

## CHAPTER 30

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# A DOCTRINE OF PRECEDENT?<sup>\*</sup>

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<sup>\*</sup> Parts of this chapter have previously appeared in C Schreuer, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration', 3(2) TDM (2006) and in C MacLachlan, L Shore, and M Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford, Oxford University Press, 2007).

## (1) PRECEDENT IN INTERNATIONAL LAW

RELIANCE on past decisions is a fundamental feature of any orderly decision process. Drawing on the experience of 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 their authority.

In actual fact, tribunals in investment disputes, including ICSID tribunals, rely on previous decisions of other tribunals whenever they can. At the same time, it is also well established that the doctrine of precedent, in the sense known in the common law, does not apply in international adjudication.<sup>1</sup> In other words, tribunals in investment arbitrations are not bound by previous decisions of other tribunals. Moreover, each tribunal is constituted *ad hoc* for any particular case. Therefore, ICSID tribunals cannot be expected to act like national courts.

Under common law systems, a doctrine of precedent exists to provide 'guidance, predictability, efficiency, uniformity and impersonality'.<sup>2</sup> Within a unified legal system, a consistent application of precedent provides fairness and equality as like cases are treated alike. These concepts are difficult to apply to a series of unconnected arbitrations governed by public international law. The system, if it can even be called a system, of investment treaty arbitration is not unitary in the sense of each tribunal sitting under the same source of jurisdiction. More fundamentally, it is not a common law system. The common law system of precedent, with judges inching step by step towards a current exposition of the law, is at odds with the code-based approach where the law is set out, in a fully developed form, for all to know in advance.<sup>3</sup> It would be inappropriate for investment treaty tribunals to prefer a common law approach over that of the civil law.

In listing the sources of international law to be applied by the Court, Article 38 of the ICJ Statute mentions 'judicial decisions' in fourth place. Even then, they are only 'subsidiary means for the determination of rules of law'. This can be contrasted with the first three sources listed in Article 38, which are primary means for establishing, rather than merely determining, rules of law. There is no doubt that:

... the role of precedent in international law is a matter of considerable delicacy. Just as jealous sovereign States are averse to any suggestion that compacts other than those to which they have consented may be invoked against them, so too are they unwilling to submit to the

<sup>1</sup> See M L Shahabuddeen, *Precedent in the World Court* (Cambridge, Cambridge University Press, 1996).

<sup>2</sup> J Hardisty, 'Reflections on *Stare Decisis*', 55 *Ind LJ* 41 (1980); see also T Prime and G Scanlon, 'Stare Decisis under Court of Appeal Judicial Confusion and Judicial Reform', *Civil Justice Quarterly* 212 (2004) at 215, where these English authors describe the doctrine of precedent 'as a mechanism for promoting certainty and predictability in the law'.

<sup>3</sup> R Bhala, 'The Power of the Past: Towards *De Jure Stare Decisis* in WTO Adjudication', 33 *Geo Wash Int'l L Rev* 873 (2001) at 941.

elaboration of international law by anything resembling the accretion of binding precedents known as common law.<sup>4</sup>

The first part of Article 53(1) of the ICSID Convention states: 'The award shall be binding on the parties...'. This may be read as excluding the applicability of the principle of binding precedent to successive ICSID cases. Nothing in the Convention's *travaux préparatoires* suggests that the doctrine of *stare decisis* should be applied to ICSID arbitration.

The Statute of the ICJ is even more explicit than the ICSID Convention in rejecting the precedent value of its decisions. Article 59 provides that: 'The decision of the Court has no binding force except between the parties and in respect of that particular case'. In practice, this does not prevent parties to litigation before the ICJ from making reference to, and seeking to rely upon, findings and dissenting opinions made in earlier cases.

There is nothing unusual about international law developing in this manner. Crawford has observed this common law-style process having begun long before the present system of treaty arbitration developed:

The content of the law of state responsibility, at least in the important field of injury to the persons and property of aliens, was not based on any codified approach, or even on any general principle of law. It was dependent largely on diplomatic correspondence or decisions of arbitral commissions in relation to particular facts and situations. In some respects at least, it resembled the evolution of the common law of torts before *Donoghue v Stevenson*. For example, we are still working out the content of the 'international minimum standard' on a case-by-case basis—as witnessed in current developments in the application of Articles 1105 and 1110 of the North American Free Trade Agreement and their equivalent in bilateral investment treaties.<sup>5</sup>

One of the members of the US negotiating team for NAFTA has written that a purpose behind the incorporation of the customary international law standard of treatment in NAFTA Article 1105 was to allow NAFTA practice to develop in line with decisions of other tribunals in spite of the formal absence of a *stare decisis* effect.<sup>6</sup> Yet NAFTA contains a specific provision, Article 1136(1), stating that a decision from one panel has no precedent effect on any other panel.<sup>7</sup>

The fact that tribunals are aware of the role they play in developing legal principles should be welcomed. Part of the responsibility of a tribunal is to work out the

<sup>4</sup> J Paulsson, 'International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law', 3 TDM (September 2006), available at <<http://transnational-dispute-management.com>> (accessed 20 September 2006).

<sup>5</sup> J Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect', 96 AJIL 874 (2002) at 886.

<sup>6</sup> DM Price, 'Chapter 11—Private Party v Government Investor-State Dispute Settlement: Frankenstein or Safety Valve?', 26 Can-USLJ 107 (2000) at 111.

<sup>7</sup> North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994) Can TS 1994 No. 2; (1993) 32 ILM 612 (NAFTA) Art 1136(1): 'An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case'.

applicable principles of international law to be applied to the dispute before it. A tribunal should be seeking to set out the principles it finds as clearly as possible as part of its professional duty to render the best award possible. If this is achieved, it is understandable and positive that the award should be perceived as a contribution to the field of international legal scholarship. Investment treaty awards can thus play a role in counteracting the increasing fragmentation of international law.

## (2) PRACTICE OF INVESTMENT TREATY TRIBUNALS

Tribunals have pointed out repeatedly that they are not bound by previous ICSID cases. In the annulment proceedings in *Amco v Indonesia*<sup>8</sup> the ad hoc committee stated:

44. Neither the decisions of the International Court of Justice in the case of the Award of the King of Spain nor the Decision of the *Klöckner ad hoc* Committee are binding on this *ad hoc* Committee. The absence, however, of a rule of *stare decisis* in the ICSID arbitration system does not prevent this *ad hoc* Committee from sharing the interpretation given to Article 52(1)(e) by the *Klöckner ad hoc* Committee. This interpretation is well founded in the context of the Convention and in harmony with applicable international jurisprudence. Therefore this *ad hoc* Committee does not feel compelled to distinguish strictly between the *ratio decidendi* and *obiter dicta* in the *Klöckner ad hoc* Committee decision.<sup>9</sup>

Similarly, in *LETCO v Liberia*,<sup>10</sup> the tribunal, before quoting authority from other ICSID tribunals, said: 'Though the Tribunal is not bound by the precedents established by other ICSID Tribunals, it is nonetheless instructive to consider their interpretations...'.<sup>11</sup>

Tribunals operating under the NAFTA in the framework of the ICSID Additional Facility have reached the same result. For instance, the Tribunal in *Feldman v Mexico*<sup>12</sup> said:

...this Tribunal has also sought guidance in the decisions of several earlier NAFTA Chapter 11 Tribunals that have interpreted Article 1110. The Tribunal realizes that under NAFTA Article 1136(1), 'An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case,' and that each

<sup>8</sup> *Amco v Indonesia*, Decision on Annulment, 16 May 1986, 1 ICSID Reports 509.

<sup>9</sup> *Ibid* at para 44; see also *Amco v Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 395.

<sup>10</sup> *LETCO v Liberia*, Award, 31 March 1986, 2 ICSID Reports 346.

<sup>11</sup> *Ibid* at 352.

<sup>12</sup> *Feldman v Mexico*, Award, 16 December 2002, 7 ICSID Reports 341.

determination under Article 1110 is necessarily fact-specific. However, in view of the fact that both of the parties in this proceeding have extensively cited and relied upon some of the earlier decisions, the Tribunal believes it appropriate to discuss briefly relevant aspects of earlier decisions . . .<sup>13</sup>

Other tribunals have followed the same line in finding that they are not bound by previous decisions but will take due account of them.<sup>14</sup>

The question of the authority of previous decisions became the subject of heated debate in some of the cases against Argentina. Despite numerous decisions to the contrary, Argentina tenaciously kept raising the same jurisdictional objections over and over again. In the Decision on Jurisdiction in the resubmitted *Vivendi* case,<sup>15</sup> one of Argentina's objections concerned the question of whether the participation of foreign shareholders in a domestically incorporated company constituted an 'investment'. The tribunal not only rejected the Argentinian objection but added an appendix to its decision in which it listed previous decisions that had rejected that same argument. The tribunal said:<sup>16</sup>

94. Finally, numerous arbitral tribunals have rejected this very same jurisdictional objection as shown by the 18 cases referred to in Appendix 1 to this Decision. In each of those eighteen cases the tribunals upheld the right of shareholders to pursue such claims. In 11 cases, the Argentine Republic was respondent and asserted, and lost, this same objection. In the last one of these cases, the Tribunal observed that the very objection which Argentina raises in this case 'has been made numerous times, never, so far as the Tribunal has been aware, with success'.<sup>17</sup>

Despite the tedium of repeated identical objections, tribunals have treated Argentina's right to reintroduce arguments that had failed in other cases and its insistence on the irrelevance of previous decisions with respect and caution. In *Enron v Argentina*,<sup>18</sup> the tribunal said:

40. The Tribunal is of course mindful that decisions of ICSID or other arbitral tribunals are not a primary source of rules. The citations of and references to those decisions respond to the fact that the Tribunal in examining the claim and arguments of this case under

<sup>13</sup> Ibid at para 107.

<sup>14</sup> *EnCana v Ecuador*, Award, 3 February 2006, para 189; *El Paso v Argentina*, Decision on Jurisdiction, 27 April 2006, para 39; *Suez v Argentina*, Decision on Jurisdiction, 16 May 2006, paras 26, 31, 60-5; *Jan de Nul & Dredging International v Egypt*, Decision on Jurisdiction, 16 June 2006, paras 63, 64; *Azurix v Argentina*, Award, 14 July 2006, para 391; *Pan American Energy v Argentina*, Decision on Preliminary Objections, 27 July 2006, para 42; *Grand River Enterprises Six Nations Ltd v United States*, Decision on Jurisdiction, 20 July 2006, para 36; *ADC v Hungary*, Award, 2 October 2006, para 293; *World Duty Free v Kenya*, Award, 4 October 2006, para 16.

<sup>15</sup> *Compañía de Aguas del Aconquija, SA & Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic*, Decision on Jurisdiction, 14 November 2005.

<sup>16</sup> Ibid at para 94.

<sup>17</sup> *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 (footnote in original).

<sup>18</sup> *Enron v Argentina*, Decision on Jurisdiction, 14 January 2004.

international law, believes that in essence the conclusions and reasons of those decisions are correct.<sup>19</sup>

In a subsequent decision in the same case, the tribunal was even more specific. It said:

The Tribunal agrees with the view expressed by the Argentine Republic in the hearing on jurisdiction held in respect of this dispute, to the effect that the decisions of ICSID tribunals are not binding precedents and that every case must be examined in the light of its own circumstances.<sup>20</sup>

The tribunal in *AES Corp v Argentina*<sup>21</sup> has made the most detailed examination of the role of precedent in investment arbitration to date. The claimant pointed out that Argentina's five objections to jurisdiction were similar or identical to arguments that Argentina had presented unsuccessfully in previous arbitrations. It sought to persuade the tribunal to treat Argentina's jurisdictional objections as 'moot if not even useless' on the basis that previous tribunals had consistently rejected the objections. In response, Argentina insisted on the specificity of each treaty involved and said:

Repeating decisions taken in other cases, without making the factual and legal distinctions, may constitute an excess of power and may affect the integrity of the international system for the protection of investments.<sup>22</sup>

The tribunal was not willing to accept the extremities of the claimant's position. It agreed with Argentina that every BIT has its own identity. The terms of each treaty should thus be carefully analysed to determine the exact scope of the consent expressed by the two parties. Here the *AES* tribunal was following the position taken by the International Tribunal for the Law of the Sea in the *MOX* and *OSPAR* cases where it was stated that identical or similar provisions of different treaties may not necessarily yield the same interpretive results once differences in the respective context, objects and purposes, subsequent practice of parties, and *travaux préparatoires* have been taken into account.<sup>23</sup>

Argentina could thus not be prevented from raising its objections again. The tribunal stated that the provisions of Article 25 of the ICSID Convention, together with fundamental principles of public international law, dictate that:

... each decision or award delivered by an ICSID Tribunal is only binding on the parties to the dispute settled by this decision or award.<sup>24</sup> There is so far no rule of precedent in

<sup>19</sup> Ibid at para 40.

<sup>20</sup> *Enron v Argentina*, Decision on Jurisdiction (Ancillary Claim), 2 August 2004 at para 25.

<sup>21</sup> *AES Corp v Argentina*, Decision on Jurisdiction, 26 April 2005 at paras 17–33.

<sup>22</sup> Ibid at para 22.

<sup>23</sup> *The MOX Plant Case (Ireland v United Kingdom)* (Provisional Measure, Order of 3 December 2001) 126 ILR 260 (2005) at 273–4; *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v United Kingdom)* 126 ILR 334 (2005).

<sup>24</sup> Art 53 of the ICSID Convention (footnote in original).

general international law; nor is there any within the specific ICSID system for the settlement of disputes between one State party to the Convention and the National of another State Party. This was in particular illustrated by diverging positions respectively taken by two ICSID tribunals on issues dealing with the interpretation of arguably similar language in two different BITs.<sup>25</sup>

The AES tribunal pointed out that each BIT has its own identity and that striking similarities in the wording of many BITs often dissimulate real differences.<sup>26</sup> The tribunal drew the following conclusion:

From the above derive at least two consequences: the *first* is that the findings of law made by one ICSID tribunal in one case in consideration, among others, of the terms of a determined BIT, are not necessarily relevant for other ICSID tribunals, which were constituted for other cases; the *second* is that, although Argentina had already submitted similar objections to the jurisdiction of other tribunals prior to those raised in the present case before this Tribunal, Argentina has a valid and legitimate right to raise the objections it has chosen for opposing the jurisdiction of this Tribunal.<sup>27</sup>

At the same time the tribunal rejected the 'excessive assertion' that 'absolutely no consideration might be given to other decisions on jurisdiction or awards delivered by other tribunals in similar cases'.<sup>28</sup> In case of a high level of similarity or identity of underlying legal questions, the tribunal did not feel barred as a matter of principle from considering the position taken by other tribunals.<sup>29</sup>

This led the tribunal to the following compromise solution:

An identity of the basis of jurisdiction of these tribunals, even when it meets with very similar if not even identical facts at the origin of the disputes, does not suffice to apply systematically to the present case positions or solutions already adopted in these cases. 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 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... precedents may also be rightly considered, at least as a matter of comparison and, if so considered by the Tribunal, of inspiration.<sup>30</sup>

<sup>25</sup> *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 and *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No. ARB/02/6 (footnote in original).

<sup>26</sup> *AES v Argentina*, Decision on Jurisdiction at paras 24–5.

<sup>27</sup> *Ibid* at para 26.

<sup>28</sup> *Ibid* at para 27.

<sup>29</sup> *Ibid* at para 28.

<sup>30</sup> *Ibid* at paras 30–1.

Having made these broad statements on the practical standing of 'precedents', the tribunal actually proceeded to examine and rely on previous decisions by other tribunals.<sup>31</sup>

In a similar manner, the tribunal in *Bayindir v Pakistan*<sup>32</sup> considered the issue of precedents and concluded that it was 'not bound by earlier decisions, but will certainly carefully consider such decisions whenever appropriate'.<sup>33</sup>

The decision in *Gas Natural v Argentina*<sup>34</sup> demonstrates the tribunal's cautious attitude towards 'precedents' not only in its wording but also in the decision's structure. The tribunal first gave its Decision on Jurisdiction without reference to previous cases.<sup>35</sup> After having reached a result it stated:

The Tribunal wishes to emphasize that it has rendered its decision independently, without considering itself bound by any other judgments or arbitral awards. Having reached its conclusions, however, the Tribunal thought it useful to compare its conclusion with the conclusions reached in other recent arbitrations conducted pursuant to the ICSID Arbitration Rules and arising out of claims under contemporary bilateral investment treaties. We summarize a few of these decisions here, and confirm that we have not found or been referred to any decisions or awards reaching a contrary conclusion.<sup>36</sup>

Only after having made that statement does the tribunal examine a number of previous decisions which it finds to be in line with its own conclusions.<sup>37</sup> Its conclusion is as follows:

In sum, the Tribunal is satisfied that its analyses and decisions, independently arrived at, are consistent with the conclusions of other arbitral tribunals faced with similar issues. It does not follow that the ultimate decisions of this Tribunal on the merits will be wholly consistent with those of other arbitral tribunals, because different claims have been based on different treaties and different factual situations.<sup>38</sup>

Whether a decision that relies preponderantly or exclusively on previous decisions might be subject to annulment for that reason may be subject to doubt. No ad hoc committee in ICSID proceedings has ever annulled an award because it rested its reasoning on precedents. But an application for annulment that alleges an excess of powers or a failure to state reasons because the tribunal has simply relied on earlier decisions without making an independent decision or developing its own reasons is entirely possible. From the perspective of tribunals it seems wiser not to expose themselves to this charge.

<sup>31</sup> Ibid at paras 51–9, 70, 73, 86, 89, 95–7.

<sup>32</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, Decision on Jurisdiction, 14 November 2005.

<sup>33</sup> Ibid at para 76.

<sup>34</sup> *Gas Natural SDG, SA v Argentina*, Decision on Jurisdiction, 17 June 2005.

<sup>35</sup> Ibid at paras 20–35.

<sup>36</sup> Ibid at para 36.

<sup>37</sup> Ibid at paras 37–51.

<sup>38</sup> Ibid at para 52.



### (3) INCONSISTENT DECISIONS

Thus a *de facto* practice of precedent certainly exists. However, it is not identical to that prevailing within domestic common law systems. For example, there is no doctrine of hierarchy whereby certain courts are obliged to defer to judgments rendered by higher courts. Instead, individual tribunal decisions have persuasive force and compel the respectful attention of tribunals confronted with similar cases.

Nonetheless, in some cases tribunals did not follow earlier decisions but adopted different solutions. At times, they simply adopted a different solution without distancing themselves from the earlier decision. At other times, they referred to the earlier decision and pointed out that they were unconvinced by what another tribunal had said and that, therefore, their decision departed from the one adopted earlier. Increasingly, tribunals are following this latter path.

A clear example of a rejection of an earlier decision occurred in *SGS v Philippines*.<sup>39</sup> The tribunal discussed the earlier decision in *SGS v Pakistan*<sup>40</sup> and voiced its disagreement with some of the answers given there. The *SGS v Philippines* tribunal said:

As will become clear, the present Tribunal does not in all respects agree with the conclusions reached by the *SGS v. Pakistan* Tribunal on issues of the interpretation of arguably similar language in the Swiss-Philippines BIT. This raises a question whether, nonetheless, the present Tribunal should defer to the answers given by the *SGS v Pakistan* Tribunal. The ICSID Convention provides only that awards rendered under it are 'binding on the parties' (Article 53(1)), a provision which might be regarded as directed to the *res judicata* effect of awards rather than their impact as precedents in later cases. In the Tribunal's view, although different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State. Moreover there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision. There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals. It must be initially for the control mechanisms provided for under the BIT and the ICSID Convention, and in the longer term for the development of a common legal opinion or *jurisprudence constante*, to resolve the difficult legal questions discussed by the *SGS v Pakistan* Tribunal and also in the present decision.<sup>41</sup>

The consistency or lack thereof of decisions has become a prominent issue in investment arbitration.<sup>42</sup> There have been a number of instances in which tribunals sitting

<sup>39</sup> *SGS v Philippines*, Decision on Jurisdiction, 29 January 2004.

<sup>40</sup> *SGS v Pakistan*, Decision on Jurisdiction, 6 August 2003, 8 ICSID Reports 383.

<sup>41</sup> *SGS v Philippines*, at para 97 (original footnotes omitted).

<sup>42</sup> In addition to conflicting answers to similar questions in different cases, there is the occasional problem of conflicting outcomes of parallel proceedings concerning the same dispute. See especially

in different cases have come to conflicting conclusions on identical questions. Five examples may suffice to illustrate this point:

1. Many BITs in their consent clauses contain phrases referring to 'all disputes concerning investments' or 'any legal dispute concerning an investment'. Tribunals have given conflicting meanings to these terms.<sup>43</sup>

2. Umbrella clauses have received divergent interpretations in the practice of tribunals.<sup>44</sup> Some tribunals found that treaty clauses guaranteeing the 'observance of commitments' made by host states meant that breaches of contracts were elevated to breaches of the treaty. Others have emphatically rejected such an interpretation.

3. A common condition in BITs for the institution of arbitration proceedings is the observance of so-called waiting periods. This means that an amicable settlement must have been attempted through consultations or negotiations for a certain period of time. The reaction of tribunals to these provisions has not been uniform. In some cases the tribunals found that non-compliance with the waiting periods did not affect their jurisdiction.<sup>45</sup> In other cases, they reached the opposite conclusion. For example, in *Enron Corp and Ponderosa Assets, LP v Argentina*, the tribunal, although disagreeing with previous tribunals, noted the findings of its predecessors:

The Tribunal wishes to note in this matter, however, that the conclusion reached is not because the six-month negotiation period could be a procedural and not a jurisdictional requirement as has been argued by the Claimants and affirmed by other tribunals. Such requirement is in the view of the Tribunal very much a jurisdictional one.<sup>46</sup>

4. Most BITs and some other treaties for the protection of investment contain most-favoured-nation (MFN) clauses. This has led to the question of whether the effect of MFN clauses extends to the provisions on dispute settlement in these

*Ronald S Lauder v The Czech Republic*, Final Award, 3 September 2001, 9 ICSID Reports 66 and *CME v The Czech Republic*, Partial Award, 13 September 2001, 9 ICSID Reports 121.

<sup>43</sup> *Salini Costruttori SpA et Italstrade SpA c/Royaume du Maroc*, Decision on Jurisdiction, 23 July 2001, *Journal de Droit International* 196 (2002), 6 ICSID Reports 400, para 61; *Compañía de Aguas del Aconquija, SA & Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic*, Decision on Annulment, 3 July 2002, 6 ICSID Reports 340, para 55; *SGS v Pakistan*, Decision on Jurisdiction, 6 August 2003, 8 ICSID Reports 383, para 55; *SGS v Philippines*, Decision on Jurisdiction, 29 January 2004, 8 ICSID Reports 518, paras 131–5.

<sup>44</sup> *SGS v Pakistan*, Decision on Jurisdiction, 6 August 2003, 8 ICSID Reports 383 at paras 163–73; *SGS v Philippines*, Decision on Jurisdiction, 29 January 2004, 8 ICSID Reports 518, paras 125, 128; *Joy Mining v Egypt*, Award, 6 August 2004, para 81; *CMS v Argentina*, Award, 12 May 2005, paras 296–303; *Eureko v Poland*, Partial Award, 19 August 2005, paras 244–60; *Noble Ventures v Romania*, Award, 12 October 2005, paras 42–62; *El Paso v Argentina*, Decision on Jurisdiction, 27 April 2006, paras 66–86; *Pan American Energy v Argentina*, Decision on Preliminary Objections, 27 July 2006, paras 92–115.

<sup>45</sup> *Ethyl Corp v Canada*, Decision on Jurisdiction, 24 June 1998, Decision on Jurisdiction, 7 ICSID Reports 12 at paras 76–88 and in *Ronald S Lauder v The Czech Republic*, Final Award, 3 September 2001; *Wena Hotels v Egypt*, Decision on Jurisdiction, 29 June 1999, 6 ICSID Reports 74, at para 87; *SGS v Pakistan*, Decision on Jurisdiction, 6 August 2003, 8 ICSID Reports 383, at para 184.

<sup>46</sup> *Enron Corp and Ponderosa Assets, LP v Argentina*, Decision on Jurisdiction, 14 January 2004, at para 88. See also *A Goetz v Burundi*, Award, 10 February 1999, 6 ICSID Reports 5, at paras 90–3.

treaties. Tribunals have given conflicting decisions on this point.<sup>47</sup> In doing so, tribunals often use the language of precedent-bound systems. The tribunal in *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentina*<sup>48</sup> referred to the broad MFN decisions (ie *Maffezini*) and the narrow MFN decisions (ie *Plama*) as constituting a 'line of cases'.<sup>49</sup> In deciding to follow *Maffezini*, it took upon itself the task of distinguishing *Plama* in the best traditions of common law advocacy.<sup>50</sup> This was noted in a subsequent decision, *Telenor Mobile Communications AS v Hungary*, where the tribunal described the *Aguas* case as dissenting from *Plama*!<sup>51</sup> Its contribution to the conversation was to agree with *Plama*.

5. The existence of a state of necessity is to be judged in accordance with customary international law as set out in the ILC Articles on State Responsibility.<sup>52</sup> The tribunals in *CMS v Argentina*<sup>53</sup> and in *LG&E v Argentina*<sup>54</sup> have given sharply conflicting responses to Argentina's pleas of a state of necessity. The differences relate to both matters of fact and of law.<sup>55</sup> What is remarkable about the two cases is that they did not concern a divergence of interpretation of separate treaties but the application of the same legal principle of customary international law to the same state of emergency declared by Argentina. Even more surprisingly, the later decision does not even mention the earlier one rendered 15 months previously, despite the fact that one arbitrator sat on both tribunals.

Fortunately, the problem of inconsistency is not pervasive. Most tribunals carefully examine earlier decisions and accept these as authority most of the time. But sometimes they disagree with them and make their disagreement known. In addition, the growing number of simultaneous cases makes it increasingly likely that tribunals may reach conflicting results without realizing it. Therefore, the problem of conflicting awards is a reality and has led to a discussion on how to address the problem.

<sup>47</sup> *Maffezini v Spain*, Decision on Jurisdiction, 25 January 2000, 5 ICSID Reports 396, at paras 38–64; *Siemens v Argentina*, Decision on Jurisdiction, 3 August 2004, at paras 32–110; *Salini v Jordan*, Decision on Jurisdiction, 29 November 2004, at paras 115, 119; *Plama v Bulgaria*, Decision on Jurisdiction, 8 February 2005, at paras 216–26; *Gas Natural v Argentina*, Decision on Jurisdiction, 17 June 2005, at paras 24–31, 41–9.

<sup>48</sup> *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentina*, Decision on Jurisdiction, 3 August 2006.

<sup>49</sup> *Ibid* at para 65.

<sup>50</sup> *Ibid* at paras 65 and 66.

<sup>51</sup> *Ibid* at para 99.

<sup>52</sup> Art 25 of the International Law Commission's Articles on State Responsibility. See J Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge, Cambridge University Press, 2002) at 178 ff.

<sup>53</sup> *CMS Gas Transmission Company v Argentina*, Award, 12 May 2005, 44 ILM 1205 (2005).

<sup>54</sup> *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc v The Argentine Republic*, Decision on Liability, 3 October 2006.

<sup>55</sup> For an incisive analysis of the differences between the two cases see A Reinisch, 'Necessity in International Investment Arbitration—An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on *CMS v Argentina* and *LG&E v Argentina*', 3(5) TDM (December 2006).

## (4) INTERPRETATIVE STATEMENTS BY STATES

Occasionally, the state parties to a treaty may issue a joint statement without binding force on a question of interpretation pending before a tribunal. In *CME v Czech Republic*,<sup>56</sup> the BIT between the Czech Republic and the Netherlands provided for 'consultations' with a view to resolving any issue of interpretation and application of the treaty. Pursuant to this procedure, the Netherlands and the Czech Republic issued 'Agreed Minutes' containing a 'common position' on the interpretation of the BIT, after the tribunal had issued a partial award.<sup>57</sup> The tribunal, in rendering its final award, took this joint statement into account as supporting its view.<sup>58</sup>

A unilateral assertion of the disputing state party, on the meaning of a treaty provision, made in the process of ongoing proceedings is of limited value. Such a statement will be perceived as self-serving since it is probably determined by the desire to influence the tribunal's decision in favour of the state offering the interpretation.

Alternatively, the non-disputing state party to a BIT may give a unilateral statement on the interpretation of the treaty. Such a statement may or may not confirm the position of the disputing state party to the treaty. In *Aguas del Tunari v Bolivia*,<sup>59</sup> the claimant had submitted statements made by ministries of the government of the Netherlands to the parliament of the Netherlands.<sup>60</sup> In addition, the tribunal wrote to the legal adviser to the foreign ministry of the Netherlands enquiring about certain aspects of the BIT's interpretation.<sup>61</sup> The Tribunal found the information thus obtained not helpful.<sup>62</sup> It said:

...the Tribunal can find no 'subsequent practice...which establishes an agreement of the parties' regarding the interpretation of the BIT. In addition, the response from the Netherlands provides no additional information of the type suggested by Article 31 of the Vienna Convention on the Law of Treaties as being possibly relevant and upon which a general interpretative position might be based.<sup>63</sup>

In one case, the government of the claimant's state of nationality took the unusual step of writing to ICSID to voice its disapproval of an interpretation given by an

<sup>56</sup> *CME v The Czech Republic*, Final Award, 14 March 2003, 9 ICSID Reports 264.

<sup>57</sup> *Ibid* at paras 87-93.

<sup>58</sup> *Ibid* at paras 437, 504.

<sup>59</sup> *Aguas del Tunari v Bolivia*, Decision on Jurisdiction, 21 October 2005.

<sup>60</sup> *Ibid* at paras 249-57.

<sup>61</sup> *Ibid* at paras 47, 258-9.

<sup>62</sup> *Ibid* at paras 260-3.

<sup>63</sup> *Ibid* at para 262.

ICSID tribunal. In *SGS v Pakistan*<sup>64</sup> the Swiss government in a letter to ICSID's Deputy Secretary-General stated that the Swiss authorities were wondering why the tribunal had not found it necessary to enquire about their view of the meaning of the provision in the Pakistan–Switzerland BIT in spite of the fact that the tribunal had attributed considerable importance to the intent of the contracting parties in drafting it. The Swiss authorities were alarmed by the interpretation given by the tribunal to the provision. The letter added that the interpretation ran counter to the intention of Switzerland when concluding the treaty and was neither supported by the meaning of similar articles in BITs concluded by other countries nor by academic comments.<sup>65</sup>

It is obvious from these examples of practice that occasional views expressed by states parties to treaties on the meaning of particular provisions are not a viable method to achieve uniformity of interpretation.

## (5) INSTITUTIONALIZED MECHANISMS

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### (a) Official Interpretations

Plans to create institutionalized mechanisms to achieve uniform interpretations have yielded limited results so far. The NAFTA has a mechanism whereby the Free Trade Commission (FTC), a body composed of representatives of the three states parties, can adopt binding interpretations of the treaty.<sup>66</sup> The FTC has made use of this method in July 2001 in interpreting the concepts of 'fair and equitable treatment' and 'full protection and security' under Article 1105 of the NAFTA.<sup>67</sup>

<sup>64</sup> *SGS v Pakistan*, Decision on Jurisdiction, 6 August 2003.

<sup>65</sup> See SA Alexandrov, 'Breaches of Contract and Breaches of Treaty', 5 *JWIT* 555 (2004) at 570–1; E Gaillard, 'Investment Treaty Arbitration and Jurisdiction over Contract Claims—The *SGS* Cases considered', in T Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (London, Cameron May, 2005) at 325, 341–2.

<sup>66</sup> NAFTA Art 2001(1): 'The Parties hereby establish the Free Trade Commission, comprising cabinet-level representatives of the Parties or their designees'. NAFTA Art 1131(2): 'An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section'.

<sup>67</sup> FTC Note of Interpretation of 31 July 2001.

NAFTA tribunals have accepted this interpretation as binding.<sup>68</sup> The tribunal in *Methanex v United States*<sup>69</sup> said:

With respect to Article 1105, the existing interpretation is contained in the FTC's Interpretation of 31st July 2001. Leaving to one side the impact of Article 1131(2) NAFTA, the FTC's interpretation must also be considered in the light of Article 31(3)(a) of the Vienna Convention as it constitutes a subsequent agreement between the NAFTA Parties on the interpretation of Article 1105 NAFTA....<sup>70</sup>

BITs do not normally have institutional mechanisms to obtain authentic interpretations of their meaning. But the US Model BIT of 2004 provides for a mechanism that is similar to the one in the NAFTA:

*Article 30(3)*

A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.

This method is efficient, but has a serious drawback. States will strive to issue official interpretations to influence proceedings to which they are parties. As the example of the July 2001 interpretation of the FTC under NAFTA demonstrates, the home states of disputing investors are less interested in interpretations favourable to their nationals in pending disputes than in interpretations that favour state respondents generally. It is obvious that a mechanism whereby a party to a dispute is able to influence the outcome of judicial proceedings, by issuing official interpretation to the detriment of the other party, is incompatible with principles of a fair procedure and is hence undesirable.

## (b) Appeals Procedures

Another possible solution is the creation of an appeals facility that would open the possibility of reviewing decisions, thereby increasing the chances of a consistent case-law. A number of US treaties foresee this possibility in the form of an appellate

<sup>68</sup> See *Mondev International Ltd v United States of America*, Award, 11 October 2002, 6 ICSID Reports 192, at paras 100 ff; *United Parcel Service of America, Inc v Canada*, Award, 22 November 2002, 7 ICSID Reports 288 at para 97; *ADF Group, Inc v United States of America*, Award, 9 January 2003, 6 ICSID Reports 470, at paras 175–8; *Loewen Group, Inc. and Raymond L Loewen v United States of America*, Award, 26 June 2003, 7 ICSID Reports 442, at paras 124–8; *Waste Management, Inc v United Mexican States*, Award, 30 April 2004, at paras 90–1. See also *United Mexican States v Metalclad Corp*, Judgment, Supreme Court of British Columbia, 2 May 2001, 5 ICSID Reports 236, at paras 61–65.

<sup>69</sup> *Methanex v United States*, Award, 3 August 2005.

<sup>70</sup> *Ibid*, part II, ch H, at para 23.

body or similar mechanism.<sup>71</sup> The US Model BIT of 2004 contains the following provision in an Annex:

*Annex D*

*Possibility of a Bilateral Appellate Mechanism*

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 34 in arbitrations commenced after they establish the appellate body or similar mechanism.

This idea of a bilateral appeals mechanism has found entry into the US BIT with Uruguay.<sup>72</sup>

It is doubtful whether appellate bodies established under different bilateral treaties would lead to a coherent case-law. Separate mechanisms for different treaties, even if used regularly, will only have a limited impact. The issues in question, such as the proper interpretation of umbrella clauses or the reach of MFN clauses, recur in the context of many treaties. A harmonizing effect will be achieved only if the institutional mechanism applies to all or at least many treaties.

A similar idea, though directed at a multilateral appeals mechanism, is reflected in the CAFTA-DR Free Trade Agreement (FTA)<sup>73</sup> as well as in US FTAs with Singapore<sup>74</sup> and Chile.<sup>75</sup> To this effect, the FTA with Chile provides:

10. If a separate multilateral agreement enters into force as between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment agreements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body review awards rendered under Article 10.25 in arbitrations commenced after the appellate body's establishment.<sup>76</sup>

ICSID at one point floated a draft that foresaw the creation of an appeals facility at ICSID. A Discussion Paper of October 2004<sup>77</sup> pointed to the danger of inconsistencies, and offered the prospect of a single appeal mechanism as an alternative to multiple mechanisms. An annex to the paper presented possible features of an ICSID Appeals Facility. Submission to the Appeals Facility would have to take place by treaty. It would be available for ICSID as well as for non-ICSID awards

<sup>71</sup> Generally see B Legum, 'The Introduction of an Appellate Mechanism: The U.S. Trade Act of 2002', in E Gaillard and Y Banifatemi (eds), *Annulment of ICSID Awards* (New York, Juris Publishing, 2004) at 289 ff.

<sup>72</sup> See Uruguay-US BIT, 25 October 2004, Annex E, 44 ILM 268 (2005) at 296.

<sup>73</sup> Central America-Dominican Republic Free Trade Agreement, 5 August 2004, Art 10.20(10).

<sup>74</sup> Singapore-US FTA, 1 January 2004, Art 15.19(10).

<sup>75</sup> Chile-US FTA, 1 January 2004.

<sup>76</sup> *Ibid*, Art 10.19(10).

<sup>77</sup> ICSID Secretariat, 'Possible Improvements of the Framework for ICSID Arbitration' (Discussion Paper, 22 October 2004).

rendered in investor-State arbitrations. An appeal would be heard by an appeal tribunal consisting of three members and selected for each case from a panel of 15 persons. The appeal would have to be based on an error of law or fact or one of the grounds for annulment set out in Article 52 of the ICSID Convention. The appeal tribunal would have the power to uphold, modify, or reverse the award concerned.

In a subsequent Working Paper of May 2005,<sup>78</sup> the idea of an appellate mechanism was dropped, at least for the time being, since 'it would be premature to attempt to establish such an ICSID mechanism at this stage'.

The project of a multilateral appeals mechanism at ICSID would have created certain problems. Article 53 of the ICSID Convention says that an award shall not be subject to any remedy except those provided for in the Convention. In addition, the appeals mechanism would have excluded the application of the annulment procedure under Article 52 of the ICSID Convention. Any attempt to amend the ICSID Convention would be far too complex to be realistic. The idea was that bilateral treaties providing for appellate mechanisms would operate in partial derogation of the ICSID Convention. While this avenue may be feasible under the law of treaties, it is questionable whether an organ created by a multilateral convention is the right body to take the initiative towards the derogation of that convention by way of bilateral or regional treaties.

An appeal before three arbitrators selected from a panel of 15 would not have guaranteed any uniformity of decisions. The different composition of appeals tribunals would not offer a guarantee against inconsistency.

Another problem would be the avoidance of national setting-aside procedures for non-ICSID awards. The legal bases for these setting-aside procedures are national arbitration laws. It would be necessary to ensure that, where an appeal is available under the international procedure, there would be no possibility to turn to a national court for the setting aside of the award. Equally, it would be important to shield the decisions of the appeal tribunal from review by national courts. Any other solution would lead to an undesirable situation of competing and possibly conflicting appeals procedures.<sup>79</sup>

### (c) Preliminary Rulings

An appeals facility is not necessarily the best mechanism to achieve coherence and consistency in the interpretation of investment treaties. Appeal presupposes a

<sup>78</sup> ICSID Secretariat, 'Suggested Changes to the ICSID Rules and Regulations' (Working Paper, 12 May 2005).

<sup>79</sup> For a fuller discussion, see Qureshi, 'An Appellate System in International Investment Arbitration?' ch 28 above.



decision that will be attacked for some alleged flaw in order to be repaired. Rather than try and fix the damage after the fact through an appeal, it is more economical and effective to address it preventively before it even occurs.

A method to secure coherence and consistency that has been remarkably successful is to allow for preliminary rulings while the original proceedings are still pending.<sup>80</sup> Under such a system, a tribunal would suspend proceedings and request a ruling on a question of law from a body established for that purpose. This procedure has been very successfully used in the framework of the European Community to secure the uniform application of European Community Law by domestic courts. It is contained in Article 234 (formerly 177) of the Treaty establishing the European Community<sup>81</sup> and provides for preliminary rulings by the European Court upon the request of domestic courts.<sup>82</sup>

Adapted to investment arbitration, this method could provide for an interim procedure whenever a tribunal is faced with a fundamental issue of investment treaty application, a situation where it wants to depart from a decision by a previous tribunal, or where there are previous conflicting decisions. In such a situation, the tribunal might be required to suspend proceedings and request a ruling from the central decision-maker. Once that ruling has been forthcoming the original tribunal would continue its proceedings. This method promises to be successful at warding off inconsistency and fragmentation.

A number of details would have to be worked out. One is under what circumstances a tribunal would request a preliminary ruling and whether it would be

<sup>80</sup> The idea has been put forward before: see G Kaufmann-Kohler, 'Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are there Differences?' in Gaillard and Banifatemi, above n 72. See also G Kaufmann-Kohler, 'In Search of Transparency and Consistency: ICSID Reform Proposal', 2(5) TDM (2005) at 8.

<sup>81</sup> Treaty Establishing the European Community, Article 234:

The 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 Court of Justice.

<sup>82</sup> From among the numerous writings on preliminary rulings under the EC Treaty, see eg M Andenas (ed), *Article 177 References to the European Court—Policy and Practice* (London, Butterworths, 1994); D Anderson, *References to the European Court* (London, Sweet & Maxwell, 1995); A Dashwood and A Johnston (eds), *The Future of the Judicial System of the European Union* (Oxford, Hart, 2001); G De Búrca and JHH Weiler (eds), *The European Court of Justice* (Oxford and New York, Oxford University Press, 2001).

under an obligation to do so. Another would be whether these rulings would bind the tribunal or would merely constitute recommendations. Not least, the composition of a body charged with giving preliminary rulings would need to be discussed.

Preliminary rulings would leave Article 53 of the ICSID Convention untouched. They would not affect the principles of expediency and finality, two of the chief assets of arbitration. And they would help to prevent the development of inconsistencies rather than create a costly and time-consuming repair mechanism.

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