

Conflicting Decisions in International Arbitration

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Abstract

There has been much discussion recently, both in academic and practitioner circles, about inconsistency in international arbitration. The debate has concentrated on specific topics such as contradictory arbitral awards, the precedential value of arbitral awards, the creation of an appeal system, or the need for increased transparency. The present study argues that such debate has overlooked the fact that some, and perhaps most, of the perceived problems are a reflection of the underlying values that make international arbitration appealing to international economic actors. Specifically, the authors argue that instead of concentrating on far-reaching reforms, commentators should focus on refining currently existing techniques to deal with conflicting decisions in international arbitration.

Keywords

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There has been much discussion in recent times about potentially conflicting awards in the field of international arbitration.¹ One major focus of

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¹ A symposium organized by the International Arbitration Institute in December 2007 on “Precedent in International Arbitration” was very much concerned with the issue of contradiction and consistency. The discussion on contradictory awards has, as a rule, been undertaken from a number of more specific perspectives such as parallel proceedings and/or consolidation, *lis pendens* and *res judicata*, the precedential value of previous awards, etc. The relevant literature will be reviewed later in this study.

this discussion concerns the conflicting awards rendered in two ICSID arbitrations, namely *CMS v. Argentina*² and *LG&E v. Argentina*.³ The two tribunals reached, indeed, opposite conclusions on the availability of the necessity defense despite the factual and legal similarities of the two cases.⁴ However, the discussion is not limited to this prominent example of contradictory decisions. Issues such as the use and impact of precedent, the creation of an appeal system or the enhancement of transparency, to name but a few, have also been largely discussed by both academics and practitioners of international arbitration.

This is understandable. The existence of conflicting decisions may threaten the legal predictability required by international business transactions. Admittedly, there is no way to entirely eliminate uncertainty in such transactions. It is all a matter of degree. The real question is therefore whether the phenomenon of contradictory decisions makes international arbitration as a dispute settlement mechanism a risky choice and, if so, what can be done about it. The purpose of this piece is to gather the insights derived from a wide range of topics where the issue of contradiction has arisen in order to provide a more general appraisal of the reasons explaining conflicting decisions in international arbitration as well as the mechanisms that can (or could) be used to handle them.

As we will try to show, a pragmatic assessment of this phenomenon suggests that at least part of the risk is linked to what the parties actually expect from international arbitral proceedings in terms of enhanced confidentiality, flexibility and expediency, and that such risk can be reduced through a number of techniques most of which are already in use in the

² See *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/08 (United States/Argentina BIT), Award of 12 May 2005 (hereafter “CMS Award”), Annulment Decision of 25 September 2007 (hereafter “CMS Annulment”).

³ See *LG&E v. Argentina*, ICSID Case No. ARB/02/1 (United States/Argentina BIT), Decision on liability of 3 October 2006 (hereafter “LG&E Liability”), Damages Award of 25 July 2007 (hereafter “LG&E Damages”).

⁴ On this discussion see: D. Foster, ‘Necessity Knows No Law!': *LG&E v. Argentina*, 9/6 *International Arbitration Law Review*, (2006) 149 ff; J. Fourret, *CMS c/ LG&E ou l'état de nécessité en question*, 2, *Revue de l'arbitrage*, (2007) 249 ff; A. Reinisch, Necessity in International Investment Arbitration: An Unnecessary Split of Opinions in Recent ICSID Cases?, 8/2, *Journal of World Investment & Trade*, (2007) 191 ff; S.W. Schill, International Investment Law and the Host State's Power to Handle Economic Crises: Comment on the ICSID Decision in *LG&E v. Argentina*, 24/3, *Journal of International Arbitration*, (2007) 265 ff; J.E. Viñuales, State of Necessity and Peremptory Norms in International Investment Law, 14/1 *Law and Business Review of the Americas*, (2008) 79 ff.

trade. In order to understand how these techniques operate (III), it is first useful to circumscribe the basic types of conflicts (I) as well as the main reasons why they may arise (II).

I. Basic Types of Contradiction

Let us begin the discussion with the most intuitive type of contradiction, i.e. that between two awards rendered with regard to similar factual and legal backgrounds. We shall refer to this hypothesis as a “contradiction *stricto sensu*”. Three requirements must be satisfied for a contradiction *stricto sensu* to exist: a similar set of facts actually established, the same governing law, and conflicting legal conclusions in at least one of the issues raised.⁵ Conflicts may also arise, more generally, even in the absence of this exacting characterization. Indeed, arbitral tribunals often resort, as the case may be, to general principles of law, customary principles or principles of *lex mercatoria*⁶ in cases involving legal relationships otherwise governed by the laws of different countries.⁷ If the tribunals reach different interpretations of such principles, the conflicting effects of such interpretations from one case to the other may amount to a contradiction *lato sensu*.

⁵ When the same parties are involved in the two disputes, then there is an identity of disputes and contradiction is normally avoided by the application of the *lis pendens* rule. Such case is merely one among several other types of situations encompassed under the hypothesis of “contradiction *stricto sensu*”. When the parties to the two disputes are not related in any relevant way, as in the *CMS Award* and *LG&E Liability*, there is still a conflict capable of impairing legal predictability. A particularly difficult case, also encompassed by the hypothesis of contradiction *stricto sensu*, is when the parties to the two disputes are indeed related in relevant ways. On this point see our discussion of *lis pendens* and *res judicata infra* section II.

⁶ On this topic, see the seminal contributions of: B. Goldman, *Frontières du droit et lex mercatoria*, *Archives de philosophie du droit* (1964) 177 ff; B. Goldman, *La lex mercatoria dans les contrats et l'arbitrage internationaux: réalités et perspectives*, *Journal de droit international*, (1979) 475 ff; B. Goldman, *Nouvelles réflexions sur la lex mercatoria*, in C. Dominicé, R. Patry, Cl. Reymond (eds.), *Etudes de droit international en l'honneur de Pierre Lalive*, Helbing & Lichtenhahn, Basle, 1993, pp. 241–255. For a contemporary restatement of the idea of a *lex mercatoria* see F. Marrella, *La Nuova Lex Mercatoria. Principi UNIDROIT ed Usi dei Contratti del Commercio Internazionale*, CEDAM, Padua, 2003.

⁷ For an overview of the law applicable to international investment disputes see: Ch. Leben, *La théorie du contrat d'Etat et l'évolution du droit international des investissements*, *Recueil des cours de l'Académie de droit international de La Haye*, vol. 302, 2003, chapter 2, section I, pp. 264 ff. and references cited therein.

The differing conclusions reached on the issue of necessity in the *CMS* and *LG&E* awards⁸ provide a clear illustration of the potentially disruptive effect entailed by such contradiction. As a reaction to the economic crisis which unfolded from late 1999 onwards in Argentina, the government decided to suspend US PPI⁹ tariff adjustment and freeze gas distribution tariffs.¹⁰ These measures led a number of US investors active in the gas sector, including CMS Gas Transmission Company (CMS) and LG&E Energy Corporation, to start arbitration proceedings under the aegis of ICSID. In both the *CMS* and the *LG&E* cases the Argentine government claimed to be under a state of necessity under both Argentine law and international law (US-Argentina BIT and customary international law). In both cases, the law governing the issue of necessity was therefore essentially the same. The two tribunals reached, however, conflicting decisions, for whereas the *CMS* Award rejected necessity, the *LG&E* Award partially admitted it. 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. One could see in such contradictory awards a potentially substantial loss in terms of predictability in investment arbitrations.

In order to understand how these types of conflicts might be handled in practice, it appears useful to inquire first into the possible reasons why such conflicts may arise.

II. Reasons Explaining Conflicting Decisions

Conflicting decisions may be explained by a number of reasons the importance of which varies depending on the type of arbitration (commercial or investment arbitration).¹¹

⁸ Other decisions may also serve to illustrate this point. Indeed, some decisions may assert potentially contradictory principles although the facts under review differ considerably. See, for instance, the different stances as to the scope of umbrella clauses, most favored nation clauses and fair and equitable treatment, adopted in a number of recent arbitral awards, cf. G. Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23/3, *Arbitration International* (2007) 369–373.

⁹ United States Price Producer Index (US PPI).

¹⁰ As the crisis got worse, more restrictive reforms were subsequently adopted by the Argentine government, in particular a decree imposing controls on foreign exchange.

¹¹ A terminological distinction is frequently made between commercial arbitration (private-to-private arbitration) and investment arbitration (mixed or investor-State arbitration).

A first reason – and probably the decisive reason – accounting for conflicting decisions is that there is *no formal rule of precedent* in international (commercial or investment) arbitration.¹² In other words, although arbitral tribunals may be well advised to search for relevant precedents in order to buttress their argumentation, they are not legally bound by the solutions given in such precedents. The difference between the stances taken by the arbitral tribunals in *CMS* and *LG&E* may be seen as a good illustration of the consequences of the absence of a formal rule of precedent. The *LG&E* tribunal did not even feel the need to refer in its award on liability to the *CMS* Award, despite the great similarity between the two cases. This is not to say that, in practice, arbitral tribunals disregard altogether what other tribunals and/or international jurisdictions have said. We will deal with this issue later on, under section III(A) of this piece.

A second reason possibly explaining contradiction both *stricto sensu* and *lato sensu* is the *absence of an appeal system* or a system of material review in all the major institutions offering arbitration services.¹³ Aside from the question of whether or not such proceedings would be desirable or even feasible, they would certainly enhance consistency among awards rendered under the rules of such institutions. Although there are some (diverse) mechanisms that allow for some form of scrutiny of arbitral awards, either before or after they are officially rendered, such as the one laid out in Article 27 of the ICC Rules of Arbitration,¹⁴ the annulment procedure under Article 52 of the ICSID Convention,¹⁵ or the grounds for denying recognition and enforcement of a foreign award under Article V of the New York Convention,¹⁶ these can certainly not be considered appeal mechanisms or even harmonizing procedures. The decision of the Annulment Committee in *CMS*¹⁷ offers a good example of this latter point. Argentina argued, among others, that the *CMS* tribunal “contradicted

¹² See R. Dolzer, C. Schreuer, *Principles of International Investment Law*, Oxford University Press, Oxford, 2008, pp. 35–37 and the numerous references cited therein; G. Kaufmann-Kohler, *Arbitral Precedent...*, pp. 361 ff.

¹³ For a penetrating overview of control systems (as distinct from appeal systems) in international arbitration see: M. Reisman, *Systems of Control in International Adjudication and Arbitration*, Duke University Press, Durham/London, 1992, especially chapters 3 and 4.

¹⁴ See *infra* section III (E).

¹⁵ See *infra* section III (E).

¹⁶ See *infra* section III (E).

¹⁷ *CMS* Annulment, see *supra* footnote 2.

itself in deciding that no expropriation had taken place and in using the standard of compensation applicable in case of expropriation”.¹⁸ Indeed, in a former NAFTA case, an arbitral tribunal had discarded fair market value as the measure of damages applicable in case of a non-expropriation finding.¹⁹ The *ad hoc* Committee was not entitled to harmonize the conflicting findings in these two cases, nor did it attempt to do so. It merely stated that the *CMS* tribunal had provided an explanation of why the fair market value measure was nevertheless applicable in the matter under review.²⁰ In the meantime, an award on damages rendered in the *LG&E* case a few months before the decision of the *ad hoc* Committee had again taken the stance that fair market value could not serve as the measure of damages in that case, despite its similarities with the *CMS* case.²¹

A third possible reason, this time only relevant for contradiction *lato sensu*, relates to *differences in the governing law* from one case to the other. Two arbitral tribunals may reach differing conclusions in factually similar cases if the applicable law is different. For instance, there seems to be a cleavage in the interpretation of umbrella clauses in bilateral investment treaties (BITs).²² Decisions such as *SGS v. Pakistan*, *El Paso v. Argentina* or *Pan American v. Argentina*, which assert the principle that umbrella clauses cannot transform any contract claim into a treaty claim,²³ conflict with the more extensive interpretation of such clauses provided in cases such as

¹⁸ *Ibid.*, para. 152.

¹⁹ *Feldman (Marvin) v. Mexico*, ICSID Case No. ARB (AF)/99/1 (NAFTA), Award of 16 December 2002, para. 194.

²⁰ *CMS Annulment*, paras. 151–157.

²¹ *LG&E Damages*, para. 35. The tribunal took note, however, of the differing approach followed in *CMS* and sought to explain such divergence by mentioning, without any further development: “The tribunal in *CMS v. Argentina* noted that ‘While this standard [FMV] figures prominently in respect to expropriation, it is not excluded that it might also be appropriate for breaches different from expropriation if their effect results in important long-term losses’ (...) With respect to *CMS*, the Tribunal is of the view that ‘important long-term losses’ in the circumstances of this case are too uncertain and have not been adequately proven,” *Ibid.*, para. 39.

²² See G. Kaufmann-Kohler, *Arbitral Precedent...*, pp. 369–370.

²³ See *SGS Société Générale de Surveillance SA v. Pakistan*, ICSID Case ARB/01/13, Decision on Jurisdiction of 6 August 2003, paras. 163–174 (hereafter “*SGS v. Pakistan*”); *El Paso Energy International Co. v. Argentina*, ICSID Case ARB/03/15, Decision on Jurisdiction of 27 April 2006, para. 82; *Pan American Energy LLC and BP Argentina Exploration Company v. Argentina*, ICSID Case No. ARB/03/13, Decision on Jurisdiction of 27 July 2006, paras. 112–115, referred to in *ibid.*, p. 369.

Eureko v. Poland or *Noble Ventures v. Romania* according to which umbrella clauses transform municipal law obligations into international law obligations.²⁴ The law applicable to each of these disputes is certainly not the same. As a matter of fact, in at least some of these cases the tribunals largely grounded their reasoning on the specific wording of a BIT provision.²⁵ However, the general views that can be derived from the reading of a specific provision may produce a phenomenon of contagion (positive or negative). As noted by Dolzer and Schreuer with reference to *SGS v. Pakistan*: “For a while, it seemed as if *SGS v. Pakistan* would remain an isolated decision. But the decision was supported to some extent in 2006 by two nearly identical decisions, in *El Paso v. Argentina* and in *Pan American v. Argentina*”.²⁶ Thus, an at first case-specific reasoning may generalize and give rise to a divergent and potentially conflicting jurisprudential strand. The two sets of decisions as to the way umbrella clauses should operate are indeed in conflict. One may, of course, argue that no contradiction has so far been detected on this specific point in the interpretation of the same BIT. However, such stricter contradiction cannot be ruled out, as shown (albeit on a different point of law) by the *CMS* and *LG&E Awards*, which both refer to the Argentina-US BIT.

A fourth possible reason explaining contradictory decisions is the *confidentiality* which characterizes commercial and to a lesser extent investment arbitration proceedings. The basic point which may be made in this regard is that limitations imposed on the publication of arbitral awards foster incoherence between decisions. We will come back to this point later on.

²⁴ See *Eureko BV v. Poland*, Ad hoc – UNCITRAL Arbitration Rules, Partial Award of 19 August 2005, para. 250; *Noble Ventures Inc v. Romania*, ICSID Case No. ARB/01/11, Award of 12 October 2005, paras. 60–61, referred to in *Idem*.

²⁵ See, for instance, *SGS v. Pakistan*, the analysis of the wording of the relevant BIT provision conducted in paras. 163–171. At para. 173, the tribunal recognizes that a different wording may lead to a different conclusion: “The Tribunal is not saying that States may not agree with each other in a BIT that henceforth, all breaches of each State’s contracts with investors of the other State are forthwith converted into and to be treated as breaches of the BIT. What the Tribunal is stressing is that in this case, there is no clear and persuasive evidence that such was in fact the intention of both Switzerland and Pakistan in adopting Article 11 of the BIT. Pakistan for its part in effect denies that, in concluding the BIT, it had any such intention. *SGS*, of course, does not speak for Switzerland. But it has not submitted evidence of the necessary level of specificity and explicitness of text. We believe and so hold that, in the circumstances of this case, *SGS*’s claim about Article 11 of the BIT must be rejected.”

²⁶ R. Dolzer, C. Schreuer, *Principles of International Investment Law* . . . , p. 158.

A fifth reason why contradictions may arise is the strict way in which international arbitral tribunals tend to apply the *res judicata* and *lis pendens* principles.²⁷ The parallel and yet divergent awards rendered in *Lauder v. Czech Republic*²⁸ and *CME v. Czech Republic*²⁹ offer a good illustration of this point. Ronald Lauder, an American citizen, held some 30% of shares of CME, a Netherlands company, which in turn held 99% of the shares of a Czech TV company (CNTS). After the Czech government revoked CNTS' TV license, both Lauder and (some six months later) CME started arbitration proceedings against the Czech Republic, based on the US-Czech Republic BIT and the Netherlands-Czech Republic BIT respectively. Lauder's claims were all dismissed by a tribunal based in London while a Stockholm-based tribunal awarded substantial damages to CME. Despite the similarity of the two matters (including the similarity of content of the two BITs involved), the *CME* tribunal disregarded the arguments of *lis pendens* and *res judicata* raised by the Czech government, on the grounds that not only had the Respondent waived these two arguments but, in addition, the conditions for the admissibility of *res judicata* were not met, in particular because the parties to the two disputes were not the same.³⁰ This stance was later confirmed by a Swedish Court of Appeal³¹

²⁷ Both *res judicata* and *lis pendens* have been considered "general principles of law" in the sense of Article 38 para. 1 letter c) of the ICJ Statute. On these two principles see: N. Gallagher, *Parallel Proceedings, Res Judicata and Lis Pendens: Problems and Possible Solutions*, in L.A. Mistelis, J.D.M. Lew (eds.), *Pervasive Problems in International Arbitration*, Kluwer, The Hague, 2006, pp. 329–356.

²⁸ *Lauder v. Czech Republic*, Ad hoc – UNCITRAL Arbitration Rules, Final Award of 3 September 2001.

²⁹ *CME Czech Republic BV v. Czech Republic*, Ad hoc – UNCITRAL Arbitration Rules, Partial Award of 13 September 2001 and IIC 62 (2003), Final Award of 14 March 2003.

³⁰ The Tribunal notes, in paragraph 432 of the Award of 14 March 2003, that: "The Tribunal further is of the view that the principle of *res judicata* does not apply in favour of the London Arbitration for more than one reason. The parties in the London Arbitration differ from the parties in this arbitration. Mr. Lauder is the controlling shareholder of CME Media Ltd, whereas in this arbitration a Dutch holding company being part of the CME Media Ltd Group is the Claimant. The two arbitrations are based on differing bilateral investment treaties, which grant comparable investment protection, which, however, is not identical. Both arbitrations deal with the Media Council's interference with the same investment in the Czech Republic. However, the Tribunal cannot judge whether the facts submitted to the two tribunals for decision are identical and it may well be that facts and circumstances presented to this Tribunal have been presented quite differently to the London Tribunal."

³¹ *Czech Republic v. CME Czech Republic BV*, Svea Court of Appeal, Case no. T 8735-01, Decision of 15 May 2003.

on similar grounds.³² A less strict interpretation of the doctrines of *lis pendens* and *res judicata*, taking into account the relationship between the claimants in each dispute, might have led to a different outcome, and probably a more consistent one. Beyond the particular case of *CME*, in which other arguments also favored the conclusions of the tribunal, the basic point is that a strict interpretation of these two doctrines would favor parallel proceedings and thus increase the probability of contradictions *stricto sensu*. This can be further illustrated by our next reason possibly accounting for conflicting decisions.

Indeed, a sixth reason, which is closely related to the preceding one, can be derived from the implications of the relatively recent distinction between treaty claims and contract claims in international arbitration.³³ To the extent that investors can avail themselves of different *fora* to bring claims arising from the same facts but based on distinct legal grounds (breach of contract as opposed to breach of the standards of protection granted to investors under a BIT), the parallel proceedings thus initiated may lead to conflicting decisions. The strict interpretation of the doctrines of *lis pendens* and *res judicata* previously discussed may not allow, even in disputes involving the same parties, to prevent or handle such potentially contradictory decisions, insofar as the different legal grounding of the claims is viewed as sufficient to distinguish the two disputes. This latter point is also relevant to explain why forum exclusivity, such as that contemplated by Article 26 of the ICSID Convention,³⁴ or “fork-in-the-road” (“*electa una*

³² “According to Swedish law, one of the fundamental conditions for *lis pendens* and *res judicata* is that the same parties are involved in both cases. As far as is known, the same condition applies in other legal systems which recognize the principles in question. Identity between a minority shareholder, albeit a controlling one, and the actual company cannot, in the Court of Appeal’s opinion, be deemed to exist in a case such the instant one [sic]. This assessment would apply even if one were to allow a broad determination of the concept of identity”, *Id.*, p. 98, cited in N. Gallagher, *Parallel Proceedings . . .*, p. 343.

³³ On this distinction see: *Compañía de Aguas del Aconquija, S.A., Vivendi Universal v. Argentine Republic*, ICSID Case ARB/97/3, Decision on Annulment of 3 July 2002, para. 96: “In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law”. See also, R. Dolzer, C. Schreuer, *Principles of International Investment Law . . .*, pp. 217–220.

³⁴ Article 26 of the ICSID Convention states, in relevant part: “Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy”.

via”) clauses included in investment contracts or in BITs³⁵ may not be effective to prevent such contradiction from arising either.

Finally, a seventh reason one may advance to account for the occurrence of contradictory decisions is the *little use of consolidation techniques* in international arbitration.³⁶ Indeed, different parties to a same investment scheme often file separate requests for arbitration which result in different (parallel) proceedings. The aforementioned *Lauder* and *CME* cases offer a good illustration of this issue as well as of some of its potential drawbacks. Aside from the inefficiency of conducting two or more arbitration proceedings addressing essentially the same dispute, parallel proceedings may lead to contradictory decisions. As noted by a NAFTA arbitral tribunal to justify a decision consolidating three separate cases:

The desirability of avoiding conflicting results is not limited to cases where the parties are the same. Cases with different parties may present the same legal issues arising out of the same event or related to the same measure. Conflicting results then may take place if the findings with respect to those issues differ in two or more cases.³⁷

However, consolidation remains the exception and not the rule.³⁸ The reasons for this are many and diverse. The fact that the jurisdictional basis of different disputes is often provided by different treaties tends to encourage procedural fragmentation.³⁹ Moreover, consolidation may hamper some of the

³⁵ See R. Dolzer, C. Schreuer, *Principles of International Investment Law* . . . , pp. 216–217.

³⁶ On consolidation in international arbitration see the four contributions published in: *ICSID Review*, Vol. 21, No. 1, Spring 2006.

³⁷ *Canfor Corporation v. United States of America, Tembec. et al. v. United States of America, Terminal Forest Products Ltd. v. United States of America*, Order of the Consolidation Tribunal, of 7 September 2005, para. 133. (usually referred to as the “Softwood Lumber Cases” or *Canfor, Tembec, Terminal v. United States*).

³⁸ See G. Kaufmann-Kohler, L. Boisson de Chazournes, V. Bonnin, M.M. Mbengue, *Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?*, 21(1) *ICSID Review*, (2006) 80.

³⁹ As noted by Antonio Parra: “With the breadth and proliferation of such treaty consents, there is greater likelihood of different arbitration proceedings being initiated, by covered investors against their host States, in relation to the same or similar issues, events or circumstances”, A. Parra, *Desirability and Feasibility of Consolidation: Introductory Remarks* 21(1) *ICSID Review*, (2006) 132.

advantages of international arbitration, including expediency,⁴⁰ flexibility⁴¹ and confidentiality,⁴² as well as, more generally, the autonomy of the parties.⁴³

This latter point serves as a transition to a more general consideration, which is relevant for the seven reasons so far identified. These reasons possibly explaining the occurrence of conflicting decisions in the field of international arbitration partly reflect the specific conditions in which international jurisdictions operate in general⁴⁴ and international arbitral tribunals in particular. Indeed, the specificity of a procedure is often due to the choices made by the parties, either beforehand or throughout the arbitral proceedings. The main users of international arbitration proceedings may not be willing to enhance legal certainty and the predictability of the procedures' outcomes if that considerably impairs the confidentiality, flexibility and expediency which the international arbitration system is expected to provide. The question thus becomes: what can be done to minimize the probability of contradictory decisions overall, without jeopardizing the core values underlying international arbitration?

⁴⁰ Because of its higher complexity, a consolidated proceeding may take longer than the proceeding initiated by a single party. This is especially the case if the different claimants have conflicting procedural strategies, G. Kaufmann-Kohler, L. Boisson de Chazournes, V. Bonnin, M.M. Mbengue, *Consolidation of Proceedings*..., p. 83.

⁴¹ Consolidation may, for instance, deprive the parties of the possibility of choosing their own arbitrators, as argued by Canfor in the context of the consolidation initiative in the *Softwood Lumber* case, see *Order of the Consolidation Tribunal*, of 7 September 2005, para. 33.

⁴² This issue was raised by Canfor, Tembec and Terminal in the *Softwood Lumber* cases, see *Order of the Consolidation Tribunal*, of 7 September 2005, paras. 35, 47, 53. See, more generally: G. Kaufmann-Kohler, L. Boisson de Chazournes, V. Bonnin, M.M. Mbengue, *Consolidation of Proceedings*..., p. 84; M. Platte, When Should an Arbitrator Join Cases?, *Arbitration International*, Vol. 18, No. 1, 2002, p. 78.

⁴³ See, Y. Shany, Consolidation and Tests for Application: Is International Law Relevant?, 21(1) *ICSID Review*, (2006) 135–136.

⁴⁴ As noted by the International Criminal Tribunal for the Former Yugoslavia in the famous *Tadic* case: "International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided)", *Prosecutor v. Tadic* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 11, see N. Gallagher, *Parallel Proceedings*..., p. 332. Unlike international arbitral tribunals, the ICTY benefited from an appeal system to provide coherence to the tribunal's case-law.

III. Dealing with Conflicting Decisions

In practice, arbitration institutions and tribunals, as well as state courts (in their capacity as supporting or review mechanisms), have developed a number of techniques which considerably reduce the probability of conflicting decisions or help manage them when they arise, while seeking to preserve the values of confidentiality, flexibility and expediency underlying international arbitration.

In what follows, we will discuss some of these techniques paying attention to their advantages and disadvantages in light of the main values underlying international arbitration as identified above. Of course, this discussion is neither meant to be exhaustive nor to provide a detailed presentation of each mechanism. Our goal is simply to show that there are, in fact, a number of techniques currently in use which considerably reduce the probability and/or the negative effects of contradictory decisions.

A. *Precedential Value*⁴⁵

Few things are as useful as a good precedent to buttress a party's legal argument or to add legitimacy to the holding of an arbitral tribunal or a state court. This golden rule is true not only in those legal systems in which precedents are legally binding, but also in systems where previous decisions are not a formal source of law as such.⁴⁶ In such systems, precedents often serve as instruments of persuasion that both litigants and adjudicators would be eagerly looking for. From a more general perspective, following precedents would improve the probability that the same legal principles are uniformly applied in similar cases and over time.⁴⁷

Arbitral tribunals are naturally reluctant to adopt ungrounded or hazardous stances when deciding a case. In this regard, precedents are extremely

⁴⁵ On this issue see: G. Kaufmann-Kohler, *Arbitral Precedent...*, *supra* footnote 8.

⁴⁶ The international legal order is such a system where precedents are not legally binding. Article 38(1)(d) of the Statute of the International Court of Justice states: "subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." The idea that judicial decisions have no binding power beyond the matter decided is even clearer in light of Article 59 of the same Statute: "The decision of the Court has no binding force except between the parties and in respect of that particular case." On this issue, see: J. Barberis, *Fuentes del Derecho Internacional*, Editora Platense, Buenos Aires, 1973, pp. 263 ff.

⁴⁷ See *infra* III (B).

useful, for they allow arbitral tribunals to adhere to a relatively settled legal solution. However, the existence of a relatively settled solution supposes a case in which such a solution was first retained. Under the doctrine of *stare decisis*, such case would constitute an original precedent, namely one “that creates and applies a new legal rule”.⁴⁸ Absent a formal rule of precedent in international investment⁴⁹ arbitration and in most systems of international commercial arbitration, such cases constitute persuasive precedents. As stated 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.⁵⁰

Moreover, it has been empirically established that investment tribunals, at least those constituted under the aegis of ICSID, increasingly refer to previous decisions of other international jurisdictions, in particular those of other ICSID tribunals.⁵¹ Whether a similar trend exists in the field of international commercial arbitration is far less clear.⁵²

⁴⁸ See the entry “Precedent” of the *Black’s Law Dictionary* (second pocket edition), West Group, St. Paul, MN, 2001 (hereafter “Black’s Law Dictionary”).

⁴⁹ This is clearly stated in Article 53(1) of the ICSID Convention, according to which: “The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.”

⁵⁰ See *Saipem v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures of 21 March 2007, para. 67 (footnotes omitted). Interestingly enough, the WTO Appellate Body has recently referred to this decision to buttress its own view that “absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case”, US-Final Anti-Dumping Measures on Stainless Steel, WT/DS344/AB/R, Report of 30 April 2008, para. 160.

⁵¹ For a detailed study of cross-referencing among ICSID tribunals see: J. Commission, Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence, 24(2) *Journal of International Arbitration* (2007) 129–158.

⁵² See G. Kaufmann-Kohler, *Arbitral Precedent* . . . , pp. 362–365, 373.

B. Harmonization Through Principles

When a settled solution acquires some generality, one may speak of a principle. In international law, the concept of principles is as pervasive as it is ambiguous.⁵³ The term principles may essentially refer to “general principles of law”, which is an autonomous source of international law,⁵⁴ or to “principles of international law”, a term which is itself ambiguous. On the one hand, one may speak of “principles of international law” with respect to fundamental international norms such as the sovereign equality of States, non-intervention in the internal affairs of other States, prohibition of the threat or the use of force, permanent sovereignty over natural resources, etc.⁵⁵ On the other hand, “principles of international law” are often equated to that of “rules of international law”. The law applied by international arbitral tribunals abounds in such principles, the formal source of which often remains unclear.⁵⁶

Principles are relevant beyond the applicability of any particular legal order to a specific dispute.⁵⁷ They summarize and organize the different solutions retained throughout the years by different tribunals and set fron-

⁵³ On the concept of principles see: M. Virally, *Le rôle des “principes” dans le développement du droit international*, in M. Virally, *Le droit international en devenir*, PUF/IUHEI, Paris/Genève, 1990, pp. 195–212.

⁵⁴ See Article 38(1)(c) of the Statute of the International Court of Justice.

⁵⁵ See, A. Cassese, *International Law*, Oxford University Press, New York, 2001, chapter 5; N. Schrijver, *Sovereignty Over Natural Resources*, Cambridge University Press, Cambridge, 1997, p. 3.

⁵⁶ Technically, such principles may amount to general principles of law, international customary law or treaty law. But the idea of principles of international law is not, as such, a formal source of law.

⁵⁷ Under Article 42(1) of the ICSID Convention, the composite character of the law applicable to a dispute allows for such principles to play a major role: “The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable”. As noted by Schreuer: “This passage of Art. 42(1) contains a curious discrepancy between the English and Spanish texts of the Convention on one side and the French text on the other. Whereas the English text speaks of ‘rules of international law’ (Spanish ‘normas de derecho internacional’), the French text speaks of ‘principes de droit international’ which would be better translated as ‘principles of international law’ and would indicate a higher level of generality and abstraction (...) The difference between rules and principles of international law does not seem to have created major difficulties for tribunals...”, C. Schreuer, *The ICSID Convention: A Commentary*, Cambridge University Press, Cambridge, 2001, paras. 103–104 and Art. 42.

tiers to the relevance of a given solution or line of cases.⁵⁸ The development of principles is therefore an important tool for enhancing the coherence of a body of law such as international investment law, and one could even argue that the emergence of principles may give rise to an autonomous body of law, such as the *lex mercatoria*.⁵⁹

Let us take one example in the field of investment arbitration to explore how this mechanism works in practice.⁶⁰ One important legal issue in this field concerns the standards of compensation applicable for claims other than expropriation. Indeed, arbitral tribunals have diverged on whether or not the standard of fair market value used in assessing expropriation damages can be applied to damages based on a breach of the fair and equitable treatment or the full protection standards. An earlier decisions, based on NAFTA chapter eleven, followed a restrictive approach, excluding the use of fair market value in such cases.⁶¹ This approach has been countered by a strand of recent awards rendered against Argentina, which have all considered that fair market value was the appropriate standard of compensation even in the absence of expropriation.⁶² A solution to what, at first, may amount to contradiction has been recently proposed in the award on damages rendered in the *LG&E* case.⁶³ In order to justify its decision not to use the fair market value standard for assessing the damage suffered by LG&E, the arbitral tribunal was compelled to explain why it did not intend to follow the

⁵⁸ See D. Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology, *Journal of Legal Education*, Vol. 36, 1986, pp. 518–562.

⁵⁹ See *supra* footnote 6.

⁶⁰ This mechanism is less apparent in international commercial arbitration. There has been much discussion since the 1960s about the existence of a sort of transnational law stemming from the awards of international arbitral tribunals. It is however unclear what was the impact of precedents in the development and shaping of principles. A recent study concludes that “there is no meaningful precedential value of awards in commercial arbitration”, G. Kaufmann-Kohler, *Arbitral Precedent...*, p. 373. A possible reason for the differences in the value of precedents between the areas of investment and commercial arbitration is that, in investment arbitration, the applicable law is more comparable from one case to the other, as a major component of the set of rules applied by arbitral tribunals stems from international law. This is far less clear in international commercial arbitration.

⁶¹ See *Feldman (Marvin) v. Mexico*, ICSID Case No. ARB(AF)/99/1 (NAFTA), Award of 16 December 2002, para. 194.

⁶² See *CMS Award*, para. 410; *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12 (United States/Argentina BIT), Award of 14 July 2006 (hereafter “*Azurix*”), para. 424; *Enron and Ponderosa Assets v. Argentina*, ICSID Case No. ARB/01/3, Award of 22 May 2007, para. 361; *Sempra Energy v. Argentina*, ICSID Case No. ARB/02/16, Award of 28 September 2007, para. 404.

⁶³ See *LG&E Damages*, *supra* footnote 3.

solutions adopted in the *Azurix*⁶⁴ and *CMS*⁶⁵ cases. In this regard, the tribunal noted that:

...when addressing the question of the absence of applicable treaty compensation standards for breaches other than expropriation, recent tribunals have opted to apply FMV. Yet, their decisions were grounded on the correspondence between the situation under analysis and expropriation. In *Azurix v. Argentina* the tribunal decided that ‘compensation based on the fair market value of the Concession would be appropriate, particularly since the Province has taken it over’. The tribunal in *CMS v. Argentina* noted that ‘While this standard [FMV] figures prominently in respect to expropriation, it is not excluded that it might also be appropriate for breaches different from expropriation if their effect results in important long-term losses’. The Tribunal considers that the situation in *Azurix* is different from that of *LG&E* because the Licenses, the main asset of the Licensees, are still in force. With respect to *CMS*, the Tribunal is of the view that ‘important long-term losses’ in the circumstances of this case are too uncertain and have not been adequately proven.⁶⁶

A rationale is thus offered to make contradiction only apparent, to the extent that the difference in the applicable standard of compensation is derived from a conceptualization of two sets of factual hypothesis, each governed by a different rule. Harmonization would thus be the result of an effort to circumscribe the scope of operation of a rule. Another example of this same mechanism is given by the apparently contradictory stances adopted in *Maffezini*⁶⁷ and *Plama*⁶⁸ with respect to the applicability of the MFN clause to dispute resolution clauses.⁶⁹ A broader principle may make

⁶⁴ See *Azurix*, *supra* footnote 62.

⁶⁵ See *CMS Award*, *supra* footnote 2.

⁶⁶ *LG&E Damages*, para. 39.

⁶⁷ *Emilio Agustín Maffezini v. Spain*, ICSID Case No. ARB/97/17, Decision on Jurisdiction, 25 January 2000, para. 63, referred to in G. Kaufmann-Kohler, *Arbitral Precedent...*, p. 370.

⁶⁸ *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, para. 184 ff., referred to in *Idem*.

⁶⁹ In *Maffezini*, the applicable arbitration clause contained a requirement that the investor resort to the host State’s courts for 18 months before starting arbitration proceedings. The tribunal disregarded this requirement through the operation of a most-favoured-nation (MFN) clause which allowed the investor to avail itself of a less burdensome arbitration clause “imported” from

sense of the solutions given in both cases, although such a broader principle has yet to be asserted by an arbitral tribunal.⁷⁰

Hence, in the long term, contradiction may be solved by the reorganization of contradictory solutions under broader principles capable of making sense of either solution. In turn, this harmonizing mechanism further contributes to the development of a relatively uniform set of principles applicable in international investment disputes, irrespective of the specific legal instruments by which a dispute is governed.⁷¹ Thus, the development of principles is a very useful mechanism for reducing inconsistency and improving legal predictability at the level of the international arbitration regime as a whole.

C. *Public Availability of Decisions*

The public availability of decisions admits different degrees and may be achieved by a number of techniques. The more basic technique is, of course, the publication of awards in some easily accessible (electronic or printed) format. Another technique may be through legal commentaries or doctrinal works referring to decisions that have not been published and/or have been rendered in foreign languages not usually spoken by the arbitration community. Still another possible technique may consist of granting limited intervention to third parties acting, for instance, as *amici curiae*.⁷² Such intervention may be useful to draw the attention of the

another BIT signed by the host State. Conversely, in *Plama*, the tribunal refused to import into the BIT between Bulgaria and Cyprus (which does not provide for investor-state arbitration) the arbitration clause contained in another BIT on the basis of an MFN clause.

⁷⁰ As noted by Kaufmann-Kolher: "... in theory there appears to be a clear distinction between the two schools. In practice, however, I would submit that they can easily be reconciled. Indeed, in actual application, they can be combined without conflicting. The rule that appears to emerge from this combination is the following: MFN clauses can be used to overcome waiting periods and similar admissibility requirements, but not to replace, in whole or in part, the dispute resolution mechanism provided in the treaty upon which jurisdiction is based", G. Kaufmann-Kohler, *Arbitral Precedent* ..., p. 371.

⁷¹ Moreover, the wider the scope of precedents that require reorganization, the larger the parcel of international law that may become harmonized. In the example of the standards of compensation, the decisions which were reorganized in *LG&E* had been rendered in the context of NAFTA and of a number of BITs. Thus, the reorganizing rationale may result in a harmonization of standards of compensation for non-expropriation claims both under NAFTA chapter 11 and under a number of BITs.

⁷² On this issue see: L. Boisson de Chazournes, M. Mbengue, "The amici curiae and the WTO dispute settlement system: the doors are open", 2(2) *The Law and Practice of International Courts and Tribunals*, (2003) 205–248; P. Dumberry, The admissibility of *amicus curiae* briefs by NGOs

tribunal towards decisions and/or awards that have not been referred to by the parties.⁷³

There is a significant divide between investment and commercial arbitration with respect to the publication of decisions and awards.⁷⁴ As a rule, the public availability of decisions and awards is much more developed in the context of international investment disputes than in the context of international commercial disputes. In the ICSID context, decisions and awards are most often published, with the consent of the parties, in accordance with Article 48(5) of the ICSID Convention.⁷⁵ In contrast, publication of decisions and awards in proceedings conducted under the UNCITRAL or the ICC Rules, which are both tailored for commercial disputes, is more restricted.⁷⁶

D. Consolidation-like Techniques

The techniques so far reviewed help deal with contradictory decisions at the level of the international (commercial and/or investment) arbitration as a whole. However, this does not solve the issue of the cost to achieve

in investors–States arbitration: The precedent set by the *Methanex* case in the context of NAFTA chapter 11 proceedings, 1(3) *Non-State Actors and International Law*, (2001) 201–214; D. Shelton, The Participation of Nongovernmental Organizations in International Judicial Proceedings, *American Journal of International Law*, 88/4, October 1994, pp. 611–642; B. Stern, L'entrée de la société civile dans l'arbitrage entre Etat et investisseur, in *Revue de l'arbitrage*, no. 2, 2002, pp. 329–345; J.E. Viñuales, Amicus Intervention in Investor-State Arbitration, *Dispute Resolution Journal*, November 2006 – January 2007, pp. 72–81; F. Grisel, J.E. Viñuales, L'*amicus curiae* dans l'arbitrage d'investissement: 23 *ICSID Review, Foreign Investment Law Journal* (2008) 349–401.

⁷³ This was the original function of an *amicus curiae* in the English common law tradition. See the note on Amici Curiae published in the *Harvard Law Review*, 34/7, May 1921, pp. 773–776 as well as the study by E. Angell, The Amicus Curiae: American Development of English Institutions, *International and Comparative Law Quarterly*, 16/4, 1967, pp. 1017–1044.

⁷⁴ See B. Legum, Investment Treaty Arbitration's Contribution to International Commercial Arbitration, *Dispute Resolution Journal*, August–October 2005, pp. 70 ff.

⁷⁵ Under Article 48(4) of the ICSID Arbitration Rules, the Center is further authorized to publish excerpts of the legal reasoning conducted by an arbitral tribunal, even if the parties have not consented to publication of the award.

⁷⁶ Article 32(5) of the UNCITRAL Rules subjects publication to the consent of the parties. In this regard, it must be noted that in the case of investment disputes under NAFTA, following UNCITRAL rules, publication has been extensive, including the submissions of the parties. As for the ICC context, there are no provisions in the ICC arbitration rules addressing the issue of publication. In this latter context, confidentiality is clearly the rule. See G. Kaufmann-Kohler, L. Boisson de Chazournes, V. Bonnin, M.M. Mbengue, *Consolidation of Proceedings...*, p. 78.

such consistency. The cost of tribunals' trials and errors until a principle arises as the settled solution for a particular set of facts is entirely supported by the parties who suffered the application of an inconsistent or unsettled solution. From a practical standpoint, the issue is then how to redress the situation of an investor (or contractual partner), who is treated unequally. One thing is to say that the international arbitration regime is achieving satisfactory levels of legal certainty and predictability overall. And another very different thing is to say that a party who suffers from the uncertainty entailed by the existence of contradictory decisions will be able to avail itself of a means to erase the effects of such contradiction in the matter at hand.

In order to reduce the probability of contradictory decisions in this context, a number of techniques have been developed that can be referred to as "consolidation-like techniques". These techniques range from consolidation *stricto sensu*, to mechanisms such as the joinder of third parties,⁷⁷ the adoption of interim measures protecting the tribunal's jurisdiction,⁷⁸ and the alignment of tribunals dealing with sufficiently related cases.⁷⁹ This latter technique has become more frequent in the last few years as shown by a number of related cases which have been submitted to formally different

⁷⁷ Joinder of third parties is allowed, for instance, under Article 4 of the Swiss Rules of International Arbitration or under Article 22.1.h of the LCIA Rules. However, as joinder implies that the party to be joined is not already a party to pending proceedings, its relevance for dealing with contradictory decisions is very limited. See *ibid.*, pp. 71–73.

⁷⁸ For instance, Article 1134 of NAFTA states, in relevant part, that: "A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order... to protect the Tribunal's jurisdiction". As for the ICSID context, Article 26 of the ICSID Convention states, in relevant part, that: "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy". A NAFTA or an ICSID tribunal may therefore be led to enjoin parties from pursuing proceedings on a matter already subject to the aforesaid tribunal. Thus, in *SGS Société Générale de Surveillance v. Pakistan* (ICSID Case No. ARB/01/13, Procedural Order No. 2, 16 October 2002), the arbitral tribunal recommended the stay of a local arbitral proceeding until it would have decided on its jurisdiction. This may be a way to prevent contradictory decisions from being taken in the same matter. See G. Kaufmann-Kohler, A. Antonietti, Interim Relief in IAAS, in K. Yannaca-Small (ed.), *Arbitration under International Investment Agreements: An analysis of the Key Procedural, Jurisdictional and Substantive Issues*, Oxford University Press, New York, forthcoming.

⁷⁹ See *ibid.*, pp. 65–81, identifying a number of techniques that do (or could potentially) fulfill the function of consolidation *stricto sensu*, including the *res judicata* and *lis pendens* exceptions, fork-in-the-road and waiver provisions, joinder of third parties, class arbitrations, alignment of tribunals, publication of decisions, etc.

tribunals with exactly the same composition.⁸⁰ Such a *modus operandi* has the advantage of ensuring that the tribunals deciding these cases will be mindful, when reaching a conclusion on one case, of the conclusions reached in the other related cases. On the other hand, such an approach raises some serious due process concerns as the tribunals might (informally) ground a decision on one case on information which was only submitted in the context of other related cases, as if such information had been equally submitted in the aforementioned case. In this regard, it is possible to speak of a *de facto* consolidation to the extent that different though related cases are *de facto* treated as if they were pending before the same tribunal.

When discussing the possible reasons explaining contradictory decisions, we saw that parties tend to be reluctant towards consolidation of proceedings because this may impair the flexibility, expediency and confidentiality expected from arbitration proceedings. This is why the use of techniques such as joinder of third parties or formal consolidation are rather exceptional in international arbitration. Both techniques conflict with the fundamental principle underlying international arbitration, namely that the jurisdiction of an arbitral tribunal be based on the consent of the parties. This could be mitigated by introducing some adjustments in the use of these techniques. Professor Yuval Shany has suggested, for instance, that consolidation mechanisms be laid out as “best practices” guidelines.⁸¹

E. Review-like Techniques

There are a number of mechanisms allowing for a review of an arbitral award. Depending on the specific contexts, “review-like techniques” may

⁸⁰ See for instance the *Salini and R.F.C.C. cases against Morocco* (*Salini Costruttori SpA and Italstrade v. Morocco*, ICSID Case No. ARB/00/4; *Consortium R.F.C.C. v. Morocco*, ICSID Case No. ARB/00/6), the four water concession cases against Argentina (*Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentina*, ICSID Case No. ARB/03/17; *Aguas Cordobesas S.A., Suez, and Sociedad General de Aguas de Barcelona S.A. v. Argentina*, ICSID Case No. ARB/03/18; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19; and one UNCITRAL arbitration) and the two EDF cases against Argentina (*Electricidad Argentina S.A. and EDF International S.A. v. Argentina*, ICSID Case No. ARB/03/22; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentina*, ICSID Case No. ARB/03/23), all referred to by G. Kaufmann-Kohler, L. Boisson de Chazournes, V. Bonnin, M.M. Mbengue, *Consolidation of Proceedings...*, pp. 74–75.

⁸¹ See Y. Shany, *Consolidation and Tests for Application...*, pp. 141 ff.

take different forms ranging from annulment proceedings under ICSID,⁸² to challenges under domestic law (*lex arbitri*),⁸³ to rather indirect mechanisms such as review by a domestic tribunal deciding on the recognition/enforcement of a foreign arbitral award⁸⁴ or the (pre-issuance) informal review performed by the ICC Court of International Arbitration under Article 27 of the ICC Arbitration Rules.⁸⁵

Although contradiction is not an explicit ground for challenging an arbitral award, it may be taken into account, for instance, within one of the commonly admitted grounds for annulment under the ICSID Convention.⁸⁶ However, even if technically possible under virtually all legal systems, successful challenges to arbitral awards are rare in arbitration-friendly

⁸² Article 52 of the ICSID Convention contemplates the following grounds for seeking the annulment of an award rendered by an ICSID tribunal: "(1) 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." On the functioning of this mechanism see *infra* footnote 87.

⁸³ Article 190 (2) of the Swiss Federal Act on Private International Law lays out the following grounds for challenging an arbitral award: "(a) When the sole arbitrator was appointed improperly or the arbitral award was composed improperly; (b) When the arbitral tribunal ruled erroneously that it had or lacked jurisdiction; (c) When the arbitral tribunal ruled beyond the claims submitted to it or failed to rule on one such claim or part thereof; (d) When the principle of equal treatment of the parties or their right to be heard in contradictory proceedings has not been respected; (e) When the award is incompatible with the *ordre public*." (unofficial translation published in the *American Journal of Comparative Law*, Vol. 37, 1989, pp. 193–246).

⁸⁴ See Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, of 10 June 1958. The grounds laid out in this article for a court to refuse to recognize/enforce a foreign arbitral award do not seem to cover the hypothesis of contradictory decisions. However, one cannot exclude that some hypotheses of contradiction might be indirectly covered by grounds such as those set forth in paragraph 1 letter (d) or in paragraph 2 letters (a) and (b). See: A.J. van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, Kluwer, The Hague, 1994; A. Remiro Brotons, *La reconnaissance et l'exécution des sentences arbitrales étrangères*, *Recueil des cours de l'Académie de droit international*, Vol. 184, 1984–I, pp. 169–354; H. Harnik, *Recognition and Enforcement of Foreign Arbitral Awards*, 31(4) *American Journal of Comparative Law* (1983) 703–712.

⁸⁵ Article 27 of the ICC Arbitration Rules states: "Before signing any Award, the Arbitral Tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the Award and, without affecting the Arbitral Tribunal's liberty of decision, may also draw its attention to points of substance. No Award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form."

⁸⁶ For instance, under Article 52(1)(e) of the ICSID Convention, as argued by Argentina in the *CMS* annulment procedure.

countries, which are the ones where the parties most frequently locate the arbitration seat. As for the annulment procedure under ICSID, its use has increased in recent years, especially after 2004, but successful challenges remain relatively rare.⁸⁷

This situation is not necessarily undesirable nor undesired by the economic actors who introduce arbitration clauses in their transactions. One of the main aims of international arbitration is indeed to tailor the proceedings to the needs and expectations of the parties. This entails, in turn, that the parties to an international transaction may *ex ante* prefer that a potential dispute between them be decided by the tribunal of their choice (as opposed to a state court in the exercise of its review powers) and with final effect, to avoid lengthy procedures. In this regard, it may be argued that, at least as far as international arbitration is concerned, some inconsistency between decisions/awards is a “fact of life”⁸⁸ or, in other words, is the prize that must be paid, the flip side of the coin, for the advantages entailed by international arbitration. Irrespective of one’s particular stance on the need for an appeal system in international arbitration, the current mechanisms offer some minimal safeguards and their persistence might probably reflect the underlying features of international arbitration rather than, mere inertia.⁸⁹

⁸⁷ For an overview of the development of ICSID annulment procedures see: C. Schreuer, Three Generations of ICSID Annulment Proceedings, in E. Gaillard, Y. Banifatemi (eds.), *Annulment of ICSID Awards*, Juris Publishing (IAI), New York, 2004, pp. 17–42. See also the paper presented by Prof. Antonio Crivellaro on 3 April 2008 at the Conference organized by the Institut de Hautes Etudes Internationales of the University of Paris II (Panthéon-Assas): *Actualité du contrôle des sentences arbitrales CIRDI* (publication forthcoming).

⁸⁸ See, J. Gill, Inconsistent Decisions: An Issue to be Addressed or a Fact of Life?, *Transnational Dispute Management*, Vol. 2, Issue 02, April 2005, pp. 12–16.

⁸⁹ As noted by one practitioner: “The current system is not broken, that is my position and I feel very strongly about that. Although there is criticism from some Governments and some Government Agencies, and NGOs, the current system is working just fine. This is a relatively new field of international law. Investment treaty arbitration has really only taken off in about the past five years . . . it is not shocking and it is not surprising in any respect that there is some level of inconsistency among arbitral awards. I would suggest to you that it would be shocking if there weren’t a significant amount of inconsistency at this point in time, which is still early in the development of this area of law. What we are seeing are normal growing pains for a new area of law like this”, D. Bishop, ‘The Case for an Appellate Panel and its Scope of Review’, 2(2) *Transnational Dispute Management* (2005) 9.

Concluding Remarks

The preceding remarks suggest that a number of possible reasons explaining conflicting decisions in international arbitration reflect some of the main values underlying the international arbitration regime as a whole. Such reasons are different in nature and concern all the stages of an arbitration process. To state it in a somewhat provocative way, the phenomenon of conflicting decisions is as pervasive as it is normal.

More importantly, most of the reasons identified are unlikely to fade out in the near future. This conclusion clearly applies, in our view, to reasons such as the flexibility enjoyed by the parties in the selection of the rules governing both the procedure and the merits of a dispute, the confidentiality of (at least part of) arbitration proceedings and the reluctance of the parties to have mandatory consolidation. But one may also make this point with regard to the other reasons mentioned, namely the absence of a precedent rule and of an appeal system in international arbitration, the restrictive application of the *lis pendens* and *res judicata* objections or the distinction between treaty and contract claims.

From the perspective of the current debate on the sources of inconsistency in international arbitration, one important conclusion that may be drawn from the preceding remarks is that the mechanisms and techniques currently available to deal with conflicting decisions deserve equal if not more attention than the potential solutions still to be designed and/or implemented. Indeed, some of the reasons explaining conflicting decisions may not be mere imperfections of the system but rather the reflection of what makes international arbitration appealing to the eyes of its users. The current system is working quite well, although it may suffer from a confidence deficit. In this context, our main point could be summarized by reference to a well-known French dictum, namely that “*le mieux est l’ennemi du bien*” or, in English, “let well enough alone”. In seeking the improvement of the current international arbitration system in order to deal with conflicting decisions, this simply means that, while some substantial reform may be welcome, the time for small and progressive adjustments of existing techniques is not up yet.