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THE CONSOLIDATION OF CLAIMS IN ICSID ARBITRATION

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CONTENTS

ABSTRACT

The International Centre for the Settlement of Investment Disputes (ICSID) has experienced a steadily growing case docket over the last decade. This rise in the number of cases submitted to ICSID for arbitration has resulted in both procedural inefficiencies and inconsistent decisions concerning similar factual and legal issues. In many other areas of law, consolidation is used to mitigate these concerns, however, the ICSID system at present has no mechanism for the consolidation of claims. This paper addresses the question of whether consolidation would be appropriate for the ICSID framework. In doing so, it considers the motivations behind consolidation and their application to the ICSID system, and the ways in which ICSID could introduce consolidation into its procedure. The paper concludes that ICSID should introduce consolidation with a view to improving procedural efficiency. Such a change, the paper concludes, could be effected by an amendment to the ICSID Arbitration Rules, which can be adopted by a two-thirds majority of the Administrative Council. The introduction of consolidation would improve the operation of the ICSID system, resulting in more efficient and cost-effective justice, and would help restore a sense of legitimacy in the system.

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Investment Treaty Arbitration-ICSID-consolidation

I INTRODUCTION

In recent years, there has been a surge in the activity of the International Centre for the Settlement of Investment Disputes (ICSID or the Centre).[1] From the Centre's creation in 1965 to July 2000 there had been 66 cases submitted for arbitration. The total at the time of writing was 269.[2] With such an increase comes a higher possibility for claims concerning the same legal or factual issues. This can give rise to two principal problems. Firstly, if similar claims are determined by different arbitral tribunals, inconsistent decisions could be rendered. Susan Franck has described the incidence of inconsistent decisions as investment treaty arbitration's "dirty little secret that is becoming less secret everyday"[3], as the issue has recently gained more international attention.[4] The second problem is that if similar claims are allowed to proceed individually, procedural delay may result.

This paper will analyse whether ICSID should establish an institutional framework for the consolidation of claims. The issue arises principally out of some recent high profile cases under ICSID, which have resulted in inconsistent decisions,[5] as well as a desire for procedural economy within a system that is faced with a steady rise of claims.

In considering the need for a framework of institutional consolidation in ICSID, this paper will firstly summarise the problem that is to be addressed. It will then provide an overview of some of the inconsistent decisions in ICSID, which illustrate one of the problems that unconsolidated proceedings can pose. The next part will consider how consolidation is effected in both domestic legal

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[1] Stephen Jagusch and Matthew Gearing "International Centre for Settlement of Investment Disputes (ICSID)" in J William Rowley QC (ed) *Arbitration World: Jurisdictional Comparisons* (2ed, The European Lawyer Ltd, London, 2006) lxvii.

[2] International Centre for the Settlement of Investment Disputes www.icsid.worldbank.org (accessed 1 August 2008) [ICSID website].

[3] Susan D Franck "The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future" (2005) 12 U C Davis J Int'l L & Pol'y 47, 55.

[4] See for example, ICSID Secretariat "Possible Improvements of the Framework for ICSID Arbitration" (Discussion Paper, 22 October 2004) paras 20–23 [ICSID Discussion Paper]; Thomas W Walsh "Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?" (2006) 24 Berkeley J Int'l L 444.

[5] These are discussed below: see Part III Inconsistent Decisions in ICSID.

systems and in international commercial arbitration. By way of comparison, consolidation in other areas will be considered. The specific focus will be on consolidation in mass claims processes and the North American Free Trade Agreement (NAFTA) consolidation framework. The paper will contrast these models to the investment treaty arbitration system. In light of this assessment, the writer will then frame the parameters of the issue of consolidation as it is seen in the investment treaty arbitration realm. The paper will then consider some specific problems with introducing consolidation into ICSID. The question of how consolidation could be introduced into the ICSID framework will be addressed, followed by a consideration of some of the other options available to ICSID to remedy the problem posed by the absence of consolidation. Finally, the paper will conclude on how the balance between consolidation and the traditional benefits of arbitration should be struck.

II AN OVERVIEW OF THE PROBLEM

The lack of any ability to consolidate claims results in two important, yet distinct, problems for the ICSID system: inconsistency and procedural inefficiency.

A Inconsistent Decisions

The problem of inconsistent decisions has arisen essentially because of the structure of the investment treaty arbitration system and the characteristics of arbitration more generally. One of the defining characteristics of arbitration is that there is no doctrine of precedent, meaning that arbitral decisions and awards need not take into account of, or follow, previous decisions of a similar nature. The possibility for inconsistency in this context is obvious, and the parties to arbitration assume this risk when they make the conscious choice to submit their dispute to arbitration.

The problem also arises, more indirectly, out of changes to the international economic environment, the most notable of which is the formidable growth, in recent years, of international investment in states by private

companies.[6] Against this backdrop, it is becoming increasingly common for states to be parties to international arbitrations.[7] This is primarily because of an increase in agreements by states to submit any investment disputes to binding arbitration, most commonly by Bilateral Investment Treaties (BITs).[8]

International investment law and protection is made up of a complex and uncoordinated web of BITs and investment agreements in which multiple shareholders may hold an interest.[9] This is exacerbated by the lack of international regulation of this environment.[10] Because of this framework, it is quite possible for multiple claims arising from either the same facts, or giving rise to the same legal issue, or both, to come before separate tribunals. This possibility has been heightened by the broad nature of the definition of "investment" and "investor" in most BITs,[11] which has, in practice, allowed for different parties to the same investment to pursue independent claims, thus opening the door for multiple claims based on similar facts and legal issues.[12]

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[6] Moshe Hirsch *The Arbitration Mechanism of the International Center for the Settlement of Investment Disputes* (Martinus Nijhoff Publishers, The Netherlands, 1993) 1.

[7] Ibid, 10.

[8] See for example, United Nations Conference on Trade and Development "Bilateral Investment Treaties 1959-1999" (2000) UNCTAD/ITE/IIA/2; United Nations Conference on Trade and Development (ed) "World Investment Report 2005 – Transnational Corporations and the Internationalization of R&D" (2005) UNCTAD/WIR/2005; For a list of BITs see United Nations Conference on Trade and Development www.unctadxi.org (accessed 2 August 2008).

[9] Campbell McLachlan QC, Laurence Shore and Matthew Weiniger *International Investment Arbitration – Substantive Principles* (Oxford University Press, Oxford, 2007) para 4.117; Giorgio Sacerdoti "The Proliferation of Bits: Conflicts of Treaties, Proceedings and Awards" (2007) Bocconi Legal Studies Research Paper No 07-02, 2.

[10] The Hague Conference on Private International Law attempted to negotiate a global regime on jurisdiction and recognition of judgements but was unsuccessful: see Fausto Pocar and Costanza Honorati *Hague Preliminary Draft Convention on Jurisdiction and Judgments* (Cedam, Padua, 2005). See also for example, Howard Mann "Transparency and Consistency in International Investment Law: Can the Problems be Fixed by Tinkering?" in Karl P Sauvant (ed) *Appeals Mechanism in International Investment Disputes* (Oxford University Press, New York, 2008) 213.

[11] See for example the wide meaning given to "investment" in *Lanco International Inc v Argentine Republic* (Jurisdiction) 5 ICSID Rep 367 (ICSID, 1998, Cremades P, Alvarez & Baptista) para 10 and *Azurix Corp v Argentine Republic* (Jurisdiction) (2004) 43 ILM 262 (ICSID, 2003, Sureda P, Lauterpacht & Martins).

[12] As evidenced by the *CME/Lauder* arbitrations: *CME Czech Republic BV (The Netherlands) v Czech Republic* (Partial Award) 9 ICSID Rep 121 (UNCITRAL, 2001, Kühn C, Schwebel & Hàndl); *CME Czech Republic BV (The Netherlands) v Czech Republic* (Final Award) 9 ICSID Rep 264 (UNCITRAL, 2003, Kühn C, Schwebel & Brownlie); and *Lauder v Czech Republic* (Final Award) 9 ICSID Rep 62 (UNCITRAL, 2001, Briner C, Cutler & Klein).

Inconsistent decisions are potentially a significant problem for the investment treaty arbitration world as they have the potential to call into question the legitimacy of the ICSID system.[13] As Moshe Hirsch notes: [14]

> "Undoubtedly, one of the basic conditions for the existence and improvement of a modern economic system is the existence of appropriate mechanisms for the settlement of disputes, which afford stability and predictability to the parties operating in the system"

Indeed, some states seem to have already begun to question the value of remaining party to the ICSID Convention. In May 2007, Bolivia withdrew from the ICSID Convention, urging other Latin American countries to do the same.[15] Emmanuel Gaillard, writing in the international commercial arbitration sphere, notes that the concern over inconsistent decisions is even more important in arbitration given that there is generally no ability to substantively review awards.[16] This is also true of the investment treaty arbitration field.[17]

B Procedural Inefficiency

The practice of not consolidating similar claims also results in procedural delays within the system. In the 36 years since the first claim was submitted to ICSID,[18] 153 claims have been concluded,[19] leaving another 120 still pending.[20]

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[13] See for example, Charles N Brower, Charles H Brower and Jeremy K Sharpe "The Coming Crisis in the Global Adjudication System" (2003) 19 Arb Int 415.
[14] Hirsch, above n 6, 2.
[15] Damon Vis-Dunbar, Luke Eric Peterson and Fernando Cabrera Diaz "Bolivia Notifies World Bank of Withdrawal from ICSID, Pursues BIT Revisions" (9 May 2007) International Institute for Sustainable Development: Investment Treaty News, available at www.bilaterals.org (accessed 9 August 2008); Jonathan C Hamilton, Sabina Sacco, Stephen Ostrowski, Mairée Uran-Bidegain, Monica Fernández-Fonseca, Javier Ferrero and Rafael Llano Oddone "Treaty Developments Related to Bolivia, Ecuador, and Venezuela" (2007) International Disputes Quarterly 6, available at www.whitecase.com (accessed 9 August 2008). See also, M Sornarajah "A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration" in Sauvant, above n 10, 39.
[16] Emmanuel Gaillard "The Consolidation of Arbitral Proceedings and Court Proceedings" (2003) ICC International Court of Arbitration Bulletin – Special Supplement 35, 36.
[17] Under the ICSID Convention there are only limited grounds for review of awards: Convention on the Settlement of Investment Disputes between States and Nationals of other States (18 March 1965) 575 UNTS 159, art 52 [ICSID Convention]. See Part II C The ICSID System at Present.
[18] *Holiday Inns SA & ors v Kingdom of Morocco* ICSID Case No ARB/72/1, which was registered on 13 January 1972.
[19] ICSID website "List of Concluded Cases", above n 2.
[20] ICSID website "List of Pending Cases", above n 2.

A prime example of procedural delay can be seen in the recent wave of cases submitted in the wake of the Argentine Fiscal Crisis. These cases have, by and large, proceeded individually, despite raising similar factual and legal issues. The recent wave of arbitrations against Argentina highlights the need for ICSID to develop a framework for dealing with similar arbitrations in a more efficient and cost-effective manner. As two commentators have noted:[21]

> The investment dispute arbitration system is still in an incipient phase and the cases against Argentina are testing the ability of ICSID to deal with a multitude of disputes involving the same country, with many disputes arising out of the same measures.

C The ICSID System at Present

Presently in ICSID there is no institutional consolidation. There is, despite the lack of any institutional incentives, some voluntary consolidation between claimants. For example, in *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v Argentine Republic*,[22] three related claimants chose to pursue their respective claims together. This case of voluntary consolidation is also interesting in that two of the claimants were Spanish, while the third was French. This meant that the case also involved two different BITs.[23]

Hanotiau also notes that the ICSID Secretariat has developed a practice of recommending that the same arbitrators be appointed in cases raising similar issues, and attempting to harmonise procedures with a view to reaching "in practice a result that is as close to consolidation as possible."[24] However, the

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[21] R Doak Bishop and Roberto Aguirre Luzi "Investment Claims: First Lessons from Argentina" in Todd Weiler (ed) *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May Ltd, 2005, London) 425, 425.

[22] *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v Argentine Republic* (Jurisdiction) ICSID Case No ARB/03/17 (ICSID, 2006, Salacuse P, Kaufmann-Kohler & Nikken) [*Suez and InterAguas Servicios*].

[23] Ibid, para 2.

[24] Bernard Hanotiau *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (Kluwer Law International, The Hague, 2005) para 419. This practice will be considered further at Part X A Appointment of the Same Tribunal.

writer questions how close is "as close ... as possible" when inconsistent decisions continue to occur on a relatively frequent basis, and the majority of cases proceed individually.

The ICSID framework has recently undergone review and reform. In October 2004 a discussion paper on possible improvements to the ICSID framework was released.[25] This was followed by a Working Paper on 12 May 2005.[26] Finally ICSID implemented revised Rules of Procedure for Arbitration Proceedings (Arbitration Rules) as of 10 April 2006.[27] The potential for a consolidation mechanism in ICSID was not debated in the process of these amendments.

The annulment procedure under ICSID does not provide a means to challenge decisions based on inconsistency with a previous decision. This is because the circumstances in which an award may be annulled are strictly limited by the ICSID Convention. Article 52 of the Convention allows for awards to be annulled for certain procedural, but generally not for substantive, reasons.[28]

D Appropriate Cases for Consolidation

It should also be noted in this overview that cases may be appropriate for consolidation in two different situations. Firstly, one may consolidate where the cases all arise out of the same event or sequence of events. Secondly, consolidation may be appropriate where, although arising from different factual circumstances, the cases all raise a common question of law.[29]

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[25] ICSID Discussion Paper, above n 4.
[26] ICSID Secretariat "Suggested Changes to the ICSID Rules and Regulations" (Working Paper, 12 May 2005) [ICSID Working Paper].
[27] International Centre for the Settlement of Investment Disputes "Rules of Procedure for Arbitration Proceedings (Arbitration Rules)" (10 April 2006) available at www.icsid.worldbank.org (accessed 7 August 2008) [ICSID Arbitration Rules].
[28] Christoph H Schreuer *The ICSID Convention: A Commentary* (Cambridge University Press, Cambridge, 2001) art 52.
[29] This distinction is considered further: Part VI B The Basis upon which Claims May be Consolidated.

III INCONSISTENT DECISIONS IN ICSID

Several recent cases, both in ICSID, and in investment treaty arbitration generally, have demonstrated the problem of inconsistent decisions arising from the lack of any institutional mechanism for consolidation. The most notorious of these decisions are the *CME*[30] and *Lauder*[31] cases. Given the volume of writing on *CME* and *Lauder* and the focus of this paper on the ICSID framework, this paper will not consider these cases, and will instead take examples from within ICSID. The paper will therefore consider two sets of cases. Firstly, the cases of *LG&E*[32] and *CMS,*[33] which arose out of the Argentine Fiscal Crisis, will be considered. Secondly, the paper will discuss the *SGS* cases: *SGS v Islamic Republic of Pakistan*[34] and *SGS v Republic of the Philippines*.[35] Both sets of cases present examples of inconsistency in ICSID tribunal decision-making, despite raising similar factual and legal questions. They therefore present scenarios in which consolidation could have been a possibility, and illustrate why the question of introducing a consolidation mechanism has arisen in the ICISD framework.

A LG&E and CMS

1 The Argentine Fiscal Crisis[36]

The recent wave of arbitrations against Argentina in ICSID arise primarily out of emergency measures adopted by the Argentine Government between 2001 and 2002. These measures were designed to alleviate the effects

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[30] *CME* (Partial Award), above n 12; *CME* (Final Award), above n 12.
[31] *Lauder*, above n 12.
[32] *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic* (Liability) ICSID Case No ARB/02/1 (ICSID, 2006, de Maekelt P, Rezek & van den Berg).
[33] *CMS Gas Transmission Co v Republic of Argentina* (Award) (2005) 44 ILM 1205 (ICSID, 2005, Orrego Vicuña P, Lalonde & Rezek); *CMS Gas Transmission Co v Argentine Republic* (Annulment) ICSID Case No ARB/01/8 (ICSID, 2007, Guillaume P, Elaraby & Crawford).
[34] *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* (Jurisdiction) 8 ICSID Rep 383; (2003) 42 ILM 1290 (ICSID, 2003, Feliciano P, Faurès & Thomas).
[35] *SGS Société Générale de Surveillance SA v Republic of the Philippines* (Jurisdiction) 8 ICSID Rep 515 (ICSID, 2004, El-Kosheri P, Crawford & Crivellaro).
[36] A detailed discussion of the Argentine Fiscal Crisis is outside the scope of this paper. For more information see for example, Christina Daseking, Atish Ghosh, Timothy Lane and Alun Thomas *Lessons from the Crisis in Argentina* (International Monetary Fund, Washington DC, 2004).

of an economic crisis, which has been described as "worse than the US Great Depression".[37] This paper does not seek to analyse the nature and causes of the economic crisis. Suffice to say that the actions taken by the Argentine government in response to the worsening economic climate resulted in losses to foreign investors, hence the wave of arbitrations submitted to ICSID. The majority of cases currently pending before ICSID against Argentina relate to the withdrawal of the right in investment agreements for investors to calculate tariffs in US dollars and then convert them into pesos at the time of billing.

Two often cited cases, *LG&E* and *CMS,* present an example of where cases presenting similar factual and legal issues have given rise to different decisions by separate tribunals. Indeed, the facts of these two cases were, in all material respects, identical.[38] The inconsistency in these cases is all the more surprising given that one arbitrator, Judge Francisco Rezek, sat on both tribunals.

The tribunals in *LG&E* and *CMS* largely agreed on the substantive violations of investment law alleged by the investors in both cases. Where they diverged was on Argentina's attempted defence of necessity to these violations. In both cases, Argentina argued that it was excused from its responsibilities under the BITs by the defence of necessity under both the BIT and customary international law.

2 *Necessity in* LG&E *and* CMS

In both *CMS* and *LG&E,* Argentina invoked the fundamental international law principle of necessity as a defence to its alleged breaches of the BIT.[39] In *CMS* the Tribunal rejected the defence, [40] whereas the Tribunal in *LG&E* accepted it in part.[41]

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[37] Alan Cibils "ICSID Bleeds Argentina" (2005) Mulitnational Monitor, available at www.allbusiness.com (accessed 26 June 2008).
[38] Stephan 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*" (2007) 24 J Int Arb 211, 214.
[39] *CMS* (Award), above n 33, para 304.
[40] Ibid, para 331.
[41] *LG&E*, above n 32, para 226.

The *CMS* Tribunal rejected Argentina's defence of necessity on two principal grounds. Firstly, it held that the measures taken by Argentina to abate the crisis were not the "only way" for Argentina to safeguard its essential interests.[42] It secondly considered that Argentina had contributed to the state of necessity[43] and therefore, in accordance with the International Law Commission's Draft Articles on State Responsibility (the ILC Draft Articles),[44] and customary international law, rejected the defence.[45] The Tribunal in *LG&E*, in contrast, found that between 1 December 2001 and 26 April 2003 the crisis in Argentina necessitated the measures it took to protect its "essential security interests".[46] Argentina was therefore excused from observing its obligations under the BIT during this period.[47]

The tribunals also approached their analysis of the law of necessity from different angles. The *CMS* Tribunal relied firstly on the law of necessity under customary international law, which is expressed in Article 25 of the ILC Draft Articles.[48] It looked to the provisions of the BIT as a secondary source of the law.[49] The *LG&E* Tribunal, on the other hand, considered the hierarchy of sources of law to be considered by the Tribunal to be as follows: "first the Bilateral Treaty; second and in the absence of explicit provisions therein, general international law, and third, the Argentine domestic law …".[50] Therefore, contrary to the *CMS* Tribunal, the Tribunal in *LG&E* took the provisions of the BIT as its primary source of law, and used customary international law merely to support its conclusions.[51]

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[42] International Law Commission "Responsibility of States for Internationally Wrongful Acts" (12 December 2001) A/56/10, art 25(1)(a) [ILC Draft Articles]; *CMS* (Award), above n 33, para 323.
[43] *CMS* (Award), ibid, para 329.
[44] ILC Draft Articles, above n 42, art 25.
[45] *CMS* (Award), above n 33, para 331.
[46] *LG&E*, above n 32, para 226.
[47] Ibid; Schill, above n 38, 266.
[48] *CMS* (Award), above n 33, paras 315-331.
[49] Ibid, paras 353-382.
[50] *LG&E*, above n 32, para 99.
[51] Ibid, paras 206 and 245.

There are two main points of substantive difference between the application of necessity in the *LG&E* and *CMS* cases: the question of the burden of proof for the elements of necessity, and the question of compensation to the investor for measures taken whilst in the state of necessity.[52] This paper does not seek to comment or draw any conclusions on which of the approaches in these cases was the better one.[53] It uses them instead, as examples of fundamentally conflicting decisions within the ICSID framework.

(a) Burden of Proof

The two tribunals diverged on which party they thought must discharge the burden of proving the constituent elements of the defence of necessity. The *CMS* Tribunal placed the burden of proving that no alternative measures existed,[54] and that the state did not contribute to the state of necessity,[55] on the host state. The Tribunal in *LG&E* took the opposite approach, requiring the investor to prove these elements. On this approach, the investor must specifically prove that there were other, less damaging, ways by which the host state could have abated the crisis.[56]

(b) Compensation

The Tribunal in *CMS* considered that compensation would be due to the investor even where the BIT violation was justified by the state of necessity.[57] The Tribunal in *LG&E*, however, considered that the consequence of a finding of a state of necessity was that no compensation was available to the investor for damage caused by the measures taken during that state of necessity.[58]

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[52] Schill, above n 38, 266.
[53] For academic discussion on this point, see for example, Schill, above n 38, 280-286; William W Burke-White "The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System" (2008) University of Pennsylvania Law School Paper 202, available at http://lsr.nellco.org (accessed 9 August 2008).
[54] ILC Draft Articles, above n 42, art 25(1)(a).
[55] Ibid, art 25(2)(b).
[56] *LG&E*, above n 32, paras 242 and 256.
[57] *CMS* (Award), above n 33, paras 383 and 390.
[58] *LG&E*, above n 32, para 264.

The Tribunal in *CMS*, on the question of compensation, applied Article 27(b) of the ILC Draft Articles, which provides that the invocation of the defence of necessity "is without prejudice to: (b) The question of compensation for any material loss caused by the act in question."[59] Having failed to establish necessity, the Tribunal concluded that Argentina was required to compensate the investor. Given its reliance on Article 27(b), it presumably would have found the same had the defence of necessity been made out.

The *LG&E* Tribunal on the other hand concluded that it was the investor that must bear the losses incurred during the state of necessity.[60] It came to this conclusion by taking the provisions of the BIT, which did not mention compensation, and noting the unspecific nature of Article 27(b) of the ILC Draft Articles. It therefore concluded that the answer to the question of compensation was sufficiently provided for in the absence of any similar provision to Article 27(b) in the BIT.[61] Because the BIT contained no similar provision to that in Article 27(b), the investor was entitled to no compensation for measures taken during the state of necessity.

3 The Ramifications of these Decisions

With almost 40 pending arbitrations arising out of the emergency measures taken by Argentina in 2001-2002, these divergent decisions have had, and will have, an impact on other tribunals; in many cases, a tribunal may have to choose one approach over the other. Both investors, and the Argentine Republic, are affected by these decisions. Given the fundamental differences in the application of the law of necessity, it is impossible for parties to future disputes to predict, with any degree of certainty, the outcome of their claims.

Despite the striking similarity of the facts in *CMS* and *LG&E*, the tribunal in *LG&E* did not overtly consider the decision of the tribunal in *CMS* when discussing the application of the defence of necessity. The Tribunal in *LG&E*

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[59] ILC Draft Articles, above n 42, art 27(b); *CMS* (Award), above n 33, para 383.
[60] *LG&E*, above n 32, para 264.
[61] Ibid, paras 260-261.

only referenced the *CMS* decision in its discussion on fair and equitable treatment,[62] and the effect of the umbrella clause.[63] The *LG&E* Tribunal did not acknowledge that it was diverging from the approach of the *CMS* Tribunal with respect to the defence of necessity and ignored the *CMS* decision in its discussion of necessity. Stephan Schill notes that, "it is objectionable to use precedent in such a selective way."[64]

(a) *CMS* Annulment

On 8 September 2005, Argentina filed for annulment of the *CMS* award under Articles 52(1)(b)[65] and 52(1)(e)[66] of the ICSID Convention.[67] While the Annulment Committee considered that the Tribunal had erred in its application of the law of necessity, it did not consider that the case fell within the grounds for annulment.[68] In criticising the *CMS* Award, the Annulment Committee essentially adopted the reasoning of the *LG&E* Tribunal as to the approach of the Tribunal to the ILC Draft Articles and the BIT,[69] and as to compensation.[70] This situation is complicated further by the fact that two subsequent tribunals established under ICSID in the cases of *Enron,*[71] and *Sempra*[72] have followed *CMS* and concluded that the defence of necessity is not available to Argentina. This leaves both the law, and future claimants, in an uncertain position. Finally, on 19 September 2008, the ICSID Secretariat registered an application for the institution of annulment proceedings in *LG&E*.[73]

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[62] Ibid, para 125.
[63] Ibid, para 171.
[64] Schill, above n 38, 285.
[65] ICSID Convention, above n 17, art 52(1)(b) provides for challenge where a tribunal has manifestly exceeded its powers.
[66] Ibid, art 52(1)(e) provides for challenge where a tribunal fails to state the reasons upon which an award is based.
[67] *CMS* (Annulment), above n 33.
[68] Ibid, para 150.
[69] Ibid, paras 134-135.
[70] Ibid, para 146.
[71] *Enron Corp & Ponderosa Assets LP v Argentine Republic* (Award) ICSID Case No ARB/01/3 (ICSID, 2007, Orrego Vicuña P, van den Berg & Taschanz).
[72] *Sempra Energy International v Argentine Republic* (Award) ICSID Case No ARB/02/16 (ICSID, 2007, Orrego Vicuña P, Lalonde & Rico).
[73] ICSID website, above n 2.

B The SGS Cases

The *SGS* cases concerned the interpretation of umbrella clauses. The umbrella clause is a clause in a BIT, which essentially has the effect of elevating contractual claims to treaty claims.[74] Umbrella clauses come in many forms and are not included in all BITs.[75] The umbrella clause in the UK Model BIT for example is worded as follows: "Each contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party."[76] Many other versions also exist, which has been one of the reasons for the uncertainty surrounding the meaning and effect of these clauses.

Indeed, the effect of umbrella clauses has been the subject of much academic debate.[77] This essay does not seek to outline or contribute to that debate. The writer uses the *SGS* cases simply as an illustration of the effects of not consolidating similar claims. One issue for both of the *SGS* tribunals was a jurisdictional one, based on the correct effect of an umbrella clause: does it transform the breach of contract into a breach of treaty, or does the breach remain one of contract?[78] The disputes in these two cases arose from similar factual scenarios.

1 SGS v Pakistan

In *SGS v Pakistan,* an ICSID tribunal was called on to determine whether it had jurisdiction to decide SGS's claims based on either the BIT, the contract, or both.[79] This Tribunal was the first to consider the effect of an umbrella clause.

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[74] Anthony C Sinclair "The Origins of the Umbrella Clause in the International Law of Investment Protection" (2004) 20 Arb Int 411, 412.

[75] Notable Model BITs, which do not contain umbrella clauses, include the Sri Lanka Model BIT, the China Model BIT III Compendium III 251, and the Chile Model BIT III Compendium III 143.

[76] United Kingdom Model BIT, art 2.

[77] For a useful survey of the different possible interpretations of umbrella clauses see Katia Yannaca-Small "Interpretation of the Umbrella Clause in Investment Agreements" in Organisation for Economic Co-operation and Development *International Investment Law: Understanding Concepts and Tracking Innovations* (OECD Publishing, Paris, 2008) 101.

[78] *SGS v Pakistan,* above n 34, para 132(e); SGS *v Philippines*, above n 35, para 92(b).

[79] *SGS v Pakistan*, ibid, para 146.

SGS argued that the umbrella clause meant that breaches of contractual commitments also amounted to infringements of the BIT.[80] Pakistan argued that claims under the umbrella clause were "second order" claims, meaning that such claims would only "ripen" once a determination had been made as to whether the contract had been breached.[81] Pakistan's argument was that the ICSID tribunal did not have the jurisdiction to make this "first order" determination.[82]

The Tribunal concluded that it had jurisdiction to hear SGS's claims arising under the BIT, but not those arising from the contract.[83] They held that SGS could not use the umbrella clause to "'elevate' its claims grounded solely in a contract with another Contracting Party ... to claims grounded on the BIT."[84] They based this decision on a textual interpretation of the umbrella clause, and an analysis of the intentions of the parties.[85] This approach was also accepted and applied in *Joy Mining v Egypt*.[86]

2 SGS v Philippines

With respect to the issue of the scope of the umbrella clause, a great deal of the reasoning in the *SGS v Philippines* Tribunal is in direct contradiction to the opinion of the *SGS v Pakistan* Tribunal.[87]

The tribunal in *SGS v Philippines* concluded that an umbrella clause could convert a breach of contract into a violation of the BIT.[88] They qualified this, however, by saying that the BIT tribunal should only exercise this jurisdiction where there is no choice of forum mechanism in the underlying contract.[89]

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[80] Ibid, para 165.
[81] Ibid, para 54.
[82] Ibid.
[83] Ibid, paras 155 and 162.
[84] Ibid, para 165.
[85] Ibid, paras 166-167.
[86] *Joy Mining Machinery Ltd v Arab Republic of Egypt* (Jurisdiction) (2004) 19 ICSID Rev-FILJ 486 (ICSID, 2004, Orrego Vicuñna P, Weeramantry & Craig).
[87] Emmanual Gaillard "Investment Treaty Arbitration and Jurisdiction Over Contract Claims – the SGS Cases Considered" in Todd Weiler (ed) *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May Ltd, London, 2005) 325, 330.
[88] *SGS v Philippines*, above n 35, para 128.
[89] Ibid.

These conflicting decisions, along with subsequent decisions which provide equally conflicting results,[90] have made it unclear exactly what the effect of an umbrella clause in a BIT is. This has resulted in heated academic debate, and uncertainty in the international investment arena.[91]

IV CONSOLIDATION

The term "consolidation" is used here to mean the grouping of arbitrations where the requests for arbitration were submitted for determination independently.[92] This section will describe how consolidation is effected in domestic legal systems and in international commercial arbitration. These areas are taken as illustrations of consolidation, as the ability to consolidate may be seen as central, or at least important, to the continued operation of these systems.

A Consolidation in Domestic Legal Systems

Consolidation in domestic legal systems has a long history. In England, the Court has a broad power to consolidate under the Civil Procedure Rules, Rule 3.1(2)(g).[93] Prior to the enactment of the Civil Procedure Rules, the Rules of Court determined when cases could be consolidated.[94]

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[90] See for example, *El Paso Energy International Co. v Argentine Republic* (Jurisdiction) ICSID Case No ARB/03/15 (ICSID, 2006, Caflisch P, Stern & Bernadini); *Salini Costruttori SpA and Italstrade SpA v Hachemite Kingdom of Jordan* (Award) (ICSID, 2006, Guillaume P, Cremades & Sinclair); *Joy Mining*, above n 86; *Eureko BV v Republic of Poland* (Partial Award) (Ad Hoc Arb Trib, 2005, Fortier P, Schwebel & Rajski); *Noble Ventures Inc v Romania* (Award) ICSID Case No ARB/01/11 (ICSID, 2005, Böckstiegel P, Lever & Dupuy); *Siemens AG v Argentine Republic* (Award) ICSID Case No ARB/02/8 (ICSID, 2007, Rigo Sureda P, Brower & Bello Janeiro). For a useful summary of the different positions adopted by tribunals see Gaillard "Investment Treaty Arbitration and Jurisdiction Over Contract Claims – the SGS Cases Considered", above n 87.

[91] See for example Gaillard, ibid.

[92] Bernard Hanotiau explains that the term "consolidation" can have a wider meaning in the United States: Hanotiau, above n 24, para 402.

[93] Civil Procedure Rules 1998 (UK), r 3.1(2)(g).

[94] RSC Ord 4 r 9 (revoked); *Halsbury's Laws of England* (5ed 2008 Reissue, Butterworths, London, 2008) vol 37 (reissue), Practice and Procedure, para 131.

An example of the use of consolidation in England under the Rules of Court can be seen in *Payne v British Time Recorder Co Ltd and WW Curtis Ltd*,[95] where it was decided that it was appropriate to join the two defendants in the one action. This case was one in which an action was brought against two different defendants on different contracts.[96] Scrutton LJ commented on the discretionary power of the court under this Rule:[97]

> Broadly speaking, where claims by or against different parties involve or may involve a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matter should be disposed on at the same time the Court will allow the joinder of plaintiffs or defendants, subject to its discretion as to how the action should be tried.

It was argued in this case that there must be some link between the defendants, or that the damage to the plaintiffs must be common to both of them in order to consolidate proceedings. This was rejected by the Court.[98] The case was described as being "very near the line."[99] This is because different questions were raised between the plaintiff and each of the defendants. However, the Court considered that because the central question of the case was common to both claims, "the rest of the case is mere fringe."[100] This case illustrates the broad power of domestic courts to order consolidation.

The American Law Institute is currently reviewing the law of aggregate litigation in the United States. The Institute notes that the "central purpose of aggregation is to promote the efficient use of litigation resources in the pursuit of justice under law."[101]

Most domestic legal systems therefore have a framework whereby claims of a similar nature may be consolidated. This paper will use an example from the

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[95] [1921] 2 KB 1 (CA).
[96] Ibid, 9 Lord Sterndale MR.
[97] Ibid, 16 Scrutton LJ.
[98] Ibid 10 Lord Sterndale MR.
[99] Ibid, 11 Lord Sterndale MR.
[100] Ibid.
[101] The American Law Institute "Principles of the Law of Aggregate Litigation" Discussion Draft No 2 (6 April 2007), Draft § 1.03(a).

New Zealand domestic legal system as an illustration of contemporary consolidation.

1 An Example: the New Zealand Domestic Legal System's Approach to Consolidation

In the New Zealand domestic legal system, proceedings are consolidated under Rule 382 of the High Court Rules. The Court has a wide discretion conferred by Rule 382(c) to order consolidation if "for some other reason it is desirable" to do so.[102] More specifically, Rule 382 provides for the Court to make an order if the cases present a common question of law or fact,[103] or if the relief claimed relates to the same event and/or transaction, or series of events and/or transactions.[104] Once a ground for consolidation in Rule 382 is made out, the Court then has discretion to order or not to order consolidation of the proceedings on the terms that it thinks fit.[105] Rule 383 concerns the application of Rule 382 and makes it clear that the relief sought need not be the same in all cases for an order of consolidation to be made.[106]

Medlab Hamilton Ltd v Waikato District Health Board[107] is a recent New Zealand case that considered the relevant factors that may be taken into account when determining a consolidation order under the wide discretion of Rule 382. Factors, which will favour consolidation of proceedings, include "the savings that will be achieved in time and cost to the parties ... and removing the risk of inconsistent decisions".[108] Rodney Hansen J also considered the savings in judicial resources to be a factor weighing in favour of consolidation.[109]

This section has shown that consolidation in domestic legal proceedings is relatively straightforward. The courts in domestic legal systems have a broad

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[102] High Court Rules (NZ), r 382(c); *Medlab Hamilton Ltd v Waikato District Health Board* (2007) 18 PRNZ 517, para 8 (HC) Rodney Hansen J.
[103] High Court Rules (NZ), r 382(a).
[104] Ibid, r 382(b).
[105] Ibid, r 382.
[106] Ibid, r 383(a).
[107] *Medlab*, above n 102.
[108] *Medlab*, ibid, para 8 Rodney Hansen J.
[109] Ibid.

power to consolidate similar, or related, proceedings on the basis of similar questions of law or fact. There is less flexibility in arbitration, and consolidating claims is more difficult because of the consensual basis of the submission to arbitration.[110] This is the principal difference between consolidation in domestic legal systems and consolidation in arbitral proceedings: domestic legal systems may consolidate claims regardless of the parties' lack of consent, whereas consent is generally required in arbitral proceedings. The motive for consolidation may also be slightly different in domestic legal systems, as consolidation often serves to save court time and resources regardless of any such savings, or otherwise, to the parties.

B Consolidation in International Commercial Arbitration

Consolidation is a central feature of the international commercial arbitration regime due to the nature of modern international business transactions. One estimate suggests that one third of International Chamber of Commerce (ICC) arbitration cases involve multi-party disputes.[111] The most common instance of consolidation in international commercial arbitration is in international construction projects. These projects involve not only the employer and the main contractor, but also sub-contractors and suppliers with whom the main contractor will have agreements implementing the head agreement.[112] Because of the inter-relationship of these parties, it is often important for the effective resolution of disputes that related claims are able to be consolidated. The difficulty is that the jurisdiction of a tribunal over a party generally rests on that party's consent to the arbitration.

There are several different instances in which claims may be consolidated in international commercial arbitration: multiple claims arising out of a single contract; multiple claims arising out of separate contracts; multiple claims arising out of a series of contracts involving different parties; or consolidation of

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[110] Alan Redfern and Martin Hunter *Law and Practice of International Commercial Arbitration* (3ed, Sweet & Maxwell Limited, London, 1999) 175.
[111] David Joseph QC *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell, London, 2005) para 4.62 citing the ICC/AAA/ICSID Joint Colloquium (Paris, 19 November 2004).
[112] Redfern and Hunter, above n 110, 177.

different arbitrations between the same parties. The focus of this section will be on multi-party arbitrations arising out of different contracts, and involving several parties, as this is the most comparable category to the investment treaty arbitration realm. Similar processes, such as joinder of third parties, have a similar effect to consolidation, but in the interests of brevity, will not be considered here.

1 Consolidating Claims

Consolidation of separately commenced arbitral proceedings may occur in several ways. Firstly, the arbitration agreement may contain a consolidation clause. This is rare and is not recommended by any of the leading arbitration institutions.[113] A more common way to achieve consolidation is by express agreement between the parties. The problem with express agreements is that often at least one party will not see consolidation as beneficial to their case. The second means of consolidation is via the arbitration rules where they include provision for consolidation.[114] Exactly how such consolidation is effected depends on the particular rules. Finally, in the absence of agreement between the parties to consolidate in any of the above forms, consolidation may occur where arbitration laws provide for statutory consolidation. Statutory consolidation provisions are rare as they conflict with the fundamental principle of party autonomy in arbitration.[115] Therefore, where such laws do exist, they normally also require the consent of the parties.[116]

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[113] Julian D M Lew QC, Loukas A Mistelis and Stefan M Kroll *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague, 2003) 392 and for more information on the difficulties of drafting such a clause see 392-396.

[114] See for example, the Belgian Centre for Arbitration and Mediation (CEPANI) Rules, art 11; Rules of the Swiss Chambers of Commerce, art 4; Rules of the International Chamber of Commerce, art 4.6. For more information see Hanotiau, above n 24, paras 404-412.

[115] Lew, Mistelis and Kroll, above n 113, 397.

[116] Ibid. One notable exception to this is the Netherlands Arbitration Law, art 1046.

(a) Consolidation by Consent

Difficulties generally arise because of the consensual nature of arbitration, which means that all parties must agree to arbitration.[117] While there may be benefits to consolidating proceedings, the reality is that there is generally one party that opposes consolidation.[118] David Joseph notes that it is possible, although rare, that the parties will agree to consolidate their claims after a dispute has arisen, mainly because parties will, at this stage, have their own interests in mind.[119] It is therefore more likely that consolidation will be effected by the rules agreed between the parties in the arbitration agreement.[120]

(b) Consolidation under Arbitration Rules

Some institutional arbitration rules provide for consolidation of related disputes. While under the ICC Rules, consolidation is only possible if the parties to the disputes are the same,[121] the CEPANI Rules provide for consolidation where the parties are not the same.[122] The CEPANI Rules also allow for the decision on consolidation to be taken without the parties' consent.[123] One limitation of this method is that in order to consolidate, all arbitrations must be conducted under the same rules.

The UNCITRAL Arbitration Rules are currently under revision by the UNCITRAL Working Group on International Arbitration and Conciliation.[124] Under the UNCITRAL Arbitration Rules at present, there is no provision for consolidating claims except with the consent of all parties. A consolidation

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[117] See for example, *Government of the United Kingdom of Great Britain v Boeing Co* 998 F 2d 68 (2d Cir 1993) rejecting an earlier Court of Appeal decision that allowed consolidation despite objections by one of the parties: *Compania Espanola de Petroleos SA v Nereus Shipping SA* 527 F 2d 966 (2d Cir 1975).

[118] Martin Platte "When Should an Arbitrator Join Cases?" (2002) 18 Arb Int 67, 71.

[119] Joseph, above n 111, para 4.64.

[120] Ibid.

[121] Rules of the International Chamber of Commerce, art 4.6.

[122] CEPANI Rules, above n 114, art 12. See also Hanotiau, above n 24, para 410.

[123] CEPANI Rules, ibid, art 12.

[124] The current rules were adopted in 1976. A copy may be downloaded from the UNCITRAL website, www.uncitral.org (accessed 5 September 2008). For the reports of the Working Group see the UNCITRAL website "Working Group II" www.uncitral.org (accessed 5 September 2008).

provision was originally proposed in the Working Group's proposal for the new Rules.[125] The UNCITRAL Working Group subsequently concluded that a consolidation provision in the revised Rules "might not be necessary".[126] However, a provision on joinder of third parties to proceedings is included in proposed Rule 15(4):[127]

> The arbitral tribunal may, on the application of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement and has consented to be joined. The arbitral tribunal may make an award in respect of all parties so involved in the arbitration.

This proposed Rule is still being discussed by the Working Group. The joinder of the third party would not be dependent on the agreement of all of the parties to the arbitration.[128] This situation was considered to be defensible because "insofar as parties agreed to arbitration under rules containing the proposed joinder provision, they would have consented to the voluntary joinder of a third party."[129]

(c) Consolidation under Arbitration Laws

National courts also have the power, in some instances, to order consolidation of arbitral proceedings. The consent of the parties is generally a prerequisite.[130] Some countries have enacted legislation allowing for consolidation regardless of whether the parties consent or not.[131] An example of such a provision is the Netherlands Code of Civil Procedure.[132] Hong Kong law

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[125] Jan Paulsson and Georgios Petrochilos "Revision of the UNCITRAL Arbitration Rules" commissioned by the UNCITRAL Secretariat (2006) para 131.
[126] United Nations Commission on International Trade Law "Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-Sixth Session" (20 March 2007) A/CN.9/619, para 120 [UNCITRAL Forty-Sixth Session Report].
[127] United Nations Commission on International Trade Law Working Group II (Arbitration) "Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules: Note by the Secretariat" (6 August 2008) A/CN.9/WG.II/WP.151, art 15(4).
[128] UNCITRAL Forty-Sixth Session Report, above n 126, para 122.
[129] Ibid.
[130] See for example, *Boeing Co*, above n 117 rejecting an earlier Court of Appeal decision that allowed consolidation despite objections by one of the parties: *Nereus Shipping*, above n 117. See also, Hanotiau, above n 24, paras 413-418.
[131] See for example, Arbitration Act 1982 (Hong Kong), s 6B.
[132] Code of Civil Procedure 1986 (The Netherlands), art 1026.

also allows for court-ordered consolidation irrespective of the parties' consent where the parties adopt the rules for domestic arbitration.[133]

Court-ordered consolidation under national laws is limited to circumstances where both arbitrations are conducted in the same state. There are, of course, problems with this approach with respect, especially, to party autonomy. Indeed, the English Departmental Advisory Committee on Arbitration Law considered whether to include a provision allowing court-ordered consolidation into the English Arbitration Act 1996. The Committee concluded that while the parties could agree to consolidation between themselves,[134] allowing for consolidation regardless of the will of the parties "would amount to a negation of the principle of party autonomy".[135]

It is therefore only where both arbitrations are conducted pursuant to the same institutional rules that allow for consolidation without consent, or where the arbitrations take place in a country whose laws allow for consolidation without consent, that consolidation may occur without the consent of the parties.[136]

2 Benefits and Detriments of Consolidation in International Commercial Arbitration

The consolidation of proceedings in international commercial arbitration can have substantial benefits to the parties. Consolidation can save the parties costs and time, allow for the tribunal to assess the situation giving rise to the dispute in an all encompassing manner,[137] and avoid conflicting decisions. However, consolidation in international commercial arbitration can also be disadvantageous. For example, lack of consent to consolidate and allegations of

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[133] Arbitration Act 1982 (Hong Kong), s 6B.
[134] Arbitration Act 1996 (UK), s 35.
[135] United Kingdom Departmental Advisory Committee on Arbitration Law "Report on the Arbitration Bill by the Departmental Advisory Committee on Arbitration Law" (February 1996) para 180.
[136] Emmanuel Gaillard and John Savage (eds) *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, The Hague, 1999) para 521.
[137] Lew, Mistelis and Kroll, above n 113, 378.

unequal treatment may be grounds for refusing enforcement of the award under the New York Convention.[138]

3 Other Ways of Minimising the Problems of Multi-Party Arbitration in International Commercial Arbitration

Given that consolidation in international commercial arbitration hinges, in most cases, on the agreement of the parties, international commercial arbitration has sought other ways to minimise the potential problems of not consolidating related arbitrations. One such method has been to appoint the same arbitrators to determine the different arbitrations, which has been adopted by some arbitration rules.[139] A potential problem arises with this solution where the parties have the power to appoint their own arbitrators.[140]

Another way of dealing with this problem that has been advanced is through concurrent hearings. Provision for concurrent hearings has even been included in some arbitration rules.[141] A procedure known as de facto arbitration, which is where two or more cases are heard simultaneously and by the same arbitrators, but separate awards are rendered, is also available under some systems.[142]

Tribunals may also order a stay of arbitral proceedings until a decision has been delivered in the first case.[143] Subsequent tribunals may then take account of the first decision, helping thus to avoid inconsistent decisions. The

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[138] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 330 UNTS 38, art V(1)(d) relating to the consent of the parties to the arbitral procedure. For a comprehensive discussion see Lew, Mistelis and Kroll, above n 113, 408-409.

[139] See for example, the Zurich Chamber of Commerce Arbitration Rules, art 13.

[140] This problem was illustrated by the *Dutco* case in the French Cour de cassation: *Siemens AG and BKMI Industrienlagen GmbH v Dutco Construction Co* (7 January 1992) Bull. Civ., 1, no 2. See also Eric A Schwartz "Multi-party Arbitration and the ICC – In the Wake of Dutco" (1993) 10 J Int Arb 5.

[141] See for example, the London Maritime Arbitrators Association Rules, art 14(b).

[142] International Commercial Arbitration Act 1989 (Australia). See also Organisation of Economic Co-operation and Development *International Investment Perspectives* (OECD Publishing, Paris, 2006) 227.

[143] See for example, *Volt Information Sciences, Inc v Board of trustees of Leland Stanford Junior University* (1990) XV Yearbook Commercial Arbitration 131.

problem with this option, however, is that it can lead to more delays in the resolution of disputes.[144]

To sum up on consolidation in international commercial arbitration, consolidation is an important element of this system but is, except in a limited number of exceptional circumstances, dependent on the parties' consent.

V CONSOLIDATION IN OTHER AREAS

This section will now consider how similar claims are consolidated in two other areas: in mass claims processes, and under NAFTA. It will then compare these frameworks with the current situation under ICSID and analyse the differences between them.

A Mass Claims Processes: the UNCC

Those in the arena of mass claims processes have long realised the value of consolidating claims. One of the most ambitious mass claims processes in terms of consolidating a large number of claims was the United Nations Compensation Commission (the UNCC). The UNCC was established in 1991 by the United Nations Security Council.[145] The purpose of the UNCC was to assess claims for damage arising out of Iraq's invasion of Kuwait on 2 August 1990, and the subsequent occupation of Kuwait until 2 March 1991.[146] The Commission was presented with over 2.6 million claims, the largest workload of any mass claims commission to date.

The UNCC is regarded as having pioneered many of the techniques used in the processing of mass claims.[147] Article 38(a) and (b) of the Provisional Rules

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[144] Lew, Mistelis and Kroll, above n 113, 404.
[145] UNSC Resolution 687 (3 April 1991) S/RES/687/1991.
[146] For an overview of the events of the Iraqi invasion of Kuwait see for example Abu Baker Hamzah *Invasion of Kuwait by Iraq 1990* (Media Cendiakawan, Kuala Lumpur, 1991).
[147] Howard M Holtzmann and Edda Kristjansdottir (eds) *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford University Press, New York, 2007) 244.

for Claims Procedure[148] encouraged the adoption of procedural mechanisms to aid in resolving the claims before the Commission. The Executive Secretary and Secretariat staff maintained a computerised database of all claims received.[149] Based on the legal, factual and valuation information, similar claims were classified into six different categories,[150] and processed together. This process was said to be to "facilitate the work of the Commissioners and to ensure uniformity in the treatment of similar claims."[151]

The Panel of Commissioners generally determined the common legal issues surrounding a set of claims first, and then addressed any legal questions raised by cases with specific fact patterns.[152] Compensation, for those claimants that satisfied the criteria for compensation, was then assessed individually, the levels of which were contained in an annex.[153]

1 The Category "E" Claims

This paper will look at a case from the Category "E" claims as the writer sees these claims as being the most factually similar to those advanced under ICSID. Category "E" claims could be brought by corporations, private legal entities or public sector enterprises.[154] These claims included claims relating to "construction or other contract losses; losses from the non-payment for goods or services; losses relating to the destruction or seizure of business assets; loss of profits; and oil sector losses."[155]

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[148] United Nations Compensation Commission Governing Council "Provisional Rules for Claims Procedure (VI) (26 June 1992) S/AC.26/1992/10; (1992) 31 ILM 1053 [UNCC Provisional Rules].
[149] Ibid, art 34(1).
[150] For more information on the categories of claims see, United Nations Compensation Commission www2.unog.ch/uncc (accessed 2 August 2008) [UNCC website].
[151] UNCC Provisional Rules, above n 148, art 17.
[152] See for example, United Nations Compensation Commission "Report and Recommendations made by the Panel of Commissioners Concerning the Fourteenth Instalment of "E2" Claims" (18 September 2003) S/AC.26/2003/21, Part III [The E2 Fourteenth Instalment].
[153] See for example, the E2 Fourteenth Instalment, ibid Annex III.
[154] UNCC website "Category "E" Claims", above n 150.
[155] Ibid.

(a) An Example: The Fourteenth Instalment of "E2" Claims

The writer takes the "Report and Recommendations made by the Panel of Commissioners Concerning the Fourteenth Instalment of "E2" Claims" as an example.[156] This report, and related "E2" reports, will be used to comment on the consolidation practices of the UNCC. "E2" Claims are claims filed on behalf of non-Kuwaiti Corporations and Other Business Entities (excluding those from the oil sector, construction/engineering and export guarantee claims).[157]

The Fourteenth Instalment dealt with 229 claims filed largely on behalf of corporations operating in the import-export trade.[158] The claimants ranged from 28 different countries. These claims were selected to be grouped together by the Secretariat on the basis of three principal criteria: "(a) the date of filing with the Commission, (b) the claimant's type of business activity, and (c) the type of loss claimed."[159]

Due to the large number of claims submitted to the Commission, the Secretariat played an important role in evaluating and classifying claims in the first instance. For example, in the Fourteenth Instalment of "E2" claims, the Secretariat conducted a preliminary assessment of the claims in order to determine if they met the formal requirements set down in Article 14 of the Rules.[160] Secondly, a preliminary review of all the claims was then conducted by the Secretariat, and expert consultants appointed by the Secretariat, to determine if any additional information or documentation would be needed by the Panel of Commissioners in deciding the claims.[161]

In deciding the claims, the Panel further divided the claims into subcategories reflecting their fact patterns.[162] The Panel provided a brief description of the claims in each subcategory, followed by an analysis of the

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[156] The E2 Fourteenth Instalment, above n 152.
[157] UNCC website "Category "E" Claims", above n 150.
[158] The E2 Fourteenth Instalment, above n 152, para 2.
[159] Ibid, para 2.
[160] Ibid, para 6.
[161] Ibid, para 8.
[162] Ibid, Part III.

relevant law. The evidentiary requirements for compensation, and the criteria used to determine the level of individual compensation, were then established for each subcategory.[163] The level of compensation for each individual claimant was set out in Annex III.[164]

2 Can this Model Apply to Arbitrations under ICSID?

The first important difference between these two models is the nature of the UNCC:[165]

> The Commission is not a court or an arbitral tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims. It is only in this last respect that a quasi-judicial function may be involved.

This is largely because the liability of Iraq for damage arising out of its invasion, and occupation, of Kuwait was established by the Security Council,[166] and expressly accepted by Iraq.[167] The UNCC therefore did not have to assess the issue of liability for loss in claims brought before them. This highlights an important characteristic of mass claims commissions, which is that they are generally not charged with determining the liability of the parties.[168] In fact, by definition, mass claims commissions deal with the consequences, not the causes of the conflict.[169] This is an important difference to the ICSID system, which must deal with both of these issues.

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[163] Ibid, see especially para 36.
[164] Ibid, Annex III.
[165] United Nations Secretary-General "Report of the Secretary-General pursuant to paragraph 19 of Security Council Resolution 687 (1991)" (2 May 1991) S/22559, para 20.
[166] UNSC Resolution 687 (8 April 1991) S/RES/687/1991, paras 16 and 33.
[167] Iraq expressed its acceptance of the provisions of Resolution 687 in the following letters: (6 April 1991) S/22456; (10 April 1991) S/22480; and (23 January 1992) S/23472.
[168] The one notable exception is the Eritrea Ethiopia Claims Commission: Eritrea Ethiopia Claims Commission *Jus Ad Bellum* Ethiopia's Claims 1-8 (Partial Award) (2006) 45 ILM 430.
[169] See for example, Hans Das "The Concept of Mass Claims and the Specificity of Mass Claims Resolution" in The International Bureau of the Permanent Court of Arbitration (ed) *Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges* (Oxford University Press, Oxford, 2006) 3, 5.

The trade-off necessary to complete the Commission's work can be seen in the following comment by the Panel of Commissioners:[170]

> ... the Panel must keep in mind the reality that the vast number of claims before the Commission require the adoption of legal standards and valuation methods that are administrable and that carefully balance the twin objectives of speed and accuracy. Only by adopting such an approach can the thousands of category "E" claims that have been filed with the Commission be efficiently resolved.

Indeed, in the UNCC, the Panels generally assessed claims in the abstract, dealing with the factual patterns, but rarely commenting on specific cases.[171] This is due to the large amount of cases the Panels were required to decide in each instalment. An ICSID tribunal would not have such a high number of claims before it, and could therefore be more specific in its analysis. However, the experience of the UNCC shows that it is possible to decide legal aspects of claims in the abstract.

The trade-off, or perhaps more precisely balancing exercise, described above is not generally necessary in investment treaty arbitration. The reason for consolidation in mass claims processes seems to be more one of necessity, because of the large number of claims submitted to these institutions.[172] The number of claims means that the institution has no choice but to adopt a collective approach to the processing of claims.[173] Although the number of claims submitted to ICSID is on the rise,[174] it is nowhere near the number usually required before a process is considered a "mass claims process".[175] The rationale for consolidation in the ISCID system has more to do with efficiency and the desire to avoid the risk of conflicting decisions than it does with necessity.

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[170] United Nations Compensation Commission "Report and Recommendations made by the Panel of Commissioners Concerning the First Instalment of "E2" Claims" (3 July 1998) S/AC.26/1998/7, para 40. See also, Das, ibid, 5.
[171] See for example, the E2 Fourteenth Instalment, above n 152, Part III.
[172] Holtzmann and Kristjansdottir, above n 147, 22.
[173] Das, above n 169, 7.
[174] See Part I Introduction.
[175] Das, above n 169, 7.

On the other hand, one could argue that while the motivations for establishing the bodies are not the same, the necessity for some form of consolidation in ICSID still remains, as it experiences an increasing number of claims brought to it for determination.[176] If the principal aim of consolidation in ICSID is viewed as procedural economy then some parallels may be drawn with the mass claims commission framework. The difference between these frameworks is that while procedural economy may be seen as desirable under ICSID, it is a necessity under mass claims processes.

The Secretariat played an important role in the UNCC in receiving, evaluating, and classifying claims. A parallel may be able to be drawn with the ICSID Secretariat. While the Secretariats obviously play different roles because of the caseload that their institution is charged with, the ICSID Secretariat has, in recent years, begun to take more of an active role in the assessment of claims.[177]

Finally, whereas in the mass claims arena, "practical justice"[178] is accepted as necessary given the volume of claims submitted to these institutions, parties to investment treaty arbitrations would be unlikely to accept such justice. An example of this "practical justice" can be seen in the fact that the UNCC assessed claims on the basis of fact patterns, not the individual facts of each claim.[179]

In conclusion, claims in mass claims commissions are consolidated on the underlying basis of procedural economy driven by necessity, as opposed to any desire for consistency in decisions rendered. If consolidation were introduced in ICSID with the aim of achieving procedural economy, mass claims commissions may provide a useful parallel.

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[176] See Part I Introduction.
[177] For an example of such a practice see Part X A Appointment of the Same Tribunal.
[178] David D Caron and Brian Morris "The United Nations Compensation Commission: Practical Justice, Not Retribution" (2002) 13 EJIL 183, 188.
[179] See Part V A 1 (a) An Example: The Fourteenth Instalment of "E2" Claims.

B NAFTA

NAFTA was signed by Canada, Mexico and the United States in 1992 and came into force on 1 January 1994.[180] Chapter 11 of NAFTA concerns investments and gives an important role to arbitration in the settlement of investment disputes. Under these provisions, claims by investors of a NAFTA party against another NAFTA party may be submitted to arbitration for determination.[181] The possibility for overlapping claims was addressed in NAFTA by Article 1126 on consolidation,[182] which has been described as "an unusual and innovative provision."[183]

The success of the NAFTA consolidation provision can, in part, be illustrated by the number of subsequent treaties and regimes that have adopted similar consolidation provisions. Processes similar to the consolidation process in NAFTA have been adopted by several subsequent Free Trade Agreements (FTAs), including the Central American Free Trade Agreement (CAFTA).[184] Similar consolidation processes have also been included in the 2004 US Model BIT.[185] The most recent FTAs signed by the United States have added an extra requirement to the consolidation provision. While the NAFTA provision applies where the arbitrations have "a question of law or fact in common",[186] more recent FTAs also require that the arbitrations "arise out of the same events or circumstances".[187]

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[180] North American Free Trade Agreement (17 December 1992) 107 Stat 2057; CTS 1994 No 2; (1993) 32 ILM 289 [NAFTA].
[181] Ibid, art 1120.
[182] Ibid, art 1126, see Appendix One.
[183] Henri C Alvarez "Arbitration Under the North American Free Trade Agreement" (2000) 16 Arb Int 393, 413.
[184] Central American Free Trade Agreement (CAFTA) (28 May 2004) (2004) 43 ILM 514, art 10.25. Other FTAs to adopt similar consolidation procedures include the United States - Chile Free Trade Agreement (6 June 2003) (2003) 42 ILM 1026, art 10.24, United States - Morocco Free Trade Agreement (15 June 2004) (2004) 118 Stat 1103; (2005) 44 ILM 544, art 10.24, and the Canada - Chile Free Trade Agreement (5 December 1996) (1997) 36 ILM 1135, art G-27.
[185] United States Model BIT 2004, art 33.
[186] NAFTA, above n 180, art 1126(2).
[187] See for example, United States - Chile Free Trade Agreement, above n 184, art 10.24, United States - Morocco Free Trade Agreement, above n 184, art 10.24 and Dominican Republic – Central America – United States Free Trade Agreement (DR-CAFTA) (5 August 2004) (2004) Pub L No 109-53; (2005) 119 Stat 462; (2004) 43 ILM 514, art 10.25.

1 *Article 1126*

Article 1126 provides for the consolidation of claims by a consolidation tribunal where, firstly, the cases raise a common issue of law or fact and, secondly, consolidation is "in the interests of fair and efficient resolution of the claims".[188] If one of the parties requests consolidation, a tribunal of three arbitrators is appointed by the Secretary-General of ICSID within 60 days.[189] If the tribunal concludes in favour of consolidation, they then assume jurisdiction over all or part of the claims,[190] or one or more of the claims where it believes that the determination of that or those claims would aid in the resolution of the other claims.[191] Consolidation may not be ordered *ex officio*; it must be requested by one of the parties.

2 *Conflicting NAFTA Consolidation Decisions*

In 2005, two NAFTA consolidation cases discussed the standard for consolidation under Article 1126.[192] These decisions contradict each other on the standard they require for consolidation.

(a) *Corn Products*

The first decision, *Corn Products,*[193] in May 2005, rejected a request by Mexico to have two claims by American companies consolidated. The American companies claimed that an excise tax imposed by Mexico on soft drinks containing high fructose corn syrup breached several provisions of NAFTA.[194] The Consolidation Tribunal acknowledged that the cases had "a question of law

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[188] NAFTA, above n 180, art 1126(2).
[189] Ibid, art 1126(5).
[190] Ibid, art 1126(2)(a).
[191] Ibid, art 1126(b).
[192] *Corn Products International Inc v United Mexican States ICSID Case No ARB(AF)/04/1 and Archer Daniel Midland Co and Tate & Lyle Ingredients Americas Inc v United Mexican States ICSID Case No ARB(AF)/04/5* (Consolidation) (NAFTA/ICSID (AF), 2005, Cremades P, Rovine & Siqueiros); *Canfor Corp v United States of America, Tembec et al v United States of America, Terminal Forest Products Ltd v United States of America* (Consolidation) (NAFTA, 2005, van den Berg P, de Mestral & Robinson).
[193] *Corn Products*, ibid.
[194] The claimants alleged breaches of NAFTA, above n 180, arts 1102 (National Treatment), 1106 (Performance Requirements) and 1110 (Expropriation); ibid, para 1.

or fact in common"[195] but did not believe that consolidation would be "in the interests of fair and efficient resolution of the claims".[196] In considering the fairness and efficiency of consolidating the claims, the Tribunal concluded that "the risk of unfairness to Mexico from inconsistent awards ... cannot outweigh the unfairness to the claimants of the procedural inefficiencies that would arise in consolidation proceedings."[197] These procedural inefficiencies included the difficulties of keeping information confidential from one another, given that the parties were in competition.[198]

(b) *Canfor*

In September of the same year, a NAFTA consolidation tribunal considered a request from the United States to consolidate three claims made by Canadian companies against it.[199] The claimants were three Canadian softwood lumber companies. Their claims arose out of countervailing duty and anti-dumping measures adopted by the United States, which affected the Canadian companies concerned, and allegedly breached several NAFTA provisions.[200]

According to the *Canfor* Consolidation Tribunal, the main purpose of the consolidation provision in NAFTA was to promote "procedural economy".[201] This was a concern especially in respect of state parties.[202] The Tribunal concluded that procedural economy pointed in favour of consolidation of the claims.[203]

The *Canfor* Tribunal commented on the importance of avoiding conflicting decisions in the investment treaty arbitration realm:[204]

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[195] NAFTA, ibid, art 1126(2); *Corn Products*, ibid, para 6.
[196] NAFTA, ibid, art 1126(2); *Corn Products*, ibid, para 9.
[197] *Corn Products,* ibid, para 17.
[198] Ibid, paras 7-9.
[199] *Canfor*, above n 192.
[200] The claimants alleged breaches of NAFTA, above n 180, arts 1102 (National Treatment), 1103 (Most-Favoured-Nation Treatment), 1105 (Minimum Standard of Treatment), and 1110 (Expropriation).
[201] *Canfor*, above n 192, paras 73-76.
[202] Ibid.
[203] Ibid, para 220.
[204] Ibid, para 133.

> The desirability of avoiding conflicting decisions 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.

(c) The Differences between *Canfor* and *Corn Products*

The conflicting decisions of *Canfor* and *Corn Products* are important in NAFTA jurisprudence for their affect on the application of Article 1126. Whereas the tribunal in *Corn Products* thought that the opposition of the claimants to consolidation was relevant,[205] the tribunal in *Canfor* considered that this factor would be irrelevant in most cases.[206] The *Canfor* tribunal also considered the fact that the claimants were competitors to be irrelevant,[207] whereas this was an important factor in deciding not to consolidate the claims in *Corn Products*.[208] Indeed, if the *Corn Products* reasoning were followed, cases involving claimants in competition with each other who oppose consolidation would very rarely be consolidated.[209] According to *Canfor* "the factors of time and cost would usually cancel one another out, since consolidation will usually save the state party both time and money, and increase the investors' expenditures of both."[210] Finally, the *Canfor* Tribunal considered the avoidance of conflicting decisions as a factor that must be taken into account.[211] This factor clearly favours consolidation once the first requirement (of a common question of law or fact) is satisfied.

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[205] *Corn Products*, above n 192, para 12.
[206] *Canfor*, above n 192, paras 78-80 and 135.
[207] Ibid, para 138.
[208] *Corn Products,* above n 192, paras 7-9.
[209] Daniel Bodansky "International Decisions: The 2005 Activity of the NAFTA Tribunals" (2006) 100 AJIL 429, 433.
[210] Ibid.
[211] *Canfor*, above n 192, paras 131-133.

The most obvious difference in NAFTA, compared with investment treaty arbitration, is that under NAFTA, all of the disputes arise under the same treaty. In investment treaty arbitration, the disputes can, and most commonly do, arise from a number of investment agreements and BITs. In this later scenario, consent to consolidation cannot be found in the consent to the Treaty, as is the case in the NAFTA context.

Henri Alvarez notes that given the special nature of arbitration claims under NAFTA, "some compromise of the principles of private arbitration may be justified."[212] Arbitral proceedings under NAFTA are not based on consent as is traditionally and normally the case in arbitration. NAFTA provides arbitration as of right to investors that fall within the provisions of NAFTA. It is not necessary that there be an investment contract or agreement to arbitrate.[213] Conversely, consolidation under NAFTA can still be viewed as the product of the consent of the parties.[214] The state's consent derives from its acceptance of NAFTA and the investor's consent from its decision to invest in a NAFTA country.

One lesson that can be learnt from the NAFTA context by ICSID is that, in developing a consolidation framework, one should be more clear as to what the objectives of consolidation are. Otherwise, the uncertainty and inconsistency found in some arbitral awards is just replicated at a higher level.

VI FRAMING THE ISSUE

In light of the preceding analysis, it is necessary to draw some distinctions before proceeding to consider consolidation with respect to the ICSID framework. The need for consolidation may arise from several scenarios and be sought for several reasons. This section aims to outline and distinguish

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[212] Alvarez, above n 183, 414.
[213] Ibid.
[214] See for example, Antonio Crivellaro "Consolidation of arbitral and court proceedings in investment disputes" in Bernardo M Cremades and Julian D M Lew *Parallel State and Arbitral Procedures in International Arbitration* (ICC Publishing, Paris, 2005).

the different reasons for consolidating claims, and the different bases upon which claims may be consolidated.

A Reasons for Consolidating

Due to the lack of any institutional consolidation mechanism in ICSID, it is quite possible that a host state will face multiple claims arising out of the same event, or sequence of events. There are two concerns with this and it is submitted that these concerns must be treated separately. The first is the possibility of inconsistent decisions. The second is the concern over procedural inefficiency. There seems, therefore, to be two main reasons to consolidate claims: as a means of achieving consistency and as a means of achieving procedural economy. These reasons may co-exist in any given set of circumstances, for example in the claims arising out of the Argentine Fiscal Crisis. It is not necessarily the case, however, that both reasons will always be present.

1 Consistency

One fundamental reason for consolidating claims may be the desire to avoid the possibility of tribunals rendering inconsistent decisions. The danger of this has been illustrated by several cases, including *LG&E*[215] and *CMS*,[216] and the *SGS* cases.[217] While the arbitral system does not operate on a principle of *stare decisis*, inconsistent decisions are still undesirable as they call into question the legitimacy of the system and threaten the future acceptance of it by the participants.[218]

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[215] *LG&E*, above n 32.
[216] *CMS* (Award), above n 33; *CMS* (Annulment), above n 33.
[217] *SGS v Pakistan*, above n 34; *SGS v Philippines*, above n 35.
[218] See for example, Brower, Brower and Sharpe, above n 13; Hirsch, above n 6, 2; Franck "Do Investment Treaties Have a Bright Future", above n 3, 66.

2 *Procedural Economy*

Another principal reason for consolidating claims is the desire to achieve procedural economy. Procedural economy was considered to be the underlying basis of Article 1126 of NAFTA by the Consolidation Tribunal in *Canfor*.[219] This consideration is often one that is advanced by the state party. However, ICSID, as an institution, also has an interest in promoting procedural economy, given the recent rise in claims submitted to it for determination. Without some focus on achieving procedural economy, the determination of claims will take longer than the parties deem to be acceptable, which could result in a loss of confidence in the system.

B *The Basis upon which Claims May be Consolidated*

A set of claims may be appropriate for consolidation, in two distinct situations: when they arise out of the same event, and when they arise out of different events but give rise to similar legal issues.

1 *Arising out of the Same Event*

Claims may be appropriate for consolidation where they arise out of the same event or factual circumstances. It is not therefore necessary that consolidated claims always involve a similar question of law. Article 1126 of NAFTA provides for consolidation where there is "a question of law *or* fact in common". Subsequent treaties that have adopted a NAFTA-style consolidation provision have added an extra requirement. For example, the US Model BIT now provides for consolidation where there is a "question of law or fact in common" and the claims "arise out of the same events or circumstances".[220]

Given that the focus of consolidation proceedings arising out of the same event is not necessarily on the existence of a common question of law, the underlying reason for consolidation in this area seems to be the desire for

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[219] See Part V B (b) Canfor.
[220] United States Model BIT 2004, art 33(1).

procedural economy. This conclusion is supported in the NAFTA context by the decision in *Canfor*.[221]

2 Concerning the Same Legal Issue

Claims may also be consolidated where they all give rise to the same legal issue, but do not arise from the same event, or series of events. In the domestic realm, these cases are often brought in the form of test cases or class action suits. A test case aims to test a previously untested, or unpopular, area of law in order to set a precedent for future cases.[222] A class action aims to resolve a large number of claims efficiently and consistently.[223]

The category of consolidation that consolidates claims based on similar legal issues seems to be more focused on ensuring that like claims are decided alike, or in other words, ensuring consistency of the law within the system, as well as saving court resources, which is always a concern in domestic systems.

3 Evaluation

The Argentine claims essentially fall into both of these categories, as they all arise out of the Argentine Fiscal Crisis, and most give rise to similar legal issues. The *SGS* cases,[224] on the other hand, are an example of where the claims could have been consolidated on the basis that they gave rise to the same legal issue, regardless of the fact that they arose from different events.

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[221] *Canfor*, above n 192, paras 73-76.

[222] Test cases often occur in the context of mass tort claims. See for example, the asbestos cases in the United States: David Friedman "More Justice for Less Money" (1996) 39 J L & Econ 211; Robert G Bone "Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity" (1993) 46 Vand L Rev 561; Michael J Saks and Peter David Blanck "Justice Improved: the Unrecognised Benefits of Aggregation and Sampling in the Trial of Mass Torts" (1992) 44 Stan L Rev 815. The term is also used to describe a case brought with the aim of changing not only the law, but also social norms. One of the most famous example of this is *Brown v Board of Education* (1954) 347 US 483; 74 S Ct 686.

[223] Howard M Erichson "Mississippi Class Actions and the Inevitability of Mass Aggregate Litigation" (2005) 24 Mississippi College Law Review 285, 296; Edward F Sherman "Consumer Class Actions: Who are the Real Winners?" (2004) 56 Maine Law Review 223, 224.

[224] *SGS v Pakistan*, above n 34; *SGS v Philippines*, above n 35.

In the writer's view, it is the type of consolidation based on the same events that ICSID should focus on. Consolidating claims based on procedural economy poses less of a challenge to the ICSID framework than does promoting consistency of decisions. Procedural economy can be seen as being consistent with the traditional arbitral benefits of speed and efficiency. On the other hand, introducing a system of consolidation to ensure consistency of decisions within ICSID, or investment treaty arbitration generally, fundamentally questions the framework of arbitration as a consensual, party-specific institution binding only the parties that have consented to be bound.

C The Origin of the Claims

There is one final distinction that must be highlighted regarding the origin of the claims that are to be consolidated. This distinction arises from the fragmented nature of investment treaty arbitration.

On the one hand, related claims may arise out of the same treaty. The quintessential example of this in the modern investment treaty arbitration field is claims arising out of NAFTA. This situation does not raise any issues, as consolidation is provided for in the Treaty.

Multiple claims may also arise out of the same BIT. Where there is a consolidation clause in the BIT, consolidating claims according to the terms of the treaty will not be a problem. Many recent Model BITs have introduced consolidation clauses, for example, the 2004 US Model BIT.[225] Even where there is no consolidation clause in the treaty at issue, it seems easier to consolidate claims arising out of the same treaty, as the provisions at issue, in a legal sense, will be the same.

A different set of claims are those that arise under different BITs. An example of this can be seen in the famous *CME* and *Lauder* cases: *CME* commenced arbitration under the 1991 BIT between the Netherlands and

[225] United States Model BIT 2004, art 33.

Czechoslovakia,[226] whereas *Lauder* proceeded under the 1991 BIT between the United States and Czechoslovakia.[227] Consolidating claims that arise under different BITs raises more difficulties than consolidation under FTAs such as NAFTA, or the same BIT. The Argentine cases in ICSID blur this distinction to some extent, as the majority of claims in fact arise under the BIT between the United States and Argentina.

VII DOES CONSOLIDATION PROVIDE UNEQUAL BENEFITS?

In order to answer this question, it is necessary to look at consolidation from both the investor's and the state's perspective.

A From the State Perspective

The consolidation of claims brings substantial benefits, in terms of procedural economy, to the state party. From this point of view, establishing consolidation provisions may make ICSID more attractive to those states yet to join.[228]

In some circumstances, it may be that consolidation is not a practical benefit to a state. For example, from a tactical perspective, it may be in Argentina's interests to delay the determination of investors' claims in the hope that some investors will simply give up. A state may also see a benefit in arguing each case separately, as they can learn from early decisions and develop different arguments in an attempt to avoid liability.

B From the Investor Perspective

Consolidation is perceived as bringing less benefits, and indeed perhaps putting further burdens on investor parties. Investor parties must now collaborate in advancing their claims and may need to make more effort to, for example, keep

[226] *CME* (Partial Award), above n 12; *CME* (Final Award), above n 12.
[227] *Lauder*, above n 12.
[228] Currently 143 states have ratified the ICSID Convention: ICSID website, above n 2.

certain information confidential from each other if they are in direct competition. These difficulties are especially pronounced if one investor is a relatively small investor with a small, straightforward claim. If that investor's claim is then consolidated, it is likely that resolution will in fact take longer than it would have prior to consolidation.[229]

However, despite the apparent inequality of benefits of consolidation in favour of the state party, the investor also has an interest in consolidation, or at least in promoting consistency in arbitral decisions. Investors rely on past arbitral decisions as a guide to conduct, rights and liabilities in the investment relationship.[230] Inconsistency in arbitral decisions therefore leads to uncertainty in the practical investment relationship, resulting in a lack of predictability, reliability and clarity.[231] ICSID also has an interest in promoting consistency, for a legal system in which inconsistent decisions are allowed to foster brings the law, and the system, into disrepute. A system that is brought into disrepute in this way, will not last long.[232]

The introduction of a consolidation procedure could, on this analysis, have negative effects for the ICSID framework. Membership of ICSID is often used by states to attract foreign investment, for investors perceive their investment to be safer if they have direct recourse to an arbitral body in the event of a dispute. If a consolidation framework, which is perceived as unfavourable to investors, is introduced, membership of ICSID may lose its attractiveness, and foreign investment may suffer. This would be an undesirable consequence from the point of view of states also.

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[229] See for example, Crivellaro, above n 214, 113; Gaillard "The Consolidation of Arbitral Proceedings and Court Proceedings", above n 16, 37; Part VII C Efficiency and Cost-Effectiveness.

[230] Franck "Do Investment Treaties Have a Bright Future", above n 3, 57.

[231] Ibid, 63.

[232] Ibid, 66. See also Michael D Goldhaber "Wanted: a world investment court; All-powerful global institutions may be out of fashion. But, as recent arbitration rulings show, they may be exactly what the world needs" (2004) 26 American Lawyer SS26(5).

Consolidation can also be seen as a benefit to the investor in some circumstances, as it may in fact lend more weight to their claim if, for example, several parties present the same expert evidence.

Finally, there may also be practical reasons, unrelated to the respective benefits of consolidation, that lead an investor party to oppose consolidation. For example, an investor may have strong loyalties to their legal counsel. In situations like the Argentine cases, where there are over 40 investors seeking compensation from Argentina, investors may also perceive the chance of getting their compensation paid as more likely if they pursue their claim on their own.

C Balancing the Interests

The writer believes that while it is generally perceived that consolidation favours the state party to the arbitration, there are clear benefits of consolidation to the investor also, and the scales of convenience may therefore tip in favour of consolidation for both parties to an arbitration, if the circumstances are appropriate for consolidation.

The OECD Investment Committee considered the issue of consolidation in international investment disputes. There was no consensus in these discussions that "the advantages of consolidation provisions in investment agreements exceeded its disadvantages." Katia Yannaca-Small notes that the "consent of the parties as a prerequisite for a request for consolidation and concerns about confidentiality still weighed strongly against the advantages of this measure."[233]

VIII SPECIFIC PROBLEMS THAT MAY ARISE IN CONSOLIDATION UNDER ICSID

A The Consensual Nature of Arbitration

The apparent distaste for consolidation in ICSID, and investment treaty arbitration in general, results from a number of factors. The most important of

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[233] Katia Yannaca-Small "Improving the System of Investor-State Dispute Settlement: The OECD Government's Perspective" in Sauvant, above n 10, 223.

these is the contractual nature of the consent to arbitration, which is regarded as the "cornerstone" of the tribunal's jurisdiction.[234] This consensual aspect of arbitration means that it is difficult, if not impossible, to join non-parties to the arbitration in the absence of agreement.[235]

B Choice of Arbitrators

Under the ICSID Convention, and general arbitral practice, one of the principal benefits of arbitration is that the parties choose their own arbitrators.[236] This right could be sacrificed if cases are consolidated. Under NAFTA, if consolidation is ordered, the consolidation tribunal (appointed by the Secretary-General of ICSID)[237] assumes jurisdiction over the cases.[238] The arbitrators chosen by the parties are thus not the same arbitrators as those who decide the case.

One possible solution to the problem of how multiple parties could come to an agreement on appointing a single arbitrator could be to pass the responsibility for appointing arbitrators to ICSID, instead of giving this right to the parties.[239] This would involve amending the ICSID Convention itself, as Article 37 of the Convention provides for the right of the parties to appoint an arbitrator each in the absence of express agreement to the contrary.[240] As is noted below,[241] amending the Convention is a difficult task as it requires the agreement of all contracting states.[242]

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[234] ICSID Convention, above n 17, art 3(1); Hirsch, above n 6, 47; David J Branson and W Michael Tupman "Selecting an Arbitral Forum: A Guide to Cost-Effective International Arbitration" (1984) 24 Virginia Journal of International Law 917, 921.
[235] Hanotiau, above n 24, para 2.
[236] ICSID Convention, above n 17, art 37.
[237] NAFTA, above n 180, art 1126(5).
[238] Ibid, art 1126(2).
[239] This option fits with the opinions of some commentators that "the right to nominate an arbitrator need not be treated as sacrosanct" so long as the parties are treated equally: Platte, above n 118, 75.
[240] ICSID Convention, above n 17, art 37(2)(b).
[241] See Part IX How Could Consolidation be Introduced in ICSID?
[242] ICSID Convention, above n 17, art 66.

C Efficiency and Cost-Effectiveness

Arbitration is generally viewed as more efficient than domestic legal proceedings. From the state party's perspective, this benefit would be increased by consolidation. From the investor's perspective, however, consolidating claims may actually cause delays and increase procedural difficulties associated with coordinating its claim with another party.[243]

Emmanuel Gaillard raises a potential scenario that warrants consideration:[244]

> "it may well be that one of the parties involved is only concerned about obtaining an award on a specific point with respect to which the facts are established. In separate proceedings on this question, it may receive an award quickly, while consolidated proceedings, involving the discussion of other, possibly more complicated, issues may take substantially longer."

This could give rise to increased costs for the investor parties in consolidated investment treaty arbitrations, especially with respect to legal counsel fees. This could be remedied by allowing parties that have no interest in one particular part of the arbitration, to be excused from being present. However, the problem of delay in delivering the award in consolidated proceedings seems unable to be remedied.

In terms of costs, any institutional arbitration system proposing to introduce rules of consolidation would need to consider how the fees and other costs related to the arbitration would be apportioned between the parties.

D Confidentiality

Arbitral proceedings are generally held in private. This presents substantial benefits to commercial parties concerned with protecting commercial secrets, or commercially sensitive information. Consolidating proceedings

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[243] See for example, *Corn Products*, above n 192, para 8.
[244] Gaillard "The Consolidation of Arbitral Proceedings and Court Proceedings", above n 16, 37.

presents a danger then, especially between parties in commercial competition, that commercially sensitive information will be released to the other party. This was a concern for the Consolidation Tribunal in *Corn Products*.[245]

The move towards transparency in ICSID proceedings, introduced primarily in the 2006 amendments to the ICSID Arbitration Rules, may have begun the process of finding methods to ensure confidentiality whilst allowing third-party participation.[246] For example, Rule 32, as amended, allows for circumstances in which third parties may attend arbitral proceedings.[247] The Rule also provides that "[t]he Tribunal shall … establish procedures for the protection of proprietary or privileged information."[248] This Rule relates to third parties however, and applying such procedures as between disputing parties may create concerns over due process. If ICSID can develop mechanisms to protect confidential information in consolidated proceedings, the concern over confidentiality will be substantially alleviated. Some mechanisms that have been advanced by commentators and actors within ICSID in the context of consolidation include partially separate hearings *in camera*, appointment of a confidentiality advisor, and arbitral orders restricting access.[249]

The Tribunal in *Canfor* noted that: "in many international arbitrations, parties negotiate and execute an appropriate confidentiality agreement among themselves".[250] Implementing confidentiality agreements may therefore not be such a difficult process in cases of consolidated claims. The Tribunal also noted that cases giving rise to due process concerns over confidentiality would be rare.[251]

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[245] *Corn Products*, above n 192, paras 7-9.
[246] ICSID Arbitration Rules, above n 27.
[247] Ibid, r 32.
[248] Ibid, r 32(2).
[249] OECD *International Investment Perspectives*, above n 142, 237.
[250] *Canfor*, above n 192, para 143.
[251] Ibid, para 147.

E The Fragmented Nature of Investment Treaty Arbitration

While consolidation may promote procedural economy, establishing a consolidation procedure in ICSID will not completely remedy the problem of inconsistent decisions in the arbitral world. The arbitral world is characterised by numerous institutional frameworks, which are unconnected to each other. Many treaties or arbitration clauses allow the parties to choose between several of these institutional frameworks. For example, the disputing investor party in NAFTA arbitral proceedings may choose between the UNCITRAL Rules, the ICSID Rules, or the ICSID Additional Facility Rules.[252] This characteristic of arbitration means that even if institutionalised consolidation in ICSID were to substantially lessen the instance of inconsistent decisions, this may not be replicated in other areas.

The draft Multilateral Agreement on Investment (MAI) was negotiated in an attempt to harmonise international investment laws and practices.[253] Negotiations for the agreement began in 1995, but were discontinued in 1998 because of a lack of agreement.[254] The draft MAI contained a provision on consolidation in Article D.9,[255] which was a provision of significant debate for the negotiating group.[256]

F Summary

The above analysis makes it clear that the consolidation of separately commenced arbitral proceedings could lead to numerous procedural difficulties. Gaillard notes that these difficulties may be accentuated by the fact that most arbitration rules are designed to accommodate two-party arbitrations.[257] This, of course, could be remedied by an amendment to the ICSID Arbitration Rules. It

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[252] NAFTA, above n 180, article 1120.
[253] Organisation for Economic Co-operation and Development www.oecd.org (accessed 6 September 2008).
[254] Ibid.
[255] Organisation for Economic Co-operation and Development "The Multilateral Agreement on Investment: Draft Consolidated Text" (22 April 1998) DAFFE/MAI(98)7/REV1, art D.9.
[256] Ibid.
[257] Gaillard "The Consolidation of Arbitral Proceedings and Court Proceedings", above n 16, 37; Philippe Leboulanger "Multi-Contract Arbitration" (1996) J Int Arb 43, 43.

seems that the first step in this process has been taken with the introduction of the amended ICSID Arbitration Rules in 2006.[258] These Rules allow for increased third party participation in ICSID arbitrations, most notably in the form of written submissions.[259] Rule 32 also allows for third parties to "attend or observe all or part of the hearings", subject to the parties' approval.[260]

IX HOW COULD CONSOLIDATION BE INTRODUCED IN ICSID?

An important question remains as to how consolidation could be introduced into the ICSID framework. The answer to this question is important as it could, on its own, determine whether consolidation is a viable option within ICSID. There are two ways to change the framework of ICSID. The first is to change the ICSID Convention itself. Such an amendment is difficult to achieve, for it would need to be approved by all of the state parties to the Convention.[261] At present, the ICSID Convention has 143 Contracting States.[262] A testament to the difficulty involved in amending the ICSID Convention is that it has never been amended since it came into force in 1966. The second way to amend the ICSID framework is to amend the ICSID Arbitration Rules. This may be done by a two-thirds majority of the Administrative Council of ICSID.[263] It is therefore substantially easier to amend the Arbitration Rules than it is to amend the Convention itself. The question, therefore, is whether the introduction of consolidation could be effected by an amendment to the Arbitration Rules.

A The Administrative Council's Power to Amend

1 Article 6(1)(c)

Article 6 outlines the powers of the Administrative Council. Among other things, it gives the Administrative Council the power to, "adopt the rules of

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[258] ICSID Arbitration Rules, above n 27.
[259] Ibid, r 37.
[260] Ibid, r 32.
[261] ICSID Convention, above n 17, art 66.
[262] ICSID website, above n 2.
[263] ICSID Convention, above n 17, art 6, see Appendix Two.

procedure for conciliation and arbitration proceedings".[264] The current Arbitration Rules in this respect are the newly revised version, which came into effect on 10 April 2006.[265] Christoph Schreuer notes that during the drafting of the Convention there was disagreement over whether the Arbitration Rules should be included in the Convention itself.[266] Ultimately, the view that a degree of flexibility was needed to allow the Arbitration Rules to be amended, if necessary, convinced the drafters.[267] The Arbitration Rules are designed to supplement the Convention, and may accordingly not be contrary to it.[268]

It could therefore be argued that the Administrative Council has the power to introduce consolidation into the Arbitration Rules, because such an amendment would simply be as to the rules of procedure for arbitration proceedings.[269] Consolidation, with the view of achieving procedural economy, is a procedural matter. In this way, it is no different to the other provisions of the Arbitration Rules. It does not affect the substantive determination of the parties' claims, merely the procedure by which those claims are determined. Moreover, the Administrative Council consists of one representative of each contracting state,[270] and must adopt amendments to the Arbitration Rules by a two-thirds majority.[271] The adoption of a consolidation framework by the Administrative Council would therefore be defensible on the grounds that it reflected the will of the majority of the members of ICSID.

There are, however, some limitations on this power, which may mean that a change in the Arbitration Rules may not be enough to implement consolidation in a meaningful way. Even if the Arbitration Rules could be used to introduce consolidation into the ICSID framework, they would be limited by

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[264] Ibid, art 6(1)(c), see Appendix Two.
[265] ICSID Arbitration Rules, above n 27.
[266] Schreuer, above n 28, art 6, para 10; see also International Centre for the Settlement of Investment Disputes "Documents Concerning the Origin and Formulation of the Convention" (Vol 2, ICSID, Washington D.C., 1968) 79, para 17; 288; 327; 382; 479; 560, para 17 [ICSID Convention Formulation Documents].
[267] Schreuer, ibid.
[268] Ibid, art 6, para 11 and art 44, paras 30-31.
[269] ICSID Convention, above n 17, art 6(1)(c).
[270] Ibid, art 4(1).
[271] Ibid, art 6(1).

the ability of the parties to agree to different rules of procedure.[272] Although the parties may not modify the rules that reflect "nonderogable provisions of the Convention",[273] they may agree on virtually any other rules of procedure.[274] For example, parties using the 2004 US Model BIT agree to the provision on consolidation contained in that treaty.[275] That provision will be enforced by ICSID, despite the fact that it is not part of the Arbitration Rules. As noted in the history of the Convention, the Arbitration Rules are "model rules which the parties [are] free to adopt or not."[276] In this way, the introduction of a consolidation provision in the Arbitration Rules would not affect the parties' substantive rights, nor would it impact on the principle of party autonomy. However, given that at least one party will generally be in favour of consolidation where it is appropriate, the provision could still be effective. In addition, changing the Arbitration Rules to provide for consolidation within ICSID could act as an incentive to agree to consolidation, in that parties would have to actively agree to contract out of this rule.[277]

2 *Article 6(3)*

Alternatively, an argument could be advanced that Article 6(3) provides the necessary scope for the Administrative Council to approve the introduction of institutional consolidation in ICSID. Art 6(3) provides that "[t]he Administrative Council shall also exercise such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of this Convention."[278] The question is whether this provision is wide enough to give the Administrative Council the power to unilaterally introduce mandatory institutional consolidation: is the introduction of consolidation "necessary for the implementation of the provisions" of the ICSID Convention? One could argue

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[272] Ibid, art 44; see also ICSID Convention Formulation Documents, above n 266, 79, para 17; 107, para 4; 110, para 15; 249; 357; 383; 479; 481; 692.
[273] Schreuer, above n 28, art 44, para 19; See also ICSID Convention Formulation Documents, ibid, 357.
[274] For other limits on the power of the parties to agree on different rules of procedure, see Schreuer, ibid, art 44, paras 19-22 and for discussion on the parties' freedom to exclude or vary the Rules, see art 44, paras 11-29.
[275] United States Model BIT 2004, art 33.
[276] ICSID Convention Formulation Documents, above n 266, 692.
[277] ICSID Convention, above n 17, art 44.
[278] Ibid, art 6(3), see Appendix Two.

that the volume of claims submitted to ICSID that have arisen out of the Argentine Fiscal Crisis is testing the capacity of ICSID.[279] In order for the framework to respond to the increasing number of claims submitted to it, a system of consolidation for claims arising out of the same event is necessary. However, it does not strictly follow that consolidation is "necessary for the implementation of the provisions of [ICSID]". Consolidation may be useful or helpful in the implementation of ICSID, but it seems difficult to say that it is necessary.

Article 6(3) was originally drafted in wider terms in an earlier draft of the Convention.[280] That version would have given the Administrative Council a residual power to amend the Arbitration Rules "as may be necessary or useful for the operation of the Centre and the achievement of the purposes of the Convention."[281] This was rejected as being too open-ended.

In 1978, the Administrative Council used Article 6(3) to adopt the Additional Facility. Some questioned the ability of the Administrative Council to make this decision given the scope of their powers in Article 6(3).[282] As Schreuer notes, the adoption of the Additional Facility by the Administrative Council "shows that there is some flexibility without a formal amendment of the Convention."[283] However, the adoption of the Additional Facility is different, in some ways, to the adoption of a consolidation framework. The Additional Facility affects, first and foremost, the Secretariat, as it allows non-parties to the ICSID Convention to use the ICSID facility, thus increasing the workload of the Secretariat. It does not impact upon the parties themselves, as consolidation would.

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[279] Bishop and Luzi, above n 21, 425.
[280] Schreuer, above n 28, art 6, para 23; ICSID Convention Formulation Documents, above n 266, 659.
[281] Schreuer, ibid, art 6, para 23; ICSID Convention Formulation Documents, ibid, 659.
[282] Aron Broches "Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965: Explanatory Note and Survey of its Application" (1993) 18 Yearbook Commercial Arbitration 627, 633.
[283] Schreuer, above n 28, art 66, para 6.

It may therefore be concluded that the establishment of consolidation by the Administrative Council would be outside the scope of Article 6(3), even in light of the broad interpretation given to this Article to introduce the Additional Facility. This is because consolidation could not be seen as "necessary" for the implementation of the Convention.

3 Summary

It is submitted that while Article 6(3) may not provide the necessary scope to the Administrative Council to introduce a consolidation procedure, Article 6(1)(c) gives the Administrative Council the power to amend the rules regulating ICSID procedure. Given that consolidation is something that affects the procedural aspect of claims, it seems to fall within the ambit of Article 6(1)(c). While it is possible for the parties to contract out of these Rules, there seems to be no barrier on the Administrative Council introducing a prima facie rule of consolidation by its power in Article 6(1)(c).

As the ICSID Secretariat already plays a role in identifying cases that are appropriate for consolidation, and is in the best position to survey all claims submitted to ICSID, it is suggested that the Secretariat be responsible for administering the provision on consolidation. Another option is the creation of a Consolidation Tribunal, as is the practice in NAFTA.

B The Purpose of the Convention

When considering changes to the ICSID system, the purpose of the Convention must be kept in mind. The purposes of the ICSID Convention are commented on by the Report of the Executive Directors on the Convention.[284] One of the major purposes of the Convention was to promote international investment by the promotion of "an atmosphere of mutual confidence",[285] and

[284] International Bank for Reconstruction and Development "The Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States" (18 March 1965).
[285] Ibid, para 9.

"stimulate a larger flow of private international investment".[286] This was sought to be achieved by the establishment of the Centre to provide arbitration and conciliation facilities.[287] In an indirect way, these purposes could be achieved by consolidation, as ICSID will not be able to function as a promoter of international investment if it is not able to deal with its caseload in a timely manner; states and investors will, in this case, look elsewhere for remedies.

X OTHER OPTIONS

While consolidation is considered to be the most effective way of ensuring like claims are not determined in an unlike manner, other options do exist. In the domestic realm, for example, there are several options other than consolidation. A domestic court can order simultaneous trials, immediately successive trials, or order the stay of all but one of the proceedings pending the determination of one of them.[288]

This part will canvas some of the other options open to the ICSID system that may achieve similar results to consolidation. It will principally consider: the possibility of appointing the same tribunal to hear similar decisions; the establishment of a system of precedent in the ICSID system; the introduction of an appellate review body in ICSID; and the use of incentives to encourage parties to consolidate.

A Appointment of the Same Tribunal

One option is that like claims may be scheduled for hearing in front of the same tribunal.[289] Under this option, the claims can be heard either together or

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[286] Ibid, para 12.
[287] ICSID Convention, above n 17, art 1(2).
[288] High Court Rules (NZ), r 382.
[289] McLachlan, Shore and Weiniger, above n 9, para 4.145. Examples of such cases include *Salini Construttori SpA and Italstrade SpA v Kingdom of Morocco* (Jurisdiction) 6 ICSID Rep 398 (ICSID, 2001, Briner P, Cremades & Fadlallah) and *Consortium RFCC v Kingdom of Morocco* (Award) 20 ICSID Rev-FILJ 391 (ICSID, 2003, Briner P, Cremades & Fadlallah); *Sempra Energy*, above n 72 and *Camuzzi International SA v Argentine Republic* (Jurisdiction) ICSID Case No ARB/03/2 (ICSID, 2005, Orrego Vicuña P, Lalonde & Rico); *Electricidad Argentina SA and EDF International SA v Argentine Republic* ICSID Case No ARB/03/22

seriatim.[290] An example of this in practice can be seen in two cases brought against Argentina in the aftermath of the Argentine fiscal crisis: *Sempra Energy International*[291] and *Camuzzi International SA*.[292] Both cases were decided by a tribunal consisting of Francisco Orrego Vicuna as President, Marc Lalonde and Sandra Morelli Rico. This option involves agreement and coordination between the investor parties, as generally they will jointly appoint one arbitrator.[293]

The ICSID Secretariat's role in this practice can be seen in the cases of *Salini v Kingdom of Morocco*[294] and *Consortium RFCC v Kingdom of Morocco*.[295] The ICSID Secretariat has assumed the role of trying to encourage the parties to consolidate proceedings as much as possible.[296] When the *Salini* case was submitted to ICSID, the Secretariat recognised that it was similar in many aspects to the *Consortium R.F.C.C* case. The Secretariat therefore recommended to the parties that they appoint the same arbitrators for both cases.[297] The parties followed this recommendation. The cases were heard separately, however the fact that the composition of the tribunal was identical meant that the danger of inconsistent decisions was avoided. This option allows the parties, and especially the investor party, the freedom to conduct their proceedings without the burden of consolidation, but at the same time, substantially reducing the risk of inconsistent decisions. It is suggested that parties to a dispute be given the ability to request that the Secretariat review a group of submissions to arbitration with the view to recommending that the parties appoint the same arbitrators in each of the related disputes.

(ICSID, Park P, Kaufmann-Kohler & de Trazegnies Granda) and *EDF International SA, SAUR International SA & Léon Participations Argentinas SA v Argentine Republic* ICSID Case No ARB/03/23 (ICSID, Park P, Kaufmann-Kohler & de Trazegnies Granda); *Suez and InterAguas Servicios*, above n 22 and *Aguas Cordobesas, SA, Suez, and Sociedad General de Aguas de Barcelona SA v Argentine Republic* ICSID Case No ARB/03/18 (ICSID, Salacuse P, Kaufmann-Kohler & Nikken) and *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic* ICSID Case No ARB/03/19 (ICISD, Salacuse P, Kaufmann-Kohler & Nikken).

[290] McLachlan, Shore and Weiniger, ibid.

[291] *Sempra Energy*, above n 72.

[292] *Camuzzi International*, above n 289.

[293] As was the case in *Sempra Energy*, above n 72 and *Camuzzi International*, ibid.

[294] *Salini v Kingdom of Morocco*, above n 289.

[295] *Consortium RFCC*, above n 289.

[296] See Part II A The ICSID System at Present.

[297] Crivellaro, above n 214, 89.

ICSID could therefore develop a rule whereby cases presenting common issues of law or fact are submitted to the same tribunal. This would help to avoid conflicting decisions, while allowing investors to keep their claim separate from others. Potential drawbacks of this idea could be that this would deprive the parties of the ability to choose their own arbitrators. It could also result in longer delays in having a case decided, as one tribunal would only be able to deal with so many cases at the one time. Therefore, while it may decrease the risk of inconsistent decisions, it would not achieve greater procedural economy within the system.

B A System of Precedent

The problem of inconsistent decisions in ICSID arises, and is able to exist without undermining the whole system, because there is no principle of *stare decisis* in international investment law. This position is reflected in NAFTA where it is expressly stated that "[a]n award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case."[298] Christoph Schreuer also argues that Article 53 of the ICSID Convention reflects this principle. Article 53 provides that "[t]he award shall be binding on the parties" and Schreuer notes that the interpretation of this statement to be that the award shall "only be binding on the parties" is supported by the absence of any suggestion that a principle of *stare decisis* exists in the system in the *travaux préparatoires* of the Convention.[299]

Regardless of the lack of any principle of *stare decisis*, "contradicting awards nevertheless create insecurity about the proper state of the law and put the legitimacy of the system of investment arbitration into question."[300] One option, therefore, is to establish a system of precedent in ICSID.[301] The idea that arbitral

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[298] NAFTA, above n 180, art 1136(1).

[299] Schreuer, above n 28, art 53, para 15. See also McLachlan, Shore and Weiniger, above n 9, paras 3.83-3.103.

[300] Schill, above n 38, 278. See also Susan D Franck "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" (2005) 73 Fordham Law Review 1521.

[301] For a discussion on the value of precedent in investment treaty arbitration see Tai-Heng Cheng "Precedent and Control in Investment Treaty Arbitration" (2007) 30 Fordham International Law Journal 1014.

decisions should carry some sort of precedential value has been advanced by some academics in the past.[302] However, establishing a system of precedent in investment treaty arbitration as a whole would present several apparently insurmountable difficulties, the most important of which being the confidential nature of some proceedings and decisions. The fragmented nature of the investment treaty arbitration landscape would also contribute to this difficulty.

It has been noted, however, that previous decisions on common points in the ICSID system are often highly persuasive in subsequent tribunals.[303] Some have even argued that "an informal, but powerful" system of precedent does in fact exist in investment treaty arbitration.[304] However, the reality is that without a formal system of precedent, there is no need for tribunals to consider or follow previous decisions if they do not want to. This can be evidenced by the *LG&E* Tribunal's treatment of the *CMS* decision.[305]

Another problem with establishing a system of precedent in ICSID is that this would necessarily also involve establishing an appellate review body, as without a mechanism for higher review, bad decisions would become the law, and the law would be unable to develop past these decisions.

C Appellate Review

The dissatisfaction with the current state of affairs in investment treaty arbitration can be seen in the calls for reform of the system from both academics and practitioners, the noisiest of which have been those arguing for an appellate review system in ICSID.[306] The ICSID Discussion Paper, released in 2004, concerning the revisions of the ICSID Arbitration Rules, noted that efficiency,

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[302] Franck "Do Investment Treaties Have a Bright Future", above n 3, 56.
[303] Franck, ibid, 57; David A Gantz "The Evolution of FTA Investment Provisions: From NAFTA to the United-States-Chile Free Trade Agreement" (2004) 19 Am U Int'l L Rev 679, 689.
[304] See for example, Cheng, above n 301, 1016. See also Gabrielle Kaufmann-Kohler "Arbitral Precedent: Dream, Necessity or Excuse?: The 2006 Freshfields Lecture" (2007) 23 Arb Int 357.
[305] See Part III A 3 The Ramifications of these Decisions.
[306] See for example David A Gantz "An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges" (2006) 39 Vand J Transnat'l L 39; Walsh, above n 4; Barton Legum "Options to Establish an Appellate Mechanism for Investment Disputes" in Sauvant, above n 10, 231.

economy, coherence and consistency in ICSID case law would be best served by an appeal mechanism within ICSID.[307] This recommendation was not implemented; it was concluded in 2005 that the establishment of any ICSID appellate mechanism was "premature".[308] Interestingly, however, some recent BITs and FTAs include the possibility of establishing an appellate mechanism.[309]

It seems that if consolidation were introduced to remedy inconsistent decisions, an appellate system would be necessary. If there is no appellate review system then consolidation could lead to bad decisions. If these bad decisions are followed, these repeat precedents could "gain perhaps undue weight and authority within the system."[310] It is perhaps necessary therefore that consolidation and appellate review are either introduced hand-in-hand, or remain absent hand-in-hand. On the other hand, consolidation based on the desire for procedural economy would not present such a fundamental challenge to the system, as the aim is not to develop a body of consistent jurisprudence, but to establish a system that operates more efficiently.

D The Use of Incentives to Encourage Voluntary Consolidation

The instances of voluntary consolidation in ICSID demonstrate that consolidation can be in an investor's best interests.[311] The challenge for ICSID therefore is to tip the balance of interests in favour of consolidation in cases where similar issues arise, or where several cases arise from the same event. ICSID could encourage parties to enter into BITs and FTAs that provide for consolidation. The 2004 US Model BIT now has such a provision.[312] FTAs such as NAFTA and CAFTA provide examples of consolidation in the FTA realm. The recently concluded FTA between New Zealand and China also contains a

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[307] ICSID Discussion Paper, above n 4, 15-16.
[308] ICSID Working Paper, above n 26, 4. For a brief discussion on the advantages and disadvantages of an appellate review system, see Katia Yannaca-Small "Improving the System of Investor-State Dispute Settlement: The OECD Governments' Perspective" in Sauvant, above n 10, 223; OECD *International Investment Perspectives*, above n 142, 191-195.
[309] See for example DR-CAFTA, above n 187, art 10.20(9)(b) and Annex 10-F; United States Model BIT 2004, art 28(9)(b) and Annex D.
[310] Burke-White, above n 53, 24.
[311] See Part II C The ICSID System at Present, discussing the *Suez* case.
[312] United States Model BIT 2004, art 33.

consolidation provision.[313] However, this provision still requires the consent of all disputing parties before multiple claims are consolidated.[314] In light of previous influential FTAs, such as NAFTA, which contain mandatory consolidation provisions, it seems unlikely that a consolidation provision requiring consent, like the one in the New Zealand - China FTA, will be effective. Additionally, ICSID could provide other incentives, such as monetary benefits to the parties to encourage consolidation.

XI CONCLUSION: STRIKING THE BALANCE

The issue of consolidation in ICSID is effectively a question of striking the correct balance between protecting the traditional benefits of arbitration, and promoting consistency, predictability and procedural economy within the system.

While it may be true that "some degree of dysfunctionality is inherent in every system of adjudication",[315] fundamental flaws in the ICSID system should not be able to be explained simply by citing party autonomy. While party autonomy will, and should, remain the cornerstone of investment treaty arbitration, the system must be able to respond and develop to challenges that are presented. In this way, ICSID must not simply ignore the instances of inconsistent decisions and procedural inefficiencies, and the resulting cries that the system is being brought into disrepute.

In response to the thesis of this paper: whether ICSID should establish an institutional framework for consolidation, the following points may be made by way of conclusion.

A The Basis upon which Claims may be Consolidated

As noted in this paper, claims may be consolidated with the underlying rationale of promoting consistent decision-making, or of promoting procedural

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[313] New Zealand - China Free Trade Agreement (7 April 2008) www.chinafta.govt.nz (accessed 26 September 2008), art 156.
[314] Ibid.
[315] Brower, Brower and Sharpe, above n 13, 440.

economy. It is often asserted that the need for consolidation arises where there is an issue of law or fact in common that gives rise to the possibility of inconsistent awards.[316] This paper has argued that this second requirement need not necessarily be part of the rationale for consolidation in ICSID. In fact, the paper recommends that consolidating claims on the basis of achieving greater procedural economy is the category that ICSID should focus on in developing a mechanism for consolidation. Consolidation would therefore be appropriate in circumstances where several claims arise out of the same event, or sequence of events. A prime example of such a situation is the claims arising out of the Argentine Fiscal Crisis.

Consolidating claims on the basis of procedural economy is to be preferred over consolidating to achieve consistency in decision-making, as this presents less of a challenge to the framework in which arbitration operates. Procedural economy may be seen as an inherent value of arbitration, whereas consistency of decision-making conflicts with the principle of finality. Susan Franck notes that "[u]ltimately, because legal errors cannot be corrected in ICSID awards, the possibility of inconsistent awards is an accepted reality at ICSID, and the correctness of decisions has been sacrificed for the sake of finality."[317] For better or for worse, this may be an element of the investment treaty arbitration system that is not amenable to change. Promoting consistency of arbitral decisions thus presents a fundamental challenge to the underlying balance struck in arbitration.

B Introducing Consolidation into the ICSID Framework

This paper recommends that a consolidation provision be introduced into the ICSID Arbitration Rules by the Administrative Council under Article 6(1)(c). Use of this provision of the Convention to introduce consolidation into ICSID has two important aspects. Firstly, it means that the amendment need not be approved by all parties to the Convention. Secondly, it is important to note that

[316] See for example OECD *International Investment Perspectives*, above n 142, 230 and 238.
[317] Franck "The Legitimacy Crisis in Investment Treaty Arbitration", above n 300, 1548. This is also noted by Schreuer, above n 28, art 52, para 14.

the introduction of a consolidation provision into the Arbitration Rules would effectively amount to a presumption in favour of consolidation, for the parties would be subject to the consolidation provisions in the ICSID Rules unless they agreed otherwise.[318]

It is submitted that the time is ripe for the consideration of a consolidation provision in ICSID. The Argentine cases provide the impetus to do something to improve the procedural inefficiencies of ICSID. Moreover, consolidation provisions continue to appear in an increasing number of Model BITs and FTAs. The recent revision of the ICSID Regulations and Rules to provide, amongst other things, for the involvement of third parties in arbitrations, signifies a willingness to change the ICSID framework to respond to emerging challenges. Consolidation is but another procedural mechanism designed to improve the traditional benefits of arbitration in the form of greater procedural economy. The introduction of consolidation could therefore help improve the delivery of justice in ICSID, resulting in benefits for all involved.

[318] The parties already have the power to agree to different rules of procedure: ICSID Convention, above n 17, art 44.

APPENDIX ONE: NAFTA, ARTICLE 1126

Article 1126: Consolidation

1. A Tribunal established under this Article shall be established under the UNCITRAL Arbitration Rules and shall conduct its proceedings in accordance with those Rules, except as modified by this Section.

2. Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:
(a) assume jurisdiction over, and hear and determine together, all or part of the claims; or (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.

3. A disputing party that seeks an order under paragraph 2 shall request the Secretary-General to establish a Tribunal and shall specify in the request:
(a) the name of the disputing Party or disputing investors against which the order is sought; (b) the nature of the order sought; and □(c) the grounds on which the order is sought.

4. The disputing party shall deliver to the disputing Party or disputing investors against which the order is sought a copy of the request.

5. Within 60 days of receipt of the request, the Secretary-General shall establish a Tribunal comprising three arbitrators. The Secretary-General shall appoint the presiding arbitrator from the roster referred to in Article 1124(4). In the event that no such presiding arbitrator is available to serve, the Secretary-General shall appoint, from the ICSID Panel of Arbitrators, a presiding arbitrator who is not a national of any of the Parties. The Secretary-General shall appoint the two other members from the roster referred to in Article 1124(4), and to the extent not available from that roster, from the ICSID Panel of Arbitrators, and to the extent not available from that Panel, in the discretion of the Secretary-General. One member shall be a national of the disputing Party and one member shall be a national of a Party of the disputing investors.

6. Where a Tribunal has been established under this Article, a disputing investor that has submitted a claim to arbitration under Article 1116 or 1117 and that has not been named in a request made under paragraph 3 may make a written request to the Tribunal that it be included in an order made under paragraph 2, and shall specify in the request:
(a) the name and address of the disputing investor; (b) the nature of the order sought; and □(c) the grounds on which the order is sought.

7. A disputing investor referred to in paragraph 6 shall deliver a copy of its request to the disputing parties named in a request made under paragraph 3.

8. A Tribunal established under Article 1120 shall not have jurisdiction to decide a claim, or a part of a claim, over which a Tribunal established under this Article

has assumed jurisdiction.

9. On application of a disputing party, a Tribunal established under this Article, pending its decision under paragraph 2, may order that the proceedings of a Tribunal established under Article 1120 be stayed, unless the latter Tribunal has already adjourned its proceedings.

10. A disputing Party shall deliver to the Secretariat, within 15 days of receipt by the disputing Party, a copy of:
(a) a request for arbitration made under paragraph (1) of Article 36 of the ICSID Convention; (b) a notice of arbitration made under Article 2 of Schedule C of the ICSID Additional Facility Rules; or □(c) a notice of arbitration given under the UNCITRAL Arbitration Rules.

11. A disputing Party shall deliver to the Secretariat a copy of a request made under paragraph 3:
(a) within 15 days of receipt of the request, in the case of a request made by a disputing investor; (b) within 15 days of making the request, in the case of a request made by the disputing Party. □

12. A disputing Party shall deliver to the Secretariat a copy of a request made under paragraph 6 within 15 days of receipt of the request.

13. The Secretariat shall maintain a public register of the documents referred to in paragraphs 10, 11 and 12.

APPENDIX TWO: ICSID CONVENTION, ARTICLE 6

Article 6:
(1) Without prejudice to the powers and functions vested in it by other provisions of this Convention, the Administrative Council shall:

(a) adopt the administrative and financial regulations of the Centre;

(b) adopt the rules of procedure for the institution of conciliation and arbitration proceedings;

(c) adopt the rules of procedure for conciliation and arbitration proceedings (hereinafter called the Conciliation Rules and the Arbitration Rules);

(d) approve arrangements with the Bank for the use of the Bank's administrative facilities and services;

(e) determine the conditions of service of the Secretary-General and of any Deputy Secretary-General;

(f) adopt the annual budget of revenues and expenditures of the Centre;

(g) approve the annual report on the operation of the Centre.

The decisions referred to in sub-paragraphs (a), (b), (c) and (f) above shall be adopted by a majority of two-thirds of the members of the Administrative Council.

(2) The Administrative Council may appoint such committees as it considers necessary.

(3) The Administrative Council shall also exercise such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of this Convention.

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