AN ANALYSIS OF THE CHALLENGES POSED BY THE LACK OF BINDING PRECEDENT IN INTERNATIONAL INVESTMENT ARBITRATION

BY

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A dissertation submitted to the University of Zambia Law Faculty in partial fulfilment of the requirements for the Award of the Bachelor of Laws (LLB) Degree.

2012

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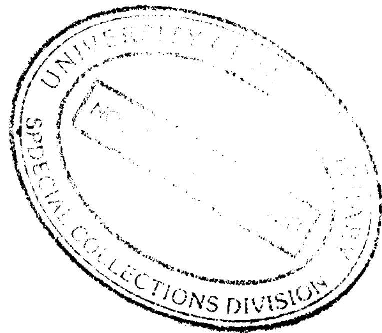

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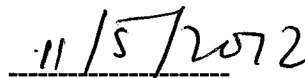

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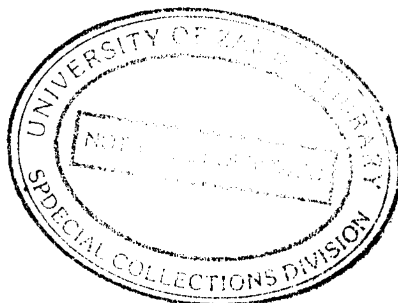

ABSTRACT

International investment arbitration lacks a *de jure* doctrine of precedent, thus creating problems for the disputants and the entire dispute resolution mechanism. This research paper is an analysis of the challenges posed on the arbitral users due to the erratic issuance of awards, without arbitrators having due regard to the growing jurisprudence in the international investment domain. The use of precedent, as evidenced by the common law legal system, creates an atmosphere that is certain, predictable and quint-essentially, consistent. The afore-mentioned attributes are vital to the success of any dispute resolution system.

This research paper is based predominantly on 'black letter' law. Therefore, the information contained herein was collected through the perusal of documents, which includes books, articles, legal papers and dissertations in the domain of international investment arbitration. The researcher further administered interviews to experts in arbitration and investment law.

This paper has established that the lack of binding precedent, primarily and most decisively, accounts for the numerous conflicting decisions in international investment arbitration. An analysis of various decisions of the International Centre for the Settlement of Investment Disputes (ICSID) tribunals, such as that of *CMS Gas v. Argentina* and *LG&E Energy Corporation v. Argentine Republic* showed the various issues that arise from the issuance of contradictory awards. Second, the paper has established that the lack of precedent entails that subsequent tribunals re-enforce errors of law and fact in their decision making process. Third, the entire arbitral system is susceptible to challenges from third parties, to a greater degree than other dispute resolution bodies that have binding precedent. Finally, the role of ICSID is arguably skewed, as ICSID places itself as a guarantor of justice for investors, thereby leaving the States parties wary of its role in the administering of just awards.

The principal recommendation in this paper is the introduction of binding precedent in international investment arbitration, that is, the use of arbitral precedent properly so-called. Other recommendations include; the creation of customary international law and the creation of an appellate system. Finally, it is essential to establish a multilateral system in contrast to the bilateral manner in which investment treaties are structured, such as that obtaining in the WTO/GATT system. The above recommendations will essentially give the system credence and save it from becoming defunct.

DEDICATION

To my parents, Nobly and Doris (Shikulu and Mbuya), everything that this paper holds is an embodiment of what you have sacrificed for me. Thank you, for your support, belief, encouragement and most importantly your patience, making it possible for me to pursue my LLB Degree.

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TABLE OF INTERNATIONAL INSTRUMENTS

The Charter of the United Nations (1945)

Germany-Guyana Bilateral Investment Treaty (BIT) of 1989

The General Agreement on Tariffs and Trade (GATT), 1994

International Convention on the Settlement of Disputes between States and Nationals of other States (ICSID), 1965

Statute of the International Court of Justice (26 June 1945) 33 UNTS 993

The World Trade Organisations Declaration on TRIPS Agreement on Public Health (Doha Declaration) of 2001

TABLE OF CASES

CME Czech Republic B.V v Czech Republic, UNCITRAL (The Netherlands/Czech Republic BIT) Partial Award 13 September 2001.

CMS Gas Transmission Company v. Argentina, ICSID case No. ARB/01/08 (United States/Argentina BIT) Award of 12 May 2005, Annulment Decision of 25 September 2007.

Land and Maritime Boundary between Cameroon and Nigeria (Preliminary Objections Judgment), 1998, ICJ Rep. 275.

Lauder v. Czech Republic, final award of March 14, 2003.

LG&E v. Argentina, ICSID case No. ARB/02/1 (United States/ Argentina BIT), Decisions on Liability of 3 October 2006, Damages Award of 25th July 2007.

Pan American Energy LLC and BP Argentina Explorations Co. v. Argentina Republic ICSID case ARB/ 03/13, Decision on Jurisdiction, 27 July 2006.

GLOSSARY OF ACRONYMS

BIT	Bilateral Investment Treaty
GATT	General Agreement on Tariffs and Trade
ICSID	International Convention on the Settlement of Investment Disputes between States and Nationals of other States
ICJ	International Court of Justice
MFN	Most Favoured Nation Treatment
UN	United Nations
WTO	World Trade Organisation

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CHAPTER ONE

GENERAL INTRODUCTION

1.0 Introduction

1.1.0 Background: Towards the Use of Arbitration

Before 1960, the resolution of all investment and commercial disputes was by state-to-state dispute resolution. The aggrieved States sought relief from the host country and only if that failed would they invoke diplomatic protection.[1] This not only left stateless individuals with no relief, but tempted the concerned States to politicise disputes, thereby increasing international friction. It was partially in offering a solution to the problem that Bilateral Investment Treaties (BITs) and the International Centre for the Settlement of Investment Disputes (ICSID) was established in order to replace the problematic political remedies. A BIT is defined as a pact between two contracting parties, which may include a State and an investor, which regulates exclusively all issues as regards the foreign investment.[2]

The interaction of States and investors across national boundaries creates special challenges for and has altered the face of the law, considerably. For litigators, the problems of the trial process are aggravated, for instance, service of process, jurisdiction and so forth. Furthermore, the enforcement factor is made more precarious.[3] An account of the disabilities of relying on national courts is overwhelming and as a result, commands that the use of domestic courts in such instances is ineffective and counterproductive. Invariably, State-investor disputes regard arbitration as an alternative manner of settling their disputes. A reference to arbitration entails the method of settling disputes and differences between two or

[1] Woo Choi, "The Present and Future of the Investor-State Dispute Settlement Paradigm," *Journal of International Economic Law* 10, (2007):727.
[2] Forji 46.
[3] Thomas E. Carbonneau, *Cases and Materials on International Litigation and Arbitration* (California: Thomson-West, 2005), 3-15.

more parties, whereby such disputes are submitted to the decision of one or more persons specifically nominated for the purpose, either instead of having recourse to an action at law, or by order of the Court, after such an action has been commenced.[4]

1.1.1 International Investment Law

International Investment law is a sphere which concerns itself with the direct and indirect investment of foreign property abroad, thus its principal participants involve the capital-exporting States (being the home State of the investor), the capital importing States (being the host State), and the private foreign investors.[5] Its main concern is the standards of domestic treatment, especially investment protection and dispute settlement. Due to the impact on sovereignty that investment arbitration poses, its legal regime at international level is controversial and non-specific, while at treaty level it is predominantly bilateral. It is apparent that this sphere has many grey areas, in the sense that there are generally no accepted or agreed standards of treatment for the concerned parties. Notwithstanding, the number of bilateral treaties has continued to grow rapidly. The increase in the number of treaties entails an increase in the number of investment disputes and these are subsequently subject to international scrutiny.[6]

ICSID is thus the normative body that forms the institutional and procedural framework for the resolution of investor-state disputes. However, despite the existence of the said body, this system has no standard code for the resolution of international investment disputes. A veritable example of such a code is that found under the WTO/GATT system. The availability of an international conflict resolution code provides for legal security and

[4] David M. Lawrance, *A Treatise on the Law and Practise of Arbitrators and Awards* (London: The Estates Gazette Ltd, 1953),1.
[5] Ben A. Wortly, *Expropriation in Public International Law* (Cambridge: Cambridge University Press, 1959): 400-430.
[6] Wortly 400.

predictability for foreign investors.[7] In this vein, the key distinguishing feature of ICSID is that it provides a conflict resolution mechanism for investment disputes between private investors and States. Thus, it ought to place both private investors and States on an equal footing.[8] One is of the realisation that the intention of the institution has not been manifested. This body is criticised for being skewed by acting as a body for the protection of the interests of the investors. The system further lends itself to criticism by deviating from the general decisions of past tribunals and therefore creating inconsistencies. This approach, inevitably, rids the institution of its predictability, which is primarily the intrinsic purpose of ICSID.

1.1.2 Arbitral Precedent

The concept of arbitral precedent raises numerous questions, as it is common knowledge that both international law and international arbitration lack a doctrine of precedent.[9] The precedential doctrine considered under the common law legal system is based on the value of prior decided cases that are subsequently relied upon for determining later cases involving similar facts or issues.[10] This is in contradistinction to persuasive precedents, which as the words suggest, is not binding but is entitled to respect and careful consideration by subsequent courts or tribunals.[11] In the recent past, several scholars have noted the growing trend of arbitrators' reliance, reference or discussion of earlier decided cases. One notes that this reliance is not as a prescribed system, but a mere trend, which entails that in some or most instances, the arbitrators are free to have new rationales and holdings despite the fact that a similar issue may have come before the same tribunal with the same facts.

[7] Wortly 420.
[8] Wortly 427.
[9] Gabrielle Kauffman-Kohler, "Arbitral Precedent: A Dream, Necessity or Excuse?" *Arbitration International Articles*, 14(November 2006): 357-78.
[10] Black's Law Dictionary, 7th edition, (St. Paul Minnesota: West Publishing Co., 1999).
[11] Black's Law Dictionary.

In the last ten years, the number of Bilateral Investment Treaty (BIT) awards and decisions has markedly increased; the role of ICSID's precedents has been a hot topic at several international conferences.[12] The role has been greatly discussed and examined in leading treatise and commentaries. In essence, a special jurisprudence is developing from the leading awards in the domain of investment arbitration and this obvious development can no longer be ignored.

The awards by ICSID and its decisions increasingly reflect and discuss this developing case law or jurisprudence. The logical set up would show that arbitrators when faced with difficult issues of law would want to know what other arbitrators do in similar circumstances, and have regard to the awards by others in similar cases as veritable precedents.[13] In this regard, ICSID tribunals do not claim to be different and are in essence no different. It is therefore observed, that whilst tribunals agree that there exists not a doctrine of precedent *per se*, they concur on the need to take earlier cases in to account. These prior decisions and awards cannot reasonably be described as merely subsidiary sources of international law; they have maintained an influential position, reminiscent of the doctrine of *stare decisis*. [14]

1.2 Statement of the Problem

International arbitration conspicuously lacks the workings of the doctrine of precedent, a doctrine that epitomises the common law legal system. However, one takes cognisance of the fact that international investment arbitrators have a tendency of relying or referring to decisions in earlier decided cases when faced with similar circumstances. The peculiarity of such a system is that the arbitrators are under no legal obligation to follow prior decisions and

[12] Jeffrey P. Commission, "Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence," *Journal of International Arbitration,* (2007): 132.
[13] Commission, "Precedent in Investment Treaty Arbitration," 130.
[14] Commission, "Precedent in Investment Treaty Arbitration," 130.

thus merely apply a *de facto* doctrine of precedent.[15] Therefore, one ventures to understand the challenges that arise due to the lack of binding precedent or a *de jure* doctrine of precedent in international arbitral process, specifically in investment arbitration.

There are, further-on, growing strands that espouse that investment arbitration, which is essentially governed by BITs has in the recent past evolved towards a multilateral basis while based on bilateral treaties.[16] This observation raises the issue of the necessity of having a formal system of precedents as the interests of the stakeholders is wider and may have much more extensive ramifications. Therefore, one questions whether a *de jure* doctrine of precedent augments the credibility of a dispute settlement system based on its consistency of decisions and decision making process. The crux of the matter is that the existence of precedent in domestic legal systems creates an atmosphere that is certain, predictable and most importantly consistent. Many scholars regard the aforementioned attributes as vital to any successful legal system.

1.3 Objectives of the Study

The broad objective of this study is to analyse the challenges posed by the lack of binding precedent in international investment arbitration.

1.3.1 Specific Objectives

1. To briefly consider the concepts of arbitration, precedent, and arbitral precedent.
2. Critically evaluate the importance of the doctrine of precedent generally, whilst highlighting the arguments that have been put for and against this doctrine.
3. Consider the current practise of arbitrators and how they go about making decisions in different fields. Thus a comparative analysis of tribunals under two specific fields,

[15] Kauffman-Kohler, "Arbitral Precedent," 357.
[16] Schill 8.

which include; international commercial arbitration and international investment arbitration, is inevitable.

4. An Analysis of the extent to which international tribunals are bound by the decisions of previous tribunals.
5. Consider whether it is justifiable to advocate for arbitral precedent in international investment arbitration in contradistinction to other related fields within the realm of international arbitration.

1.4 Hypothesis

The existence of binding legal rules in arbitral decisions is desirable as it creates certainty, predictability and equal treatment for aggrieved parties (users).

1.5 Rationale and Justification

Bower,[17] argues that the last ten years have witnessed a propagation of international investment treaty arbitration. The advent of investment treaty arbitration has notably increased from a total of five cases brought before international tribunals as of 1990, under bilateral, regional and multilateral investment treaties that contain arbitration clauses, to 160 such cases by 2004. However, despite the afore observation, one is cognizant of the fact that the significance of investment arbitration is not as a result of the quantities of the cases but the public nature of the manner of the rights involved that essentially causes the involved parties to consent as a matter of course to the publication of the awards.

It is rationalised herein, that it is of utmost importance to analyse the effects that the arbitral process has on the parties involved, being the State and investors, correspondingly. The need is exemplified by the fact that the rights that arise in investment arbitration are of a public nature and have wider ramifications than in other arbitral process confined to the private

[17] C.N. Bower, "Wither International Commercial Arbitration: The Goff Lecture," *Arbitration International,* (16 January 2007): 411.

sphere. Additionally, disputes that arise in international investment arbitration routinely involve the claim for damages in excess of millions of dollars, with considerable policy ramifications and substantial consequences for the various stakeholders. Therefore, a review of the decisions and awards rendered by these tribunals, with a view to examine the sources of law cited in the decisions is now both appropriate and warranted.[18]

1.6 Research Questions

1. What is the relevance of the existence of the doctrine of precedent in a legal system?
2. What is the justification for the use precedent in domestic legal systems and its subsequent absence in international law?
3. Is there a need to incorporate the doctrine of precedent in international arbitration?
4. Is it justifiable to advocate for precedent in specific fields of international arbitration, such as investment arbitration in contrast to other fields, such as commercial arbitration?
5. What is the effect of having arbitral precedent in international investment law on both the procedure and the stakeholders?
6. What is the justification for international arbitrators following a *de facto* system of precedent?
7. If arbitrators sometimes follow the decisions of prior tribunals, is it necessary to advocate for a legally binding mode of precedent?
8. What motivates arbitrators to rely on prior cases in some instances and totally disregard them in other instances?

[18] Commission, "Precedent in Investment Arbitration,"140.

1.7 Research Methodology

The study shall utilise the qualitative research method, which entails that the analysis of documents and literature is the fundamental mode of data collection. The paper will thus advance a descriptive analysis from the information gathered. It is established herein, that in order to understand the problems or challenges that this paper asserts, it is important to have regard to the practise in arbitral procedure, specifically that involving investment law, and this shall be considered through the extensive reading of reports, cases and so forth.

This research will achieve its objectives by reviewing primarily published and unpublished work of scholars and other experts in the field of arbitration. The research will also conduct interviews with specific institutions and people, which may include judges, lawyers and other individuals being experts in the field of arbitration. Therefore, research shall be carried out at the arbitration centre at the Law Association of Zambia, through perusal of their literature and through administering of interviews and perusal of the documents held at the High Court's arbitration centre. Other veritable institutions shall also be considered.

1.8 Conclusion

This Chapter has given the general introduction of the subject matter herein. In advancing the subject matter, general principles such as arbitration, precedents, and international investment law and arbitral process have been considered and contextual definitions have consequently been given. In essence, the chapter has stipulated what it ought to achieve at the end of this research paper, and this is to establish the challenges that the lack of arbitral precedent in investment arbitration poses to its users. The subsequent chapter shall endeavour to review the literature that has been relied on in the course of this research paper and thus determine what works have been carried on by other scholars on the subject matter. A logical conclusion shall thus be drawn from the findings therein.

CHAPTER 2

LITERATURE REVIEW

2.0 Introduction

Many scholars have researched and written on the growing importance of the existence of the doctrine of precedent in international arbitration. Taking into consideration the growing importance of arbitration as a mode of dispute resolution, they argue that the time has come for the system to evolve into one that is more precise and therefore create a structured system applying standard rules. In other disciplines, scholars have gone as far as analysing different aspects of international law and attempting to determine which aspects are in greater need of a system of precedent. The subsequent discussions hinge on an analysis of the work that has been carried out in this regard, in an attempt to ascertain what has been done and what remains to be done.

2.1 A Review of Relevant Literature

One, Kauffman-Kohler,[1] a fêted Professor of Law at the University of Geneva, delivered a lecture in which he discussed whether the call for arbitral precedent was a dream, a necessity or a mere excuse. In the lecture, he appreciated the fact that despite the absence of precedent in international arbitration, arbitrators increasingly appear to discuss and consequently rely on earlier decided cases. Therefore, the lecture dealt with the role of precedent in general, and more specifically evaluated the current practise of arbitrators in an effort to establish how they went about making decisions. Most notably, the Professor, in his discussion of the foregoing, regarded three different aspects of dispute resolution: international commercial arbitration, sports arbitration and international investment arbitration, and regard was had to

[1] Kauffman-Kohler, "Arbitral Precedent," 357.

the degree to which arbitrators relied or utilised the doctrine of *de facto* precedent in each of the instances cited.

The lecture highlighted significant findings, to which two are regarded as veritable findings for the purpose of the paper herein. First, emphasis was made on the fact that arbitration is expanding in many areas, and as economic activities become more diverse and complex, scholars must be in a position to differentiate between types of disputes and users. This was in the realisation that arbitral procedure is relied upon in many disciplines, and these disciplines consequently have very different and specific users. Thus the treatment of the users in each discipline having reliance on the said dispute mechanism will invariably diverge Second, and most importantly, it was espoused that the credibility of the entire dispute resolution system at international law depends on consistency, because a dispute settlement process that produces unpredictable results will lose the confidence of the users in the long term and defeat its own purpose.[2] The Professor, therefore, showed the importance of the existence of precedent in international investment arbitration in contradistinction to commercial arbitration, he argued that the ramifications of a decision in commercial arbitration were not as far reaching as those in investment arbitration. In that commercial transactions in most cases are private agreements while investment issues involve the actions of investors and states which invariably affect the public, be it directly or indirectly. Hence, the interests to be protected under investment arbitration are larger and mechanisms must be put in place to ensure protection of these interests. Invariably, the Professor suggests that consideration should be had to the introduction of *de jure* precedent in international investment arbitration.

[2] Kauffman-Kohler,"Arbitral Precedent," 368.

On the other hand, Commission,[3] recognises in his article that there is no doctrine of *stare decisis* or binding precedents in international law, the development of an investment treaty case law or jurisprudence is unmistakable, and has not gone unnoticed in recent times by treaty tribunals and those appearing before them. The author presents a qualitative and quantitative citation analysis of the case law, surveying and reviewing the role that precedent has played in the 207 publicly available decisions, awards, and orders rendered since 1972, including those decisions that have been rendered by early International Centre for Settlement of Investment Disputes (ICSID) tribunals. It is clear that the author pays specific attention to the development of precedent in international arbitration, although emphasizing that this is merely *de facto* and thus operates merely for persuasive value and can invariably be ignored by arbitrators and tribunals alike.

Schill,[4] in his legal paper, advances the paradoxical thesis that international investment law is developing towards a multilateral system of investment protection on the basis of bilateral treaties. The author argues that BITs in their entirety function largely and increasingly analogously to a multilateral system. Elements of this thesis are the inclusion of Most-Favoured-National (MFN) clauses, the possibility of treaty shopping through corporate structuring and the contribution of investor-state dispute settlement through the intensive use of precedent and other genuinely multi lateral approaches to treaty interpretation.

The paper conspicuously discusses what contribution investor-state dispute settlement as a compliance mechanism makes towards the progress of multilateralization of international investment law. In particular, arbitral tribunals employ several interpretative strategies that

[3] Commission, "Precedent in Investment Treaty Arbitration," 140.

[4] Schill 3.

follow multilateral rather than bilateral rationales and make intensive use of arbitral precedence thus creating unity rather than fragmentation.[5]

Spoorenberg[6], in his legal paper, concentrates on the fact that there have, in the recent past, been extensive discussions about the inconsistency of the decisions in international arbitration. The said debates have concentrated on specific topics such as contradictory arbitral awards, the precedential value of arbitral awards, the creation of an appeal system and so forth. However, the author propounds that the debaters may have overlooked one simple fact, that the existence of these perceived problems, may be a reflection of the underlying values of international arbitration that attract international actors. Thus, this author takes a rather different approach to issues such as the existence of precedent in international arbitration. He argues that instead of advocating for far-reaching reforms, the said commentators should focus on reconciling and refining currently existing techniques to deal with the conflicting decisions in this area of the law.[7]

The above author had cognisance of the conflicting awards rendered in two ICSID arbitral tribunals, namely, *CMS v. Argentina*[8] and *LG & E Energy Corporation v. Argentine Republic.*[9] The two tribunals concerned, reached contradicting conclusions on the availability of the state of necessity defense, despite the legal and factual similarities of the said cases. The author, invariably points out that such decisions may threaten the legal order in terms of predictability required by international business transactions. However, he submits that there is actually no way of entirely eliminating uncertainty in such dispute resolution. The question at the core of this article is therefore, whether the phenomenon of contradicting decisions,

[5] Schill 4.
[6] Spoorenberg and Vinuales,"Conflicting Decisions in International Arbitration," *The Law and Practise of International Courts and Tribunals*, 8(2009): 91.
[7] Spoorenberg and Vinuales 91.
[8] CMS Gas Transmission Company v. Argentina, ICSID case No. ARB/01/08 (United States/Argentina BIT) Award of 12 May 2005, Annulment Decision of 25 September 2007.
[9] LG&E v. Argentina, ICSID case No. ARB/02/1 (United States/ Argentina BIT), Decisions on Liability of 3 October 2006, Damages Award of 25th July 2007.

makes international arbitration as a dispute settlement mechanism, a risky choice, and if the answer be in the affirmative, what can be done to change the state of affairs.

In his concluding remarks, the author indeed submits that some of these imperfections may be the attracting factor for the users herein. He proposes that the system in itself is working quiet well and the only issue would be that it may eventually suffer from confidence deficit. In a well known French phrase he quotes; '*le mieux est l' ennemi du bien' translated into* "let well enough alone". In essence, he endeavours to postulate that in advocating for the improvement of the current international arbitration system, in order to address the conflicting decisions, while some substantial reforms are welcome, the time for small and progressive adjustment of existing techniques is not yet up.[10]

This paper will be guided immensely by some of the theories and works of the authors reviewed herein. However, the paper will consider in depth the role that international investment arbitration is playing in an evolving world, and illustrate herein why there is a greater felt need for the existence of *de jure* precedent in international investment arbitration in contradistinction to other fields on the international plane, as for instance, international commercial arbitration. In essence, the paper shall attempt to justify the notion that international investment arbitration has evolved into a system that relies on precedent largely, hence if the reliance exists *de facto* then this may be argued to be a call from stakeholders for the system to employ a jurisprudential body that shall ensure predictability and certainty in the dispute settlement process. The point of departure of this work shall be to ascertain the problems that may arise due to the lack of binding precedent in international investment arbitration. Therefore, in its conclusion the paper shall attempt to suggest how these problems can be dealt with adequately.

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[10] Spoorenberg and Vinuales *94.*

2.3 Conclusion

This chapter has considered the literature that has been researched or written on by other scholars with regards to the subject matter. The chapter has reviewed several scholars' literature and established that many suggest the existence of a *de facto* mode of precedent in international arbitration. The subsequent chapter shall consider the doctrine of precedent in itself and further consider the current practise of arbitrators through a comparative analysis of commercial and investment arbitration.

CHAPTER THREE

THE CONCEPT OF PRECEDENT AND THE CURRENT PRACTISE OF ARBITRATORS.

3.0 Introduction

This chapter shall consider the concept of precedent as understood in the common law legal system and on the international plane, highlighting briefly the arguments that have been fostered for and against it. The chapter will then venture into a comparative analysis of the current practise of arbitrators in two specific fields, which include; international commercial arbitration and international investment arbitration. The chapter will conclude by summing up the current practise segment and consider the reasons for the significant variations herein.

3.1 A Case for the Use of Precedent

3.1.1 Domestic Legal Systems

Domestic legal systems rely heavily on the use of precedent, in order to determine matters that come before their adjudicatory bodies. In essence, municipal courts are bound by their past decisions and judges are severely reprimanded for the failure to adhere to this enshrined principle. The starting-point of a judge's reasoning in such a system is primarily, precedent. The concept above translates into what is called *stare decisis* at common law and into the concept of *jurisprudence constante* in Roman-German law. Obviously, this concept is not regarded with much importance at international law, even though permanent jurisdictions constantly refer to their previous decisions.[1]

[1] Gilbert Guillame, 'The Use of Precedent by International Judges and Arbitrators," *Journal of International Dispute Settlement*, Vol.2, no.1 (2011): 5.

Municipal judges thus most often decide cases on the basis of applicable law and are predominantly tasked with the duty of interpretation of the already existing law. In limited circumstances, are the judges permitted to deviate from what is regarded as the law. The legal systems assume that persons in comparable situations are treated as comparable. It is in this respect that precedent plays an almost irreplaceable role. As for the parties involved in the adjudication process, it is regarded as the guarantor of certainty and equality of treatment.[2]

3.1.2 Justification of the Doctrine

One vital justification for the doctrine of precedent is that it is fair; in the sense that like cases are treated alike.[3] In order to provide guidance to, and satisfy the reasonable expectations of parties to litigation, judicial bodies must apply rules and principles uniformly. As Sir William Blackstone stated in 1765; "precedent keeps the scale of justice even and steady, and not liable to waiver with every new judge's opinion".[4] The second justification is that of efficiency. It is said that without such a doctrine the work of the judiciary would be enlarged exponentially. Therefore, if the judges are guided by principles that have been relied on from time immemorial, they are able to dispose of their work load in a much quicker fashion. The third justification is premised on the fact that precedent contributes to the perceived integrity of the judiciary.[5] Precedent acts as a fetter on the use of power in an arbitrary manner by the judges. Public confidence in the judicial system depends on a perception that outcomes are determined by the principle of the law, rather than by the whims of the decision makers. As

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[2] Guillame 5.

[3] Andrew F. Christie and Fiona Rotstein, "The Evolution of Precedent in Mandatory Arbitration- Lessons from a Domain Name Dispute Resolution," *The Arbitrator and the Mediator*, (2011): 65.

[4] Andrew F. Christie and Fiona Rotstein 65.

[5] Andrew F. Christie and Fiona Rotstein 69.

one American Supreme Court judge hypothesized, precedent underscores the presumption that "bedrock principles are founded in the law rather than in the proclivities of individuals".[6] The proponents of this system applaud it for the very fact that it creates confidence in its users, as it is certain and affords equal treatment to its users, on the basis of application of the same law to similar facts despite the fact that the parties are not always the same.

As any other concept, the issue of precedent has been challenged on many fronts by scholars. Opposition comes in the form that the use of precedent ensures that there is a freeze in the development of the law.[7] The law is poised to be stagnant for many years and this may result in the law's failure to meet the demands of society. Overtime, this may go contrary to the jurisprudential aspect of the law being an instrument of social change. The underlining principle being that the common law believes in the old law being the good law, and it is hard to bring in new law in a system that is so strict in its adherence to the principle. Others argue that the system of precedent is lazy and a failure on the judges to think. Whatever, the line of thought, the fact that this concept has been in existence so long, may be an indication that it works well for the jurisdictions that have relied on it for so long.

3.1.3 International Law

The decisions of international courts and various arbitral tribunals are only binding on the parties to the dispute and have no binding force as precedent. The Statute of the International Court of Justice (ICJ) in Article 59 stipulates as follows: "the decisions of the court have no binding force except between the parties and in respect of that particular case".[8] This statement in itself precludes the application of a formal doctrine of precedent properly so-

[6] Andrew F. Christie and Fiona Rotstein 70.

[7] Guillame 5.

[8] Statute of the ICJ (26 June 1945) 33 UNTS 993, Article 59.

called. However, practise has shown that there is strong reliance on earlier judicial decisions, which are listed as "subsidiary means for the determination of the rules of law".[9]

The ICJ had occasion to explain its approach to prior decided cases in the case of *Land and Maritime Boundary: Cameroon v. Nigeria.*[10] The Court stated:

> It is not a question of holding (the parties in the instance case) to decisions rendered by the courts in previous cases. The real question is whether in this case, there is a cause not to follow the reasoning and conclusions of earlier cases'.

The Court's stance highlights the fact that at international law, there is no obligation to follow the doctrine of precedent, but there is a type of precedent in practise, which is essentially regarded as a *de facto* doctrine of precedent. An analysis of the various decisions of either the court or the arbitral tribunals, shows that if there was a *de jure* doctrine of precedent at international law, the many complexities and uncertainties existent in fields such as international investment law, would be non-existent.

Evidently, international law has no *de jure* doctrine of precedent as obtaining in the domestic legal systems. However, two peculiarities are evident; first, permanent jurisdictions constantly refer to their previous decisions, second, the practise of arbitral tribunals. These tribunals have recourse to legal precedents in a variable manner according to the areas of expertise been considered, for instance, interstate relationships, international trade, or sport.[11] The second peculiarity is the primary concern of this paper herein.

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[9] Statute of the ICJ, Article 38.

[10] (Preliminary Objection Judgment) 1998, ICJ Rep 275 para 28.

[11] Guillame 11.

3.2 The Current Practise of Arbitral Tribunals

It has been established that precedent or permanence has no place at international law. Nonetheless, there are particular fields where the need for permanence and transparency are stronger than in others. For instance, interstate arbitration is most frequently entrusted to members of international tribunals (particularly those from the ICJ) or to academics who are familiar with these institutions.[12] The decisions are always published, therefore, more frequently imprinted with jurisprudence from the ICJ and arbitration tribunals. However, interstate arbitrators may attempt to distance themselves from this jurisprudence in an attempt to complete it or add nuances to it. Yet, the said arbitrators are essentially faithful to the precedent that they cite abundantly.[13]

On the extreme end are the arbitral awards rendered in commercial disputes between private corporations or parties. These decisions remain confidential in the vast majority. It is obviously a necessity to have privacy in these disputes as the institutions are taxed to settle specific contractual disputes in light of the parties' undertakings and the facts of the case. It is for this reason that they often arbitrate without reference to arbitral jurisprudence. The preceding discussions are hence premised on the current practise of two specific fields; commercial and investment arbitration, and how the arbitrators in each field deal with the issues that come before them, with regard to the use of binding precedent.

3.2.1 International Commercial Arbitration

A question that was considered by one Kauffman-Kohler was whether when issuing awards in commercial arbitration, do the arbitrators rely on past awards. Moreover, do the arbitrators

[12] Guillame 16.

[13] Guillame 16.

create rules that have effects beyond the dispute submitted to them? After consideration of various arbitral awards, the answers to these questions were not in the affirmative. Arbitrators, it seems, do as they please with the cases that come before them and pay no regard to past cases, there is therefore, no clear practise in this field.[14]

Most peculiar is the fact that scholarly articles or writings appear to attract more attention from arbitral tribunals than past cases. It is evident that whether on substantive or procedural matters, reference to prior cases generally is made out of an abundance of caution.[15] The rule that these arbitrators rely upon most often arises, in any event, out of institutional rules. Aside from procedural issues, perhaps, one can see no precedential value of self-standing rule creation in commercial arbitration awards. The arbitrators have a sweeping freedom to apply the law that allows him or her to 'mint' the rules that account for the specifities of each case, or the case driven propensity to transnationalise the applicable law. These principles in themselves are contradictory to the very idea of precedent.[16]

3.2.2 International Investment Arbitration

International investment arbitration has been described as a private system of justice in which matters of high public policy are addressed. The high stakes represented in this domain, in terms of policy room and monetary implications are not given the credence due to them by the arbitral tribunal awards rendered.[17] The awards are varying and an attempt to reconcile them is futile. The stakeholders attempt to explain the varying decisions by highlighting the fact that these tribunals are ad hoc in nature, addressing specific disputes arising under

[14] Kaufmann-Kohler, "Arbitral Precedence," 364.

[15] Kaufmann-Kohler, "Arbitral Precedence," 364.

[16] Kaufmann-Kohler, "Arbitral Precedence," 365.

[17] Kauffman-Kohler, "Arbitral Precedence," 365.

specific or particular investment treaties.[18] This is a plausible explanation. However, it is difficult to explain the varying awards when the disputes arise from virtually identical facts, invoking the same treaty text, and arbitrators seemingly still change their minds from one decision to another without any care to give an explanation.

The awards issued against Argentina between the years 2000 and 2001 by ICSID tribunals have caused a stir in investment jurisprudence. The said country underwent an economic meltdown and various disputes were brought before the tribunal due to its breach of treaty provisions. In this instance, two different arbitrators signed onto conflicting awards, despite the fact that the treaty and treaty provisions in question were on all fours. Needless to say the disputes arose from the same circumstances, which were the economic meltdown of the said State.[19] The rationale of these decisions is substantially.

The absence of precedence in this field is justified by Article 53 of the ICSID Convention, according to which 'precedents shall be binding on the parties'. This provision alone does not seem to be a convincing reason to refuse to follow precedent. The general consensus is illustrated in the recent award of *Pan American Co. v Argentina Republic*[20] (which has been reiterated in many other awards):

> ICSID arbitral tribunals are established ad hoc,.... and the present tribunal knows of no provision,... establishing an obligation of *stare decisis* . It is nonetheless a reasonable assumption that international arbitration tribunals, notably those established within ICSID system will generally take account of precedents established by other arbitral organs, especially those set up by other international tribunals.

[18] David Schneiderman, *Judicial Politics and international Investment Arbitration: Seeking an Explanation for Conflicting Outcomes*. (Toronto: Georgetown University Press, 2009), accessed April 4, 2012, http//works.bepress.com./david_schneiderman/1.

[19]Schneiderman.

[20] ICSID Case ARB/03/13, Decision on Jurisdiction, 27 July 2006.

In principle, one notes the emergence of rules in ICSID arbitration. An illustration of the emergence of such rules is seen from the workings of the principle of fair and equitable treatment. Another illustration is that of the decisions regarding expropriation. These decisions show that consistent case law is being developed and that tribunals are more often than not following in the footsteps of their predecessors.[21]One Kauffman-Kohler, argues that this is obvious as far as the regulatory expropriation is concerned, where the approach is to assess the legitimacy of the aim of the measure, the degree of the impact upon the investor, and proportionality. Therefore, the influence of previous case law is unmistakable. However, one grapples with the issue whether it is too early to become so presumptuous, is this influence indeed comparable to the effects of the doctrine of precedent at common or is it simply a denotation of a trend that is subject to confirmation.[22]

3.2.3 The Significant Variations in the Different Categories of Disputes

As has been highlighted in the preceding paragraphs, different domains have over time developed varying ways in which to deal with disputes. It is been noted that in commercial arbitration the disputes are predominantly of a private, contractual nature and there is therefore no basis for precedential awards. On the other hand, investment arbitration, though generally not establishing a binding precedent, has seemingly rules that have developed overtime and are reminiscent of a precedential doctrine. The disputes in this domain are based on breach of treaty provisions; therefore, it is logical to follow past cases in an instance that the parties in question are relying on the same treaty, and in more extreme circumstances the cases have similar facts.

[21] Kauffman-Kohler, "Arbitral Precedent," 371.

[22] Kauffman-Kohler, "Arbitral Precedent," 371.

Cognizant of the foregoing, scholars have attempted to establish why different categories of disputes have over time evolved varying rules in awarding decisions. It is noted that there is no meaningful precedential value of awards in commercial arbitration, while the issue for investment arbitration is different. The latter field has a progressive emergence of rules through a line of consistent cases on certain issues.[23]

The role of arbitrators is dependent on factors that are specific to the dispute or field in which they act. For instance, many argue that there is no need for the development of consistent rules in the issuing of arbitral awards in commercial arbitration, as these disputes are most often fact and contract-driven. The outcome of this award essentially affects a very specific and limited group of people, who in most cases are those privy to the specific contract. These contracts are negotiated between private parties to fit the parties specific needs. Unlike the mandatory manner, in which investment awards are published, commercial awards are published sporadically.[24]

Alternatively, investment arbitration is quite different, and it is this variation that suggests the precedential value of the awards in this domain. The actions in need of review are usually those of a governing body, usually a government. Investment arbitration is likened to that of sports domain arbitration.[25] However, it has been established that the necessity for consistency in the former is not as strong as in the latter. Investors often emanate from one country and invest in another country under a specific treaty. There are also several countries with investment treaties of varying nature. However, one is cognizant of the fact that investment arbitration may have several recurring issues, which as a matter of principle

[23]Kauffman-Kohler, "Arbitral Precedent," 375.

[24] Kauffman-Kohler, "Arbitral Precedent," 376.

[25] Kauffman-Kohler, "Arbitral Precedent," 376.

ought to be resolved by the application of one and the same rules. There is therefore, no need in such instances to fail to apply similar rules to recurring issues unless the arbitrators show compelling reasons to do so.

Kauffman Kohler[26] points out that in order to understand the outlined variations in dispute resolution one invariably has to differentiate between types of disputes and their users. This paper has attempted to differentiate between users and type of disputes with regards to commercial and investment arbitration. The users affected in commercial arbitration are predominantly private persons, as these agreements are contractual in nature, the rights and obligations that arise are likely not to recur. Alternatively, investment arbitration though based on BIT's, which are regarded as private in nature; usually involve agreements between one investor and a State party. However, the same treaty may be applied by investors vis-a-vis a different State or vice versa. The policy ramifications of investment treaties are beyond the private sphere, in that they affect a proportionate extent of the public. The rationale is simple, if the public is affected by such 'private' arrangements, the more compelling reason why there should be the application of standard rules.

It is submitted that the in considering whether the development of binding rules through arbitral decisions is desirable or not depends on the necessity, namely, the need for certainty and predictability, as well as the need for consistency and equal treatment, such needs are existent in areas where the law has not well developed. The sphere of investment arbitration is generally a system at the stage of infancy in its development of rules of procedure, the need for standard rules in such a system cannot be overstated.

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[26] Kauffman-Kohler, "Arbitral Precedent," 377.

3.3 Conclusion

This chapter has considered the concept of precedent as understood in the common law legal system and has shown the justifications for this concept. The chapter has also considered the arguments that are poised against the use of precedent. Furthermore, the concept was considered at international law, and it has been established that international courts and tribunals alike do not rely on the concept of precedent properly so-called. In some instances, however, the decisions of the courts and tribunals are reminiscent of jurisprudential elements. The chapter further considered the current practise of arbitral tribunals in two specific fields; commercial and investment arbitration. It established that different fields have developed varying ways of resolving disputes. While there is no element of precedent in commercial arbitration, it is significantly emerging in investment arbitration. The conclusion is therefore that the issue of precedent is more pressing in some fields than in others; it is relevant to the extent of the dispute or users concerned. While there is a recognised need for the application of standard rules in investment arbitration, the same cannot be said for commercial arbitration. The consequent chapter shall have consideration of the actual challenges posed by the lack of a *de jure* precedent in international investment arbitration.

CHAPTER FOUR

THE CHALLENGES POSED BY THE LACK OF BINDING PRECEDENT IN INTERNATIONAL INVESTMENT ARBITRATION.

4.0 Introduction

This chapter shall analyse the challenges posed by the lack of binding precedent in international investment arbitration. This analysis will be carried out through the consideration of specific arbitral tribunal awards. An analysis of the cases that have come before ICSID show that Argentina has had more matters before the tribunal than any other country. Therefore, the chapter shall have consideration of two specific tribunal awards issued against Argentina, and analyse how these awards were issued. From the analysis of the cases, the chapter shall highlight some of the challenges that are evident from the tribunal decisions. The chapter shall conclude by establishing whether the challenges analysed give ample justification for the need to use binding precedent in international investment arbitration.

4.1 Case Study

4.1.2 Background

After attaining independence from Spain in 1816, Argentina suffered a cycle of political and economic instability. Towards the beginning of the 1990s, Argentina was struggling to recover from the debt crises of the past decade. Therefore, the State liberalised most sectors of the economy as a ploy to attract foreign investment. The Argentines, with a view to attract western investors passed the 'convertibility law' whose effect was to peg the local currency (peso) one-to-one against the US dollar. The benefits were two-fold, as was levelled at the

time. First, it was in order to prevent the State from financing deficits by printing a new currency. Second, it was viewed as a means to keep the inflation rate under control.[1]

Argentina, before long had signed up to several BITs in Latin America, most of which provided for arbitration through ICSID, and were eventually ratified and promulgated into law. The new investor-friendly measures encouraged foreign multinational corporations to invest heavily in various sectors of the Argentine economy, which included hydrocarbons, electricity, harbours and so forth.

By late 2001, Argentina was rocked by a financial crisis, inflation skyrocketed and unemployment rose to over 25 per cent. The government's response to the crises was to enact the Public Emergency Laws 2002, as a means of restoring economic assurance, stability and political order. In normal circumstances, such a law would constitute a legitimate sovereign right. In this instance, however, it out rightly disregarded the country's commitments outlined in the BITs, by fundamentally altering the economic and financial framework in which the treaties were signed and on which the foreign investors relied.[2] This phenomenon brought rise to at least 48 cases filed against Argentina before ICSID tribunals, for breach of obligations under the stated BITs, which not only spelt out guarantees for foreign investors but accorded them investor-to-State arbitration. [3]

Two specific tribunal findings are pertinent to this study; these include the cases of *CMS Gas v. Argentina*[4] and *LG&E Energy Corporation v. Argentine Republic*[5]. The significant question in most of the cases that arose against Argentina was whether the action by the Argentine government could be justified as one taken in times of peril and in dire need, as

[1] Paolo Di Rosa, "The Recent Wave of Arbitrations against Argentina under Bilateral Investment Treaties: Background and Principle Legal Issues," *Inter-American Law Reports,* (2004): 44.
[2]Di Rosa 45.
[3] http://www.worldbank.org/icsid/cases/pending/htm
[4] Case No. ARB/01/8 ICSID (2005).
[5] Case No. ARB/02/01 ICSID (2006).

sanctioned by international law, or a mere breach of Argentina's own contractual commitments. The two cases were based on the concept of the state of necessity, that is, when is a contracting State Party permitted to invoke the said concept as a defence under international law. The analysis of the specifics of such a concept is not within the parameters of this study. What is of significance however, is the understanding of how the tribunals though tasked with the same facts based on the same BIT to which Argentina was signatory, dealt with the issues that arose, and what the ramifications of their approach was to the parties and the jurisprudence herein.

4.1.3. *CMS Gas v. Argentina*[6]

In the above-captioned case, CMS, an American subsidiary of an Argentine gas corporation, sued the government for breach of its obligations under a 1994 US-Argentina BIT. The company's claim was based on the premise that the emergency legislation promulgated by the State was in violation of Article 2 (2) of the US-Argentina BIT; by breaching the fair and equitable treatment clause and non-discrimination provisions, and furthermore the government's expropriation of gas investments without rendering full compensation. The Argentine government justified its actions on grounds of public consideration, and argued that by investing in Argentina, CMS was committing itself to the potential risk that domestic policies would change in the event of serious financial crises.[7] The State thus, claimed exemption from liability under the said BITs, not only as a matter of the catastrophic crises but also because it had discretion to act on 'public considerations' to regulate gas tariffs. The tribunal ruled in favour of the investors on the ground that the treaty provision requiring the US companies to be treated in a fair and equitable manner had been breached.[8]

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[6] Case No. ARB/01/8 ICSID (2005).
[7] Graham Mayeda, "Playing Fair," *Journal of the World Trade,* (2007):273.
[8] Mayeda 276.

4.1.4 *LG&E Energy Corporation v. Argentine Republic*[9]

The above-captioned case, as in *CMS Gas v Argentina*, originated from the economic crisis of the Argentine Republic and the ensuing emergency legislation. The investor in this instance was a US power company that had participated in the privatisation programme of Argentina's gas sector. The claim was in substance the same as that of the *CMS* case. The tribunal accepted the investors claim that suspension of the tax regime on the gas sector breached the fair and equitable standard and umbrella clause contained in the US-Argentina BIT.

4.1.4 Critique

In the two cases before the tribunal, there was a general recognition of the fact that the emergency laws that had been promulgated in the wake of the Argentine crises had potential to cause harm to the investors concerned. The Argentines, even so, presented defences to their actions. They argued that the emergency laws were exceptional measures that had been taken during exceptional financial crises. The said measures were in line with the non-precluded measures (NPM) recognised by the BITs in question, and were essentially tailored to meet the exigencies of the 'state of necessity', a well recognised and established principle under customary international law.[10]Notwithstanding the striking similarities between the two cases, the tribunals reached conflicting conclusions on assessing the extent of the state of necessity. The CMS award rejected the defence of state of necessity while the LG&E award partially accepted it. The potential consequence of the two contradictory awards is far-reaching. The availability and the extent of necessity may and has impacted on other proceedings involving analogous situations. One thus sees a potentially substantial loss in terms of predictability in investment arbitration.[11]

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[9] Case No. ARB/02/01 ICSID (2006).
[10] Waibel 637.
[11] Spoorenberg and Vinuales 95.

The tribunals agreed on the substantial obligations arising under the said BITs (fair and equitable treatment standard, umbrella clause, non-discrimination), they both assessed the application of the NPM clause and the state of necessity in the context of Argentina's defences, yet they reached contradicting conclusions. The tribunal in *CMS* argued that the requirements of the state of the necessity in the context of Argentina's defences had not been fully met. While the tribunal in *LG&E* contradicted this view by ruling that it is the aggregate of devastating economic, political and social conditions that triggered the protection afforded under article (11) of the treaty.[12]

The issues that arose in the cases above brought to the fore concerns crucial for the future of investor-State arbitration. Was the contradiction of the two tribunals suggestive of a deficiency or ambiguity in relying on ICSID as a neutral institution for the settlement of investment disputes? The cases have placed the role of ICSID and its future in a quandary, as the inconsistent and contradictory manner in which the cases were decided has attracted more criticism and uncertainty. The law on state of necessity has remained vague and without a conclusive stance. The ICSID tribunals have on several occasions been tasked with an assessment on the defence of the state of necessity. Unsurprisingly, the decisions have varied significantly, with each tribunal choosing either one or the other of the above discussed cases to rely upon.

4.2 The Specific Challenges Posed by the Contradictory Tribunal Findings

The concept of consistency has been defined as that which addresses a logical coherence among things or a uniformity of successive results.[13] Therefore, inconsistency entails a failure to have a logical coherence or a sense of uniformity. It has been observed that in some cases brought before ICSID, there is a sense of consistency, while in others there is no consistency

[12] Forgi 49.
[13] Gabrielle Kaufmann-Kohler, "Is Consistency a Myth," *Precedent in International Arbitration, (2010):*143.

whatsoever. The need for consistency in any legal system cannot be overstated. One is however, cognizant of the fact that the likelihood of a degree of inconsistency in any legal system cannot be ignored and should thus not be intolerable.[14] Hence, the true question becomes whether on the same legal issues, parties to a dispute are entitled to the same answers. The undertone is a reflection on the relationship between law and the practise of following precedents. Legal theorists underscore the fact that the rule of law is only called as such if it is consistently applied so as to ensure predictability.[15] Legal theorists further insist that decision-makers have an obligation, whether moral or legal to strive for consistency and predictability and thus to follow precedent.[16] The subsequent paragraphs attempt herein to analyse some of the challenges posed by the lack of adherence to binding precedent by arbitrators in international investment arbitration. The specific challenges shall be analysed through the sub-topics outlined below.

4.2.1 The Re-enforcement of Errors of Law and Fact

By their recognised ad-hoc nature, ICSID tribunals are expected to dissolve after each ruling and issuance of awards. The hearing of one particular matter before the tribunal is final and entails its dissolution as soon as awards have been issued. Consequently, the decisions of the tribunals are not subject to appeal. Intellectuals argue that this not only gives ICSID an 'imperial' voice but also enables errors of law and fact to become established as a way forward.[17] As was seen from the cases discussed above, scholars are bound to take either one of the decisions as the stance of the law. The point is that one of the awards is not the law as it ought to be understood, but because of the lack of precedent in this field, whichever decision one decides to adopt becomes the law for that purpose. For a layman there remains

[14] Kaufmann-Kohler, "Is Consistency a Myth," 143.
[15] Kaufmann-Kohler, "Is Consistency a Myth," 144.
[16] Kaufmann-Kohler, "Is Consistency a Myth," 144.
[17] Forgi 53.

confusion as to what the law is, in light of the varying decisions on the same issue. The jurisprudential practise is essentially to follow that principle of the law that has been established over time. In the two tribunal findings, one is entitled to choose to rely upon either award in the event that a matter with substantially similar facts comes before the arbitral tribunal. The error of law or fact shall be treated as though it was the proper law, therefore re-enforcing an untrue and unclear position.

4.2.2 Susceptibility to Challenges from Third Parties

In light of the above excerpts in the case study, it is evident that subsequent tribunals have preferred to follow the awards and the reasoning rendered by the *CMS* tribunal. Subsequent tribunals, such as those established for *Enron* (2007) and *Continental Casualty* (2008) are veritable examples. However, some tribunals have been noted to follow the reasoning and award of the *LG&E* case. This is an indication that although tribunals do not create precedent *per se*, in practise, past decisions are and may be relied on for persuasive value only. Schneiderman illustrates that the danger with such an approach is probably that the body remains forever susceptible to challenge from voices from outside to an extent that it will disrupt substantially the direction of investment law for the future.[18] Such an unstable system may unfortunately not develop. There is invariably no creation of law in such a body. It is recognised that the purpose of arbitration is not to act as a law creating field; however, as has been discussed in the preceding chapters, the field of investment arbitration in its nature may need to be differentiated from other fields and thus start to create standard principles with jurisprudential character.

[18] Schneiderman, http//works.bepress.com./david_schneiderman/1.

4.2.3 The Skewed Role of ICSID

The role of ICSID is said to be skewed, in that, instead of being a guarantor of justice for all the parties to the dispute, the tribunals have placed themselves as protectors of investor rights (though this is recognised as the central mission of the BIT system) despite the high political stakes. This slanted approach goes against the primary duty of an adjudicatory body, which is to be impartial and decide matters on merit. The consequence of this approach is that tribunals are likely to find for investors even in instances where there have been past decided cases that on similar facts found for a State Party. The said approach may have an effect on the quality of the awards and the *ratio decidenti* of the decisions. The decisions will thus lend themselves to unnecessary scrutiny from various stakeholders.

4.2.4 Inconsistent Decisions

The primary and probably the most decisive reason accounting for the conflicting decisions in international arbitration is that there is no formal rule of precedent.[19] The different stances taken by the arbitral tribunals in *CMS* and *LG&E* are regarded as illustrative of this point. Without more, the two decisions illustrate the various challenges that arise as a result of the absence of a *de jure* doctrine of precedent. More so, the *LG&E* tribunal having been convened last, failed to have consideration or refer to the awards rendered on liability in *CMS*, despite the similarity *between* the two cases.

The inconsistencies in the two cases create a stark disparity between the cases in an adjudicatory process and those in arbitration. As has been resonated in the preceding chapters, domestic courts under the common law, apply rules and principles uniformly. This approach is premised on an attempt to provide guidance and satisfy the reasonable expectations of the litigants. It entails that parties faced with a particular set of facts that have

[19] Spoorenberg and Vinuales 95.

already been adjudicated upon, will be aware of what the legal stance is, and will merely be seeking affirmation or a declaration from the court. This approach may well be applied to the users of the arbitral procedure in investment law. As has already been highlighted, the concept of precedent has many justifications but the most striking, that which ties the entire system together is the element of consistency. Wavering decisions from the same body may not only arouse confusion in a system but may also cause parties to refuse to continue to use such a system. Therefore, one notes that much of the criticism levelled against ICSID is premised on the lack of consistency in the awards rendered.

On the whole, the objections, which cast ICSID as an ad hoc, inconsistent, and investor-friendly forum, deeply threaten the systems long-term viability. Critics invariably recognise that the attempt by the tribunals to render reasoned awards may confer legitimacy on the process of arbitration; nevertheless, there is the unmistakable recognition that the use of precedent may serve a familiar and more superior function.[20]

4.3 Conclusion

This chapter has highlighted and analysed some of the challenges posed by the lack of precedent in international investment arbitration. The chapter has had consideration of two arbitral awards rendered by ICSID involving Argentina and its investors at the time when the country suffered financial crises. The Chapter has established that the conflicting decisions that the tribunals arrive at after analysing cases that have similar facts and in this instance arising from the same BIT, poses challenges to the dispute resolution system in international investment law. These highlighted challenges threaten the viability of ICSID as a veritable dispute resolution body for investment disputes. Evidently, from the foregoing analysis, one notes that there is need to restore the confidence of users in this dispute resolution

[20] Schneiderman, http//works.bepress.com./david_schneiderman/1.

mechanism. Numerous scholars have consistently argued that a system of binding precedent is vital to tackle the challenges herein. The subsequent chapter shall summarise the findings of this research paper and outline the conclusions that have been drawn herein. The Chapter shall further make recommendations as to what measures can be put in place to deal with the challenges posed by the lack of binding precedent in international investment arbitration.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction

The objective, in the preceding chapters, has been to analyse the challenges that are posed by the lack of binding precedent in international investment arbitration. This entailed an analysis of the use of the concept of precedent and its workings in both domestic and international jurisdictions.

Chapter one was the introductory chapter of this study. The chapter gave an overview of the general concepts pertinent to this research paper. These concepts included arbitration, international investment law and arbitral precedent. The chapter further established some contextual definitions. Furthermore, the general objective of the study was stated, which was to analyse the challenges posed by the lack of binding precedent in international investment arbitration.

Chapter two was substantially a review of the literature relevant to this research paper. The chapter analysed the various works that have been carried out as regards the use of precedent in investment arbitration. It established that several scholars have advocated for the use of precedent in investment arbitration and have gone further to distinguish the different domains of arbitration and stated which are in greater need of the element of consistency through the use of precedent. The point of departure for this paper was to analyse the specific challenges that are posed by the lack of the use of binding precedent in investment arbitration.

Chapter three had consideration of the general concept of precedent, both at domestic and international level. This was in order to establish the justification for the use of such a concept in domestic legal systems, specifically common law legal systems, in disparity to

international jurisdictions. The chapter thus highlighted some of the reasons that have been levelled for the use of precedent in a dispute resolution system. The chapter further ventured into an analysis of the current practise of arbitrators. This segment entailed a comparative study of two specific arbitration domains, which included international commercial arbitration and international investment arbitration. The comparative study considered the manner in which arbitrators go about making their decisions, do these arbitrators have due consideration of past awards? If they do, what compels them to behave in this manner, as it is common knowledge that there is no *de jure* doctrine of precedent in international arbitration.

In chapter four, the paper analysed the specific challenges posed by the lack of precedent in international investment arbitration. This analysis was carried out through a study of two significant cases that came before ICSID tribunals involving Argentina's breach of its obligations under BITs signed with several investors. The cases were that of *CMS Gas v. Argentina* and *LG&E Energy Corporation v. Argentine Republic.* The chapter established that despite the two cases having essentially similar facts and emanating from the same BIT, the arbitral tribunals still reached contradictory decisions. The chapter thus had consideration of the effects that the contradicting decisions had, not only on the parties involved but also on the entire dispute resolution mechanism.

The present and final chapter shall have regard to the conclusions that have been drawn from the paper holistically. The paper shall then make recommendations based on the conclusions drawn from the study. The recommendations will essentially establish the measures that ought to be put in place to tackle the challenges that have been highlighted by the failure to have a *de jure doctrine* of precedent in international investment arbitration. A logical conclusion will thus be drawn.

5.1 Conclusions Drawn

The preceding chapters have concluded that there exists a *de facto* doctrine of precedent in international investment arbitration. This means that international investment arbitrators have developed a trend where they follow prior decisions issued by other tribunals. Regrettably, they do so only as a matter of practise and not as a matter of principle or in legal parlance as a *de jure* doctrine. The said trend creates anomalies, as the arbitrators have no obligation to follow prior decisions, and entails that in some instances, they depart from prior decisions and do so with not so much as an explanation for the departure. The situation is even more complex, when the matter before the tribunal is one that is on all fours as one that has already been decided by either the same tribunal or a different one.

The lack of binding precedent consequently poses various challenges to the disputants in investment arbitration. This is evident in the fact that the system is inconsistent, as has been established from the two tribunal decisions concerning the Argentine Republic. The cases illustrate how arbitrators, in an instance where the two set of disputants have disputes based on significantly similar facts and emanating from the same BIT, still arrive at conflicting conclusions. The variation in outcomes is unwarranted, but the arbitrators do so without so much as to state the reasons for the divergence. The awards issued by the said arbitrators are further unpredictable and this is contrary to the principles of what constitutes a good dispute mechanism system.

The research paper, through an analysis of arbitral procedure in two distinct areas, concludes that the issue of arbitration has become more complex as it is dealing with several and divergent fields. As a result, there is need to differentiate between specific disputes and the disputants herein. As has been established, the issue of consistency through the use of precedent in commercial arbitration does not arise as the disputants are essentially private in

nature, and the said disputes arise predominantly from their contractual relations. International commercial disputes are arguably party specific and such disputes are implausibly susceptible to recurrence. The inherent attributes of commercial arbitration are contrary to the principles of consistency and there is consequently no great need for the existence of consistency. In contrast, the public nature of investment arbitration warrants a greater need for the existence of consistency, through the use of precedent. The almost mandatory publication of awards of investment arbitrators is arguably recognition for the need to have consistent awards rendered. The rationale for precedent in investment arbitration is gleaned from an analysis of the effects that the arbitral process has on the concerned parties, in this instance the States parties and investors respectively.

A further conclusion by this paper is the fact that the question of the development of binding rules in arbitral procedure is dependent on the necessity in the recognised field. Certain fields have developed significantly overtime, and have established procedure that is not only certain but predictable, it is consistent, and applies the principles of equality of treatment, that is, comparable parties to disputes ought to be treated comparably. Other bodies, in disparity are in their infancy stages as regards procedural or rule development. Intellectuals, in this regard adumbrate that the above stated needs are essential in areas of the law that are undeveloped. The above observation is what has prompted many to suggest that investment law, being in stage of infancy of development, ought to establish binding rules of procedure.

Evident from this research paper herein is that the conception of consistency is quint-essential to any dispute resolution system. The credibility of a dispute resolution body or mechanism is inherent in the level of consistency apparent therein. As has been underscored throughout this research paper, a system that produces erratic results will lose the confidence of its users in the long term. In this vain, the international investment arbitration system or more specifically ICSID runs a risk of becoming defunct and thereby defeating its own purpose of

being an arbitral body, which is inherently tasked with the duty to create law for both present and future users. Most importantly, in Kauffman-Kohler's observation, the world is rapidly evolving from one that was predominantly bipolar to a multipolar one. The changing environment, invariably, calls for the predictability and consistency of the rule of law and in this instance by the creation of binding arbitral rules.

In essence, the paper concludes that the lack of precedent in arbitral process creates several challenges for the users herein. These challenges include the re-enforcement of errors of law and fact by subsequent tribunals, susceptibility to challenges from third parties, the presumed skewed role of ICSID and most importantly the creation of inconsistent decisions. Furthermore, it has been established that the existence of binding legal rules in arbitral procedure in the issue of awards, is desirable as it creates certainty, predictability, and equal treatment of aggrieved parties.

5.2 Recommendations

It is clear from the foregoing analysis that the lack of binding rules in arbitral process, specifically in international investment arbitration, has become a big issue, which threatens the credibility of the entire system. Various scholars have advocated for consideration of this issue by the establishment of binding rules on the arbitral process. Arbitrators, may however, be applauded for their attempt to not only issue reasoned awards but to adhere to a *de facto* doctrine of precedent. Unfortunately, this approach is not the most efficient, as at a time when the tribunals are expected to issue awards with jurisprudential value; they deviate without so much as a compelling reason or explanation for so doing. The attempt to follow prior cases is recognised as an acceptance of the need for consistency; therefore, this ought to be strengthened considerably. The paper having recognised that the *de facto* mode of precedent

creates inconsistency, shall hereunder attempt to give recommendations as to how the investment arbitrators may better meet the needs of their disputants or users adequately.

5.2.1 The Use of Arbitral Precedent

As one proposes the use of arbitral precedent in this domain, one is aware that this is a drastic change in the field and ought to be considered cautiously. The underlying purpose for the use of arbitration by disputants is that it creates a mode of dispute resolution that is less stringent than that of the adjudicatory process by the courts. Thus several rules of procedure do not exist in arbitration, making the system not only simple but also efficient. The question however, is whether the contradictory decisions discovered in investment arbitral process make investment arbitration for the users a risky business. On the other hand, does the need to have flexibility in arbitral process take precedence over creating a consistent system. The answer is obviously not in the affirmative. The risk s therefore that the failure to give the system a semblance of consistency may result in its users resorting to the courts, an avenue that there were initially avoiding. The above observations in themselves underscore the urgent need to have precedent in investment arbitration.

Per Sir William Blackstone, the use of precedent has been regarded as that which balances out the scales of justice, thereby decisions not making themselves liable to waiver with every new judge's opinion. In this light, use of precedent shall ensure that disputants have guidance and their reasonable expectations are satisfied. In essence decisions shall be fair, efficient, predictable, certain and most importantly consistent. The application of this principle to investment arbitral process will essentially instil a sense of confidence in the users of the process.

It is recommended that in order to ensure credibility and certainty, a *de jure* doctrine of precedent ought to be introduced in arbitral process, in contrast to the *de facto* doctrine that is

currently in existent. This approach will ensure that the decisions of prior tribunals are followed as a matter of principle. As has been established, the opposition for such a use of precedent is premised on a provision of the ICSID that states that an award is only binding on the parties to the dispute.[1] This should not be regarded as a conclusive argument, as it is argued herein, that which is of prime importance to the development of international investment arbitration, are not the awards issued, but the enunciation of the applicable rules. The awards in themselves are regarded as of secondary consideration herein. The principles relied upon in the process of delivering decisions and rendering are of prime importance, and it is what this paper attempts to establish and have preserved.

5.2.2 The Creation of Customary International Law

The reliance on precedent is a principle that is almost non-existent in international law. However, there is one principle that is predominant in this sphere and that is the creation and existence of customary international law. Arbitral tribunals may foster consistency by systematically relying on rules applied in consistent line of cases and should only depart from the prior cases for very compelling reasons. Eventually, such a system may evolve into what is regarded as international customary law, not only being a well established practise but also an *opinio juris,* namely, the belief among states, investors, and arbitrators, that in absence of compelling reasons to do otherwise, a tribunal must follow the solution arising from a consistent line of earlier cases.[2] This in itself will be like *stare decisis,* applied not to a single decision but to a line of decisions. This principle is closely linked to the doctrine of precedent, as that which is established as international customary law ought to be followed by subsequent tribunals as a matter of principle. For instance, state of necessity is a well established principle in customary international law, which requires an indispensible measure

[1] Article 53 of ICSID Convention of 1965.
[2] Kaufmann-Kohler, "Arbitral Precedent," 377.

to be taken in order to safeguard and protect national interest from imminent peril. In this regard, if a State establishes that the breach of a treaty obligation is premised on need to safeguard its national interest from imminent peril, then it follows that the State is regarded not have breached its obligations. This is to show that in any event the issue of necessity arises, the tribunal has an established customary international law principle that ought to be followed.

5.2.3 The Creation of an Appellate System

A debate has been ragging currently concerning the need for an appeal mechanism in investment arbitration. This debate reflects on the need for more coherence and certainty in decisions of investment arbitrators. It is well to bear in mind that the establishment of an appeal mechanism, ad hoc or otherwise would be a step toward the institutionalisation of investment arbitration.[3] Therefore, in addition to the use of arbitral precedent, it is recommended that investment arbitration should have an appellate system, where the decision of one tribunal is not the final decision, but parties to a dispute may have recourse to a higher appellate body. The working of such a system will entail that arbitrators have knowledge of past awards and in this instance are likely to follow these past decisions than not. The appellate body shall also act as a fetter for the unwarranted deviation from decisions by subsequent tribunals.

The appellate mechanism may take the form of a single international investment court, which acts as an appeal forum stemming from the findings of the arbitral tribunals. The appeal mechanism, it should be underscored, is in addition to the use of arbitral precedent, as the findings of such a court will essentially be binding on the tribunals and the subsequent cases

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[3] Fabien Gelinas, "Investment tribunals and the Commercial Arbitration Model: Mixed Procedures and Creeping Institutionalisation," (2009) (Oxford: Mesill University Faculty), http://ssm.com/abstract

brought before the court. The approach is recommended, as in the long run it is bound to iron out the existent inconsistencies in the field.

Some authors have gone as far as calling for the total abolishment of the arbitral process and replace it with the above suggested court. Though this is a plausible suggestion, one is still wary of it. It is common knowledge that arbitration plays a major role in the quick, cost-effective and efficient settlement of disputes. Thus, the point is not to eliminate the entire process but to make the process akin to the court's adjudicatory system, in terms of the consistency of the arbitral process. As noted by one Fabien Gelinas, the impact of the decision of an ad hoc arbitral tribunal on the deliberations of future tribunals is seen as limited because the constitutive elements of a system relying on judge-made law are absent. The elements would appear to include an organisational hierarchy of tribunals, horizontally allowing for a range of opinions to develop and vertically imposing order and coherence from above, necessitated by the process of adequate reporting.[4]

5.2.4 The Establishment of a Multilateral System

There is a paradoxical thesis that investment law is developing towards a multilateral system of investment protection on the basis of bilateral treaties.[5] The development of this area of the law on the basis of bilateral treaties is said to contrasts significantly with the emergence of multilateral institutions in other international economic law institutions, such as that of international trade. The multilateralism of international trade is evidenced by the establishment of the GATT/WTO system, which essentially regulates the relations of contracting States Parties. Conversely, investment law treaties are fragmented and may exist in well over 2 500 bilateral, regional and sectoral investment treaties.[6] A system as this one,

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[4]Gelinas 580.
[5] Schill 3.
[6] Schill 3.

lacking a uniform dispute settlement body, dependant on ad hoc arbitration panels with limited State oversight and without institutional mechanisms is liable to inconsistency and unpredictable decisions. The multiplicity of sources and multiplicity of proceedings in this instance augments the incoherence in the law governing investment relations.[7] The many BITs in this realm may result in the same State measure being assessed differently under two existing investment treaties dependant on the nationality of investors affected.

Significantly, there is the possibility of having multiple proceedings relating to an identical set of facts arising from independent claims by shareholders in different corporate structures. The measures of a State against investors may result before different tribunals, in some cases based on different BITs or in other instances based on the same BIT. The result is the diverging issuance of awards even though the underlying principles that brought rise to the cases are significantly similar. The potential of the inconsistency in investment treaty arbitration are an expression of bilateralism in international investment relations.[8]

In this regard, the paper recommends that a global treaty based on the working of multilateralism be concluded. This recommended was given at the Doha Rounds as evidenced by the Doha Declaration.[9] Much as the global treaty of the WTO/GATT system, the said treaty would serve as a balancing act making the principles that govern relations between States Parties and investors, standard. A comprehensive global treaty on investment arbitration would synchronise the regulations and practises and would bring about the much needed measure of consistency and uniformity in the arbitral decisions of the tribunals. This may ultimately lead to the demise of the BIT era, as, if States were subject to one treaty having enshrined comprehensive principles, individual BITs would be insignificant. The

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[7] Schill 4.
[8] Schill 4.
[9] The World Trade Organisation's Declaration on TRIPS Agreement and Public Health (Doha Declaration) of 2001.

enshrining of the basic principles would therefore, not only make the rights and obligations of States and investors expressly known, but also aid subsequent tribunals in the predictable and consistent issuance of awards.

5.3 Conclusion

The fact that cases that arise in this extremely globalised world, are between parties from across national boundaries suggests that arbitration is an indispensible tool. However, for investment arbitrators the arbitral process has produced many conflicting decisions that are threatening the credibility of the entire system. Thus, critics have called for the augmentation of the said system, so that it may not run a risk of becoming defunct. The problems that arise in a system that is inconsistent are many, as have been adequately outlined in the work. Therefore, in order to correct the situation, the use of arbitral precedent by investment arbitrators is imperative.

This chapter has given an overview of the findings in the preceding chapters and outlined the conclusions drawn herein. The chapter has submitted some recommendations in order to address the challenges posed by the lack of precedent in investment arbitration. These recommendations include; the introduction of binding arbitral precedent in the domain of investment arbitration, the creation of principles of customary international law, the creation of an appellate system and finally the establishment of a multilateral system in contrast to the bilateral treaties that investment arbitration is premised upon. The Chapter ultimately concludes that it is necessary to have binding legal rules in arbitral procedure, as this creates certainty, predictability and equal treatment for the users herein.

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