuzzi International S.A. v. The Argentine Republic* (2005) ICSID Case No. ARB/03/02.

<sup>51</sup> *Sempra Energy International v. The Argentine Republic* (2005) ICSID Case No. ARB/02/16.

<sup>52</sup> August Reinisch, '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' (Paper presented at Stanford University, July 2007) 122.

<sup>53</sup> Antonio Crivellaro, 'Consolidation of Arbitral and Court Proceedings in Investment Disputes' (2005) 4 *The Law and Practice of International Courts and Tribunals*, 371, 385.

<sup>54</sup> *Salini Costruttori S.p.A and Italstrade S.p.A v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 23 July 2001, 6 *ICSID Reports* 400 (2004).

<sup>55</sup> *Consortium R.F.C.C. v. Kingdom of Morocco* (2003) ICSID Case No. ARB/00/6.

Consolidation appears to be an attractive solution to the problem of inconsistent awards. However, there are several important drawbacks that must be accounted for in an assessment of its merits.

The widespread use of formal consolidation may be politically difficult to achieve. There are currently no consolidation provisions contained within the ICSID Convention and therefore an amendment would be required if such provisions were to be inserted. As previously discussed, this would involve the consent of all the signatories to the Convention; a lengthy and difficult process with dubious prospects of success. Alternatively, consolidation provisions similar to those contained within the aforementioned BITs and FTAs could be imported into treaties which lack them. This, however, would involve amending or renegotiating many existing BITs or FTAs. Given the large number of such treaties worldwide, the political difficulties in assigning the responsibility of facilitating consolidation to individual states would be immense.

Consolidation also raises significant problems with regards to confidentiality particularly for investors. A party would normally feel free to rely on commercially sensitive information in a bilateral arbitration. However, in a consolidated arbitration involving a third party investor, who may be a competitor, a party may be less willing to disclose information to a tribunal. This may jeopardise a party's case and result in a less favourable outcome than might otherwise have been achieved.<sup>56</sup>

Likewise, it can also be said that consolidation tends to favour the State party. It allows the State a simpler process in defending itself against multiple claims as it need only prepare one defence. Thus for the State, consolidation can have significant benefits in terms of time and cost savings, and procedural simplicity. Despite this, as far as investors are concerned, the consolidation of proceedings can have significant drawbacks. A multi-lateral dispute involving more than one investor will generally be more prolonged and complicated, and therefore more expensive, than a bilateral arbitration. Additionally, the control of individual investors over the conduct of proceedings is diluted in consolidated arbitrations by the competing rights and needs of each claimant party. As such, investors may be reluctant to forfeit the greater flexibility, autonomy and efficiency they will receive in an arbitration where they are the sole claimant.<sup>57</sup> As consolidation can only be achieved with the consent of parties, the disincentives to consolidation may make it unpopular in practice.

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## 6. The organic development of soft precedent

It is generally accepted that a system of binding precedent does not exist in investment arbitration in the sense of strict *stare decisis* and it is not feasible to develop such a system without encroaching on the independence of tribunals or creating institutional subordination. A system of binding precedent requires the full and consistent availability of previous decisions but investor state arbitrations awards are only partially available. In the ICSID context, decisions and awards are most often published, with the consent of the parties, in accordance with Art 48(5) of the ICSID Convention. In contrast, publication of decisions and awards in proceedings conducted under the UNCITRAL or ICC Rules, which are both tailored for commercial disputes, are more restricted and can be subject to confidentiality if the parties so choose. Therefore not all awards are available. Even if all awards were available, there is the problem that multiple sources of law are being interpreted, the case typology is extremely heterogeneous and there is a risk of overburdening the proceedings.<sup>58</sup> For these reasons, it is suggested that a system of awards as binding precedent is not appropriate.

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<sup>56</sup> Antonio Crivellaro, 'Consolidation of Arbitral and Court Proceedings in Investment Disputes' (2005) 4 *The Law and Practice of International Courts and Tribunals*, 371, 410.

<sup>57</sup> Frank Spoorenberg and Jorge E. Viñuales, 'Conflicting Decisions in International Arbitration' (2008) 8 *The Law and Practice of International Courts and Tribunals*, 95, 100-101.

<sup>58</sup> Valentina S. Vadi, 'Towards Arbitral Path Coherence & Judicial Borrowing: Persuasive Precedent in Investment Arbitration' (2008) 5(3) *Transnational Dispute Management*, 3.

Notwithstanding arguments about the impracticality of binding precedent, there is an argument to be made for the doctrine of *persuasive precedent*.<sup>59</sup> This differs to binding precedent in that it offers a paradigm that can be accepted or departed from by subsequent arbitral panels based on the value of previous decisions in the context of a specific fact situation. It is not a panacea but rather an organic process that is already occurring and should be further encouraged in order to create consistency and increased predictability. Indeed the specific character of public international law lends itself to the development of persuasive precedent and most international courts and tribunals tend to faithfully follow their earlier decisions. For example, the Art 59 of the statute of the ICJ unequivocally provides that the decision of the Court has no binding force except between the parties and in respect of a particular case. Nevertheless, the ICJ relies on de facto case law whereby the ICJ almost exclusively cite its own precedents and rarely overrules them. Likewise other international dispute settlement mechanisms such as the WTO Panel and the WTO Appellate Body have been able to develop a largely consistent body of trade law over the last decade.

This trend can likewise be observed in the regular tendency of ICSID tribunals to take into account and discuss earlier investment awards when rendering their decisions. In commercial arbitration there is no need for the development of consistent rules through arbitral awards because the disputes are most often fact and contract-driven. This contrasts with investment arbitration where publication has become the rule under ICSID and there appears to be a stronger need for consistent rule creation. Consequently, there has been the progressive emergence of rules through lines of consistent cases on certain issues, although there are still contradictory outcomes at times. This outcome has been empirically verified through a study of over 500 ICSID awards<sup>60</sup> and is captured in the following statement by the Tribunal in *Saipem v Bangladesh*:

*"The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law".<sup>61</sup>*

Persuasive precedent in ICSID tribunals has led to a system of de facto case-law whereby tribunals routinely rely upon previous decisions and discuss them as quasi-authoritative sources of law. This is necessary for the predictability of investments and the credibility of the dispute resolution system. A dispute settlement process that produces unpredictable results will lose the confidence of its users in the long term and defeat its own purpose.<sup>62</sup>

Arbitrators enjoy the freedom to deviate from previous awards but tend to do so by distinguishing their decision from other decisions considered to have persuasive value. As such, arbitrators employ reasoned deviation similar to that undertaken by the judiciary and are reluctant to reach an inconsistent conclusion without explanation. Although the several high profile incidences of inconsistent decisions outlined above have caused tremors in the investor arbitration community, it is important not to overstate the importance

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<sup>59</sup> This is not dissimilar to *Path coherence* which is a process by which adjudicators take into account relevant past decisions in order to assess whether similar reasoning may be adopted to decide a given case.

<sup>60</sup> In Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, (2007) 23(3) *Arbitration International* it is stated that out of 500 cases, only about 100 were available in sufficient detail to make a finding possible, and out of these, only six referred to past awards.

<sup>61</sup> *Saipem S.p.A. v. People's Republic of Bangladesh* (2007) ICSID Case No. ARB/05/7.

<sup>62</sup> Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, (2007) 23(3) *Arbitration International*, 373.

of these cases. Such inconsistent arbitral decisions have been exceptions to the general rule that ICSID tribunals seek to follow previous decisions.<sup>63</sup>

The pressure to be transparent brought about by publication of awards and informed and professional peer discussion, has also contributed to the development of persuasive precedent. Where a State is a party to the arbitration, issues of transparency and accountability are more significant as a state must account for its actions to its public, particularly in democratic systems. Public scrutiny of investment treaty arbitration is often inspired by questions about the appropriateness of private tribunals determining issues that may have significant public fiscal consequences, such as in the *CME and Lauder* arbitrations.<sup>64</sup> Indeed the need for transparency in investor state awards places pressure on arbitrators to take account of previous decisions, avoid outright contradictions in their respective reasoning and to explain contradictory approaches with reference to the specificities of the case before them.

In order to strike the appropriate balance between private and public interests, arbitrators should give due consideration to international law norms. Ongoing and consistent professional debate amongst ICSID officials, ICSID clients, arbitrators, counsel and academics about the risks of fragmenting international law through inconsistent decisions and the importance of the coherent investment law, exercises a moderating influence on tribunals and ICSID panels and prompts them to avoid unnecessary conflict.<sup>65</sup> Decisional transparency and professional discourse should be further encouraged. It exerts pressure upon arbitrators to give careful consideration to prior decisions and enhances tribunal accountability. This is arguably the most significant contributor to the development of soft precedent and will reduce the number of inconsistent investment awards much more effectively than any other proposed method.

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## 7. Conclusion

Although on some occasions tribunals will render awards that are inconsistent with prior decisions this need not be overstated. As discussed in this paper, the investment arbitration system has means to organically resolve differences in outcomes and develop a system of persuasive precedent to provide a reasonable degree of uniformity of decisions throughout the system. The publication of decisions and need to give reasons acts as a natural mechanism to reduce inconsistencies in outcome. Arbitrators are aware of the pressing need to generate predictable results that enhance confidence in the investor-state dispute resolution system.

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<sup>63</sup> August Reinisch, 'The Role of Precedent in ICSID Arbitration' in Klausegger, Klein, et al. (ed) *Austrian Arbitration Yearbook* 495 (2008), 508.

<sup>64</sup> Judith Gill, 'Inconsistent Decisions: An Issue to be Addressed or a Fact of Life?' (2005) 2(2), *Transnational Dispute Management* 12, 15.

<sup>65</sup> Christian Tams, 'An Appealing Option? The Debate about an ICSID Appellate Structure' (2007) 4(5) *Transnational Dispute Management*; Thomas Wälde, 'Alternatives for Obtaining Greater Consistency in Investment Arbitration: An Appellate Institution after the WTO, Authoritative Treaty Arbitration or Mandatory Consolidation?' (2005) 2(2) *Transnational Dispute Management* 75.