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The Binding Effect of Arbitral Awards in International Investment Disputes

Master's Degree Thesis

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Poděkování

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Prohlášení:

Prohlašuji, že předloženou diplomovou práci jsem vypracovala samostatně a že všechny použité zdroje byly řádně uvedeny. Dále prohlašuji, že tato práce nebyla využita k získání jiného nebo stejného titulu.

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List of Abbreviations

Art.	Article
BIT	Bilateral treaty on the reciprocal protection of investments
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
p.	page
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
Statute	Statute of the International Court of Justice
UNCITRAL	United Nations Commission On International Trade Law
UNCTAD	United Nations Conference on Trade and Development

Introduction

When I entered my first class at law school I thought that the only way how to settle a dispute was to go before a State court. I kept that belief until the moment when I decided in my third year to join the Willem C. Vis International Commercial Arbitration Moot team at my law school where I was introduced to the world of alternative dispute resolution mechanism, especially to international commercial arbitration. This experience made me enthusiastic about arbitration and thus the only logical step was to continue to FDI moot court in which I participated one year later. FDI moot showed me the beauty of international investment arbitration and also helped me in choosing the topic of this diploma thesis. One of the issues discussed in 2014 FDI moot was the binding effect of prior award issued in State-to-State arbitration on the interpretation of BIT between them. Although, in the moot court itself the range of the topic was very limited I decided to enlarge this topic and to write the thesis that is now in front of you.

Topics chosen for FDI moot are always very up-to-date, this one was no exception. One of the problems of investment treaty arbitration today is inconsistency caused by contradicting decisions rendered by tribunals. The system of deciding disputes in investment treaty arbitration is of diffused nature. This allows tribunals to act independently of others which sometimes mean to go completely against prior decisions rendered by different tribunals. This creates an unpredictable legal system lacking legal certainty. This all might result in investors refusing to choose this system for settlement of their dispute and thus ultimately to decline of international investment law.

There are many proposed ways of solving this problem. In this thesis, I will focus on solving this problem through binding nature of arbitral awards. In other words, I will focus on development of *de facto* precedent in investment treaty arbitration. The Question with a capital "Q" of this thesis is: "Is there a development of *de facto* precedent in international investment law?" Theoretical findings of various academics and tribunals on this Question are dealt with in first two chapters. The last chapter then provides unique empirical study on its development from 2004 till 2105. In case the *de facto* precedent is really developing, it can be an emerging solution to inconsistencies.

A consistent case law will then be a lighthouse that will guide the way for other tribunals and which will be sought by investors and States. This way States and investors will be willing to choose investment treaty arbitration for settlement of their dispute as it would be predictable.

The quantitative analysis in this thesis surveys awards rendered by arbitral tribunals in years 2004-2006 and 2013-2015 to find out whether there is some development between these two periods of time. I surveyed only English written awards excluding partial awards and decisions on jurisdiction. In my analysis I scrutinized the tribunals reasoning in the final award and I counted prior awards tribunal relied on in its decision-making process. I did not count awards mentioned in parties' submissions, because that is irrelevant for development of *de facto* precedent.

The sources for the theoretical part were mostly cases and articles. There are not many books concerning binding effect of awards and precedent in investment treaty arbitration. Books and commentaries I used are more concerned with the general nature of international investment law and the mechanism of the whole system of treaty arbitration. The topic of binding effect of an award is, however, quite frequent in various articles and journals. Despite the involvement of many academics in the theoretical discussion of binding effect of awards, conflicting awards and possible solutions to it, the number of empirical studies conducted in this area is very limited.

In the theoretical part I also heavily relied on tribunals' awards and decisions to see what are their opinions on *de facto* precedent. If the atmosphere among tribunals would be against any form of reliance on prior awards and towards their complete isolation, there would be no need in conducting any kind of empirical study on development of *de facto* precedent. The main purpose of this study is to test the theoretical concepts brought up by numerous academics to see whether they can work in the contemporary world of investment treaty arbitration.

For the reasons stated above, I decided to conduct an empirical study in the form of quantitative analysis to find out, whether tribunals do really feel bound by past awards and whether there is an increasing practice of relying on them. The most recent study I found on this topic was already nine years old and nine years in development of international investment law plays a significant role.

The thesis is divided into three parts. The first part is introductory and is concerned with the general characteristics of international investment disputes. This part describes the system of bilateral treaties for the reciprocal encouragement of investment and the dispute mechanism in which investors are left with a choice before which body the dispute will be heard. The chapter then distinguishes two different perceptions of tribunals: the principal-agent relationship where the tribunal acts only as an agent of parties to the dispute independent of other tribunals; and tribunal as an agent of parties and also an agent of the whole investment community.

The second chapter focuses on the binding nature of an award. It looks at the wording of ICSID Convention and of the Statute and how is the award binding upon the parties. The second chapter composes of three subchapters that deal with the existence (or non-existence) of *stare decisis* doctrine in international investment law; with the specific nature of interpretative awards; and with the problem that is caused by non-existence of *stare decisis* doctrine – conflicting awards. This part of the thesis also depicts proposed ways of solving the occurring inconsistencies. One of which is the development of *de facto* precedent.

The third, and also last, chapter concentrates on the development of *de facto* precedent as a solution for inconsistent decisions. The empirical study contained in this part embodies a citation analysis of 62 decisions and awards rendered in investment treaty arbitration.

1. The International Investment Disputes

Awards, this thesis deals with, are awards arising mainly from disputes between the investor from the home State on the one side and the host State on the other side. The home State is the State of which the investor is a national and the host State is the State in which the investor invested. These disputes are most frequently governed by provisions of a bilateral treaty for the reciprocal encouragement of investment (the "BIT") which is in force between the home State and the host State. Or put simply, these are the situations where "*foreign investors initiate proceedings against States in connection with governmental conducts that would have harmed their investment*".[1]

Up to this date there are 2926 BITs concluded between the States in the world and, additionally, 345 of other international investment agreements.[2] Apart for stating substantive obligations of the State with regards to the protection of investments, the vast majority of these agreements contain also the investor-State dispute settlement clause,[3] which allows the investor to initiate binding third-party arbitration without requiring the exhaustion of local remedies.[4] In other words, the investor can bring a direct claim against the host State for breaching its duties towards the protected investment.[5] From the study executed by OECD follows that 93% of scrutinized 1,660 BITs provide for investor-State dispute settlement mechanism.[6]

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[1] GRISEL, Florian. Precedent in Investment Arbitration: The Case of Compound Interest. *PKU Transnational Law Review*. 2004, Vol. 2:1. p. 216.
[2] International Investment Agreement Navigator [online]. Available at http://investmentpolicyhub.unctad.org/IIA (visited on February 27, 2015).
[3] UNCTAD . *Investor-State Dispute Settlement* [online]. p. 18. Available at http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf (visited on February 28, 2015).
[4] However, some treaty provisions may require such exhaustion of local remedies. See SORNARAJAH, Muthucumaraswamy, *The International Law on Foreign Investment*. Third Edition. United Kingdom: University Press, Cambridge, 2011. p. 219 ISBN 978-0-521-74765-3.
[5] SUBEDI, Surya P, *International Investment Law, Reconciling Policy and Principle*. Second Edition. USA: Hart Publishing, 2012. p. 94 ISBN 978-18-4946-245-7.
[6] Pohl, J., K. Mashigo and A. Nohen. *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey. OECD Working Papers on International Investment* 2012/02 [online]. p.7. Available at http://dx.doi.org/10.1787/5k8xb71nf628-en (visited on February 28, 2015); UNCTAD . Investor-State Dispute Settlement [online]. pp. 18, 19. Available at http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf (visited on February 28, 2015).

Investor-State dispute resolution provision typically sits next to State-to-State dispute mechanism clause. However, very rarely the dispute arises between two States that are parties to the BIT. So far there are only three State-to-State investment cases known.[7] Based on the investor-State dispute settlement clauses, the disputes are regularly being resolved before the international arbitral tribunal.[8] Typically the investor has to bring the claim before the host State's domestic courts or before the international arbitration.[9] If the investor chooses to settle the dispute before the international arbitration, and most of them do, he can also choose from different arbitration rules which one should apply. The most common arbitration rules provided in BITs as a choice are: the ICSID Convention, UNCITRAL Arbitration Rules or Stockholm Chamber of Commerce Arbitration Rules.[10] There are different types of the dispute resolution clauses with different amount of rights given to the investor.[11] These, however, are not the primary interest of this thesis.

The main interest of this thesis is the impact and binding effect of past awards on future decision-making process of a tribunal. For such determination it is important to assess position of a tribunal towards parties to the dispute. There are generally two theories of what is the role of a tribunal: (i) the tribunal is an agent of the parties and its responsibility is only limited to the case at hand; or (ii) apart from being an agent of the parties, the tribunal is also an agent of the whole investment community and is thus responsible for the development of international investment law. The following two sections discus these two theories.

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[7]The three cases are: Italy v. Cuba, Peru v. Chile and Ecuador v. USA. See Orecki, Marcin. *State-to-State Arbitration Pursuant to Bilateral Investment Treaties: The Ecuador-US Dispute* [online]. Available at http://www.youngicca-blog.com/wp-content/uploads/2013/02/State_to_State_Marcin_Orecki_10_02_201.pdf (visited on February 27, 2015).

[8] SUBEDI, Surya P, *International Investment Law, Reconciling Policy and Principle*. p. 94.

[9] UNCTAD . *Investor-State Dispute Settlement* [online]. p. 36.; Pohl, J., K. Mashigo and A. Nohen. *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey. OECD Working Papers on International Investment* 2012/02 [online]. p. 10; FRANCK, Susan D. The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions. *Fordham Law Review*. 2005, Volume 73, Issue 4, Article 10, p. 1541.

[10] Pohl, J., K. Mashigo and A. Nohen. *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey. OECD Working Papers on International Investment* 2012/02 [online]. p. 24. Available at http://dx.doi.org/10.1787/5k8xb71nf628-en (visited on February 28, 2015). SORNARAJAH, Muthucumaraswamy, *The International Law on Foreign Investment.* p. 217.

[11] SORNARAJAH, Muthucumaraswamy, *The International Law on Foreign Investment.* p. 216.

1.1. The Principal-Agent Relationship

The theory of principal-agent relationship considers the relationship between the parties to the international investment dispute and the tribunal as a principal-agent one. In such scenario "*[a] P-A relationship is constituted when two contracting parties (the Principals) confer upon an arbitrator (the Agent) the authority to resolve any dispute that arises under the contract. The Principles* [sic] *are also free to select the law governing the contract and the procedures to be used in the dispute settlement process, which are assumed to constrain the arbitrator.*"[12]

The power is vested in the arbitral tribunal through the act of delegation.[13] From the theoretical point of view, the fact that only the States are parties to the BIT, and therefore only those States have agreed on this dispute resolution mechanism, might be problematic. At least one of the parties to the investor-State arbitration is then always somebody, who has never signed the arbitration clause.[14] To overcome this difficulty, the theory has elaborated a concept on a unilateral offer, where the BIT is perceived as a unilateral offer of consent to arbitration by contracting States which can be accepted by the investor.[15] The investor then accepts the offer by initiating the proceedings.

The natural outcome of the principal-agent relationship doctrine is that arbitral tribunals are seen to be deciding cases in "isolation", meaning that they are empowered to settle solely the dispute presented to them as they are created on an *ad hoc* basis.[16] Based on this reasoning, the "*tribunals take authoritative decisions whose reach is limited to the parties.*"[17] This perception of the role of a tribunal causes that

[12] STONE SWEET, Alec. Investor-State Arbitration: Proportionality's New Frontier. *Law & Ethics of Human Rights*. 2010, Volume 4, Issue 1, Article 4, p. 55.
[13] STONE SWEET, Alec. Investor-State Arbitration: Proportionality's New Frontier. p. 55.
[14] PARK, William W. Non-signatories and International Contracts: an Arbitrator's Dilemma. *Multiple Party Actions in International Arbitration*. 2009, 3, p. 1.
[15] UNCTAD . *Investor-State Dispute Settlement* [online]. p. 31-32. FRANCK, Susan D. The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions. p. 1543; Another concept of non-signatories being party to the dispute is a "joining non-signatories" (See PARK, William W. Non-signatories and International Contracts: an Arbitrator's Dilemma).
[16] STONE SWEET, Alec. Investor-State Arbitration: Proportionality's New Frontier. p. 57.
[17] *Id.* at p. 57-58.

arbitrators often tend to disregard previous decisions rendered in investment treaty arbitration. This practise creates a risk of inconsistent awards as discussed below.

1.2. The Arbitrator as an Agent of the Parties and an Agent of the Investment Community

Alec Stone Sweet supports the opinion that the strict principal-agent model "*is doomed to the extent that the judicialization process proceeds*".[18] He argues that the investor-State arbitration has been constitutionalized. This is firstly seen in the ICSID system, where the ICSID Convention, Rules and Regulations represent the constitution signed by 159 States.[19] Another "constitution" is seen in the "special-status elements" which are treated differently than ordinary norms.[20] These are for example *jus cogens* norms, fundamental human rights, and procedural guarantees associated with due process and access to justice.[21] The arbitrator in this model is then not just an agent of the parties to the dispute, but he is a part of the bigger picture. He acts within his constitutional boundaries and is, therefore, the agent of the investment community or of the global legal order at the same time.[22]

This model supports the development of the soft precedent, or *de facto* precedent, in the international investment law as it sees the arbitrator not focused solely on the case at hand, but also as a part of greater international community. In this model, the arbitrator should rely on or distinguish his case from previously decided cases; otherwise he should be responsible for issuing a conflicting award. The evolution of soft precedent in international investment arbitration is discussed further in the third chapter of this thesis.

[18] *Id.* at p. 58.
[19] As of February 28, 2015.
[20] STONE SWEET, Alec. Investor-State Arbitration: Proportionality's New Frontier. p. 58.
[21] *Id.*
[22] *Id.*

2. The Binding Effect of an Award

The final decision, the award, rendered by the tribunal is binding on the parties. This fundamental legal principle has its basis in the field of the investment arbitration in Art. 53 of the ICSID Convention which states "*[t]he award shall be binding on the parties…*"[23] Furthermore, similar provision can be found in many international conventions[24] as well as in the Statute of the International Court of Justice (the "Statute"). Art. 59 of the Statute precisely states that "*[t]he decision of the Court has no binding force except between the parties in respect of that particular case*".[25] The same wording as in Art. 59 of the Statute was adopted in Art. 1136(1) of the NAFTA Convention.

This rule is so fundamental that it is considered to reflect a general principle of law[26] which is perceived as a principle common to various systems of national law.[27] General principles of law are pursuant to Art. 38(1)(c) of the Statute one of the primary sources of international law.[28] This confirms the tribunal in *Inceysa Vallisoletana S.L. v. Republic of El Salvador* described the general principles of law as "*rules on which there is international consensus to consider them as universal standards and rules of conduct that must always be applied and which, in the opinion of important commentators, are rules of law on which the legal systems of the States are based*".[29] For the reasons stated above, the wording of Art. 59 of the Statute is also highly relevant to investment treaty arbitration.

Rendering a binding award is, without many doubts, a key element of any arbitration as the wish of the parties is to settle the dispute between them with

[23] Art. 53 ICSID Convention.
[24] E.g. International Law Commission's 1958 Model Rules on Arbitral Procedure (Arts. 30, 32), the 1976 UNCITRAL Arbitration Rules (Art. 32(2)), the 1985 UNCITRAL Model Law (Art. 35(1)), the 1998 International Chamber of Commerce Rules of Arbitration (Art. 28(6)) (See SCHREUER, Christoph H., *The ICSID Convention: A Commentary*. Second Edition. New York: Cambridge University Press, 2009. P. 1097. ISBN 978-0-521-88559-1).
[25] Art. 59 Statute of the International Court of Justice.
[26] ZIMMERMANN, Andreas, TOMUSCHAT, Christian, OELLERS-FRAHM Karin, *The Statute of the International Court of Justice: A Commentary*. First Edition. New York: Oxford University Press. 2006. p. 1232. ISBN 978-0-19-926177-2.
[27] ČEPELKA, Čestmír, ŠTURMA, Pavel, *Mezinárodní právo veřejné*. First Edition. Praha: C.H.Beck. 2008. p. 123. ISBN 978-80-7179-728-9.
[28] Art. 38 c) Statute; ČEPELKA, Čestmír, ŠTURMA, Pavel, *Mezinárodní právo veřejné*. p. 124.
[29] *Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/2, Award (2 August 2006) para 227.*

finality.[30] The award, however, is only binding (i) on the parties to the dispute; and (ii) with respect to particular case.

The limitation of this binding effect of the award only on the parties to the dispute means that no third party can be bound by the award and the arbitral tribunal cannot decide about rights and obligations of such third parties. This stems from the non-existent consent to arbitrate as a key element of the arbitration. Where there is no consent to solve the issue before the arbitral tribunal, there is no principal-agent relationship, and thus the tribunal cannot decide in such matters. Otherwise, the whole system would be completely against legal certainty of investors and States when tribunals would be allowed to decide about rights of unrelated persons.

The second characteristic is that the award has a binding effect only with respect to the particular case. The particular case is determined and limited by claims raised by the parties.[31] However, what is binding is not the award as a whole, but only the operative part of it.[32] In other words, the only part that is binding is where the rights and duties of the parties to the dispute are stated and where the tribunal decides on the existence of claims.[33] On the other hand, the reasoning of the tribunal is generally not binding, however if such reasoning "*is indispensable from the understanding and implementation of the operative provisions*" it is binding together with the operative part.[34]

There are of course slight modifications of these two characteristics of a binding effect of awards. One of these modifications is described in the following subchapter. It is the situation of interpretive awards, the awards that were issued for the interpretation of certain treaty provisions, and thus can be in limited way binding also on persons different from the parties to the original dispute.

[30] UNCTAD . *Binding Force and Enforcement* [online]. p. 11. Available at http://unctad.org/en/Docs/edmmisc232add8_en.pdf (visited on February 28, 2015).
[31] ZIMMERMANN, Andreas, TOMUSCHAT, Christian, OELLERS-FRAHM Karin, *The Statute of the International Court of Justice: A Commentary*. p. 1240.
[32] ZIMMERMANN, Andreas, TOMUSCHAT, Christian, OELLERS-FRAHM Karin, *The Statute of the International Court of Justice: A Commentary.* p. 1242.
[33] *Id.*
[34] *Id.*

2.1. No Doctrine of *Stare Decisis* in International Investment Law

The decisions of tribunals that are binding upon the parties do not, however, possess such binding power upon the future arbitral tribunals. Rarely is there such an agreement in international law as there is on the issue of the non-existence of doctrine of *stare decisis* in international (investment) law. The doctrine of *stare decisis* is generally understood as a legal obligation (not just a moral one) of a court to follow precedents, i.e. previous decisions.[35] Although the ICSID Convention is not as explicit as the Statute is and its wording does not explicitly exclude the existence of *stare decisis* doctrine, it is generally perceived, that the wording of Art. 53(1) ICSID Convention does not allow for the *stare decisis* doctrine to apply[36], as "*nothing in the Convention's travaux préparatoires suggests that a doctrine of stare decisis should be applied to ICSID arbitration*".[37] On the other hand, nothing in *travaux préparatoires* suggests that the *stare decisis* doctrine should not apply.[38]

The principle that the award is binding only upon the parties and with respect to the particular case and, therefore, that there is no doctrine of *stare decisis* in the international (investment) law, has been reiterated by a number of tribunals. In *AES Corporation v. The Argentine Republic*, the tribunal expressly held that "*each decision or award delivered by an ICSID Tribunal is only binding on the parties to the dispute settled by this decision or award. There is so far no rule of precedent in general international law; nor is there any within the specific ICSID system*".[39]

The dispute between German investor and the Argentine Republic in *Wintershall Aktiengesellschaft v. Argentine Republic*, was concerned with the investor claiming that actions taken by the Argentinean government had negatively influenced its oil and gas operations. In this case the tribunal stated that the "*stare decisis has no application*

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[35] KAUFMANN-KOHLER, Gabrielle, Arbitral Precedent: Dream, Necessity or Excuse?. *The 2006 Freshfields Lecture. Arbitration International*. 2007, Vol. 23, No. 3, p. 358. ZIMMERMANN, Andreas, TOMUSCHAT, Christian, OELLERS-FRAHM Karin, *The Statute of the International Court of Justice: A Commentary.* p. 1244.

[36] REINISH, August. *The Role of Precedent in ICSID Arbitration* [online]. p. 5. Available at http://investmentarbitration.univie.ac.at/fileadmin/user_upload/int_beziehungen/Personal/Publikationen_Reinisch/role_precedents_icsid_arbitrationaayb_2008.pdf (visited on June, 5, 2015).

[37] SCHREUER, Christoph H., *The ICSID Convention: A Commentary*. Second Edition. New York: Cambridge University Press, 2009. P. 1101. ISBN 978-0-521-88559-1.

[38] KAUFMANN-KOHLER, Gabrielle, Arbitral Precedent: Dream, Necessity or Excuse? p. 368.

[39] *AES Corporation v. The Argentine Republic,* ICSID Case No. ARB/02/17, Decision on Jurisdiction (26 April 2005) para. 23.

to decisions of ICSID tribunals – each tribunal being constituted ad hoc to decide the dispute between the parties to the particular dispute – The award of such tribunal is binding only on the parties to the dispute (Article 53 of the Convention) – not even binding on the State of which the investor is a national. Decisions and Awards of ad hoc ICSID tribunals have no binding precedential effect on successive tribunals, also appointed ad hoc between different parties".[40]

Not following previous cases is not considered as an error of law. In the decision of the *ad hoc* Committee on the Application for Annulment in the case of *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, the ICSID case decided based on the Energy Charter Treaty, the tribunal noted that "*the mere fact that a Tribunal does not follow the prevailing jurisprudence on a given issue is not an error of law per se. There is no system of binding precedent in ICSID jurisprudence. If one were to follow AES's theory, ICSID jurisprudence would be condemned to remain static and immutable, without the possibility of any evolution or innovative decisions*."[41]

These and many more decisions[42] show that the absolutely prevailing opinion is that no rule of *stare decisis* exists in the international (investment) law. This conclusion is reached despite the vague wording of Art. 53 ICSID Convention.

As it is true that tribunals often declare themselves not being bound by earlier decisions, they often tend to follow previous awards. In the case *Burlington Resources Inc. v. Republic of Ecuador, Decision on Jurisdiction,* the majority stated that the tribunal is not bound by the decisions of previous awards. At the same time, the majority however noted that it should pay due consideration to previous arbitral decisions and should follow solutions consistently established in previous cases and by doing so to contribute to the harmonious development of the international investment

[40] *Wintershall Aktiengesellschaft v. Argentine Republic,* ICSID Case No. ARB/04/14, Award (8 December 2008) para. 194.
[41] *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary,* ICSID Case No. ARB/07/22, Award (23 September 2010) para. 99.
[42] E. g. *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3 (also known as: *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*), Award (22 May 2007); *CME Czech Republic B.V. v. The Czech Republic,* UNCITRAL, Partial Award (13 September 2001); *Daimler Financial Services AG v. Argentine Republic,* ICSID Case No. ARB/05/1, Award (22 August 2012).

law.[43] Quite an extreme opinion was expressed as a dissenting opinion by Arbitrator Stern. Arbitrator Stern disagreed with the majority, "*as she considers it her duty to decide each case on its own merits, independently of any apparent jurisprudential trend*".[44]

It is therefore well established that the arbitral tribunals are not legally bound to follow the decision rendered in other arbitral proceedings and that there is no doctrine of *stare decisis* applicable in the international investment law. The primary function of the tribunal is still to decide the case at hand on its merits.[45]

However, even when not legally bound, sometimes previous arbitral awards are of some relevance. This is discussed mainly in the third part of this thesis. Before coming to that part, different types of awards will be discussed and analysed how they are treated as sources of law.

2.2. Interpretative Awards

Awards with the binding effect most similar to *stare decisis* are so-called interpretative awards rendered in State-to-State arbitration. These are the awards where tribunal decides on the interpretation of certain provision of the BIT and thus renders an abstract, not case driven, award. The question here is, whether such awards should be binding on those future tribunals who will be applying the interpreted provision, or whether the interpretative award is binding solely upon the parties to the dispute like any other investment treaty award.

Generally speaking, a State is the entity possessing the power to interpret international treaties it entered into, together with the other parties to the treaty.[46] Based on the principal-agent relationship described above, the interpretative power is delegated to the arbitral tribunal deciding the case where there is a dispute about

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[43] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (formerly *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*), Decision on Jurisdiction (2 June 2010) para. 100.
[44] *Id.*
[45] ETTEH, Nkaepe. Conflicting Decision in Investment Arbitration: How Do Inconsistent Decisions Arise and How Can They Be Avoided?. *CAR (CEPMLP Annual Review)*, 2009/10, Vol. 14, p. 9.
[46] *Question of Jaworzyna (Polish-Chzechoslovakian Frontier)*, PCIJ, Advisory Opinon (6 December1923) Series B, No. 8, p. 37.

interpretation.[47] Such interpretative power delegated to investment tribunals is "*implied and partial, rather than express and exclusive*".[48] Tribunals, as agents, are restricted by the wording of the respective BIT which reflects the will of the State parties.[49]

Permanent Court of International Justice (the "PCIJ") noted in the *Case concerning Certain German Interests in Polish Upper Silesia* that "*[t]here seems to be no reason why States should not be able to ask the Court to give an abstract interpretation of a treaty rather would it appear that this is one of the most important functions which it can fulfill*".[50]

Another tribunal which has dealt with this matter was the tribunal in the *Question of the Re-evaluation of the German Mark*, where the parties delegated to the tribunal the power to settle all disputes concerning interpretation or application. It stated in its decision that it is the right of the parties to know the legal effect of the used language and the tribunal felt itself obliged to inform them about this legal effect.[51]

Even the Commentary to ICJ Statute speaks clearly: "*where the Court has to construe an international treaty or convention, this construction applies to future cases, at least those, arising between the same parties*"[52].[53] To support its statement, the Commentary provides us with two cases: the *LaGrand case*, and the *Avena case*.[54]

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[47] ROBERTS, Anthea. Power and Persuation in Investment Treaty Interpretation. *The American Journal of International Law.* 2010, Vol. 104, No. 2, p. 185-186.
[48] *Id.* at 188.
[49] *Id.* at 186.
[50] *Case concerning certain German interests in Polish Upper Silesia,* PCIJ, Judgment (25 May 1926) Series A, No. 7, p. 18-19.
[51] *Question of the Re-evaluation of the German Mark (United Kingdom v. Federal Republic of Germany),* Decision (16 May 1980), p. 89.
[52] ZIMMERMANN, Andreas, TOMUSCHAT, Christian, OELLERS-FRAHM Karin, The Statute of the International Court of Justice: A Commentary. p. 1240-41.
[53] Bilateral investment treaties are definitely considered to be international treaties as they fulfil all requirements set forth by the Art. 2(1)(a) of the Vienna Convention on the Law of Treaties which are: (1) an international agreement; (2) between States; (3) in written form; and (4) governed by international law.
[54] ZIMMERMANN, Andreas, TOMUSCHAT, Christian, OELLERS-FRAHM Karin, The Statute of the International Court of Justice: A Commentary. p. 1241.

In *LaGrand case*, Germany here however requested assurances and guarantees of non-repetition where the real risk of repetition existed.[55] Thus, there were special conditions for binding effect of this award on future cases.

The *Avena case* tribunal, on the other hand, did not state the rule that the interpretative awards are binding on the future tribunals with much clarity either. In the decision it noted that "*the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply, that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States*".[56] Even though the rule can be seen there, it is rather negative statement than a positive one. The decision does not prove that there is an international practice acknowledging the binding effect of awards on interpretation on the future tribunals.

In the world of investment arbitration, there are not many State-to-State arbitrations that would answer the question of binding effect of an interpretative award. In fact, only one case can serve as an example. It is quite a recent dispute of the *Republic of Ecuador v. The United States of America.* This case was decided under the UNCITRAL Arbitration Rules 1976 on 29 September 2012, but unfortunately the award was not made publicly available.[57]

Here, the Republic of Ecuador, the claimant, sought the interpretation of the Ecuador-US BIT after being dissatisfied with the interpretation rendered by the tribunal in their partial award in the investor-State arbitration between Chevron Corporation (USA) and Texaco Petroleum Company and the Republic of Ecuador (the "*Chevron case*"). [58] After this partial award was rendered, the Government of Ecuador sent to the US Secretary of State a diplomatic note on the misinterpretation of the Art. II (7) of the Ecuador-US BIT, trying to gain the confirmation from the US side on the correct interpretation of the article, which was, in Ecuador's point of view, different

[55] *LaGrand (Germany v. United States of America),* ICJ, Judgment (27 June 2001) para. 128(7).
[56] *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America),* ICJ, Judgment (31 March 2004) para. 151.
[57] See http://www.italaw.com/cases/1494
[58] ORECKI, Martin. *State-to-State Arbitration Pursuant to Bilateral Investment Treaties: the Ecuador-US Dispute* [online]. p. 3. Available at http://www.youngicca-blog.com/wp-content/uploads/2013/02/State_to_State_Marcin_Orecki_10_02_201.pdf (visited on June, 9, 2015).

from the one expressed in the partial award.[59] The US did not respond to that diplomatic note and thus Ecuador commenced arbitration pursuant to the Art. VII (1) of Ecuador-US BIT.[60]

Among many other arguments, the US argued that there was no legal dispute between the Ecuador and the US and, therefore, the Art. VII (1) of the BIT was not applicable as it pertained only to disputes. The US noted that it did not "*breach the BIT in any way nor in any wrongful conduct that impaired Ecuador's rights under the BIT*".[61] Ecuador agreed that the US did not breach any provision of the BIT and thus there was no dispute in the conventional meaning. However, what Ecuador was persistent about was that there is a dispute about the interpretation of the BIT and that this dispute is fully eligible to be brought before the international tribunal under the treaty.[62]

To support the non-existence of any dispute, the US presented the tribunal with an expert opinion prepared by Prof. Christian Tomuschat, leading authority in the international law, who stated that:

> "*A legal dispute exists only if the parties are opposed to one another in respect of a specific claim raised by one party against the other which is rejected in whatever form. Divergences about the interpretation of a legal text, which have not led to such a claim, remain at a lower level of differences of opinion for which other modes of settlement may be appropriate.*"[63]

Prof. Tomuschat also quoted a *Northern Cameroons case* which reads that ICJ may render a judgment, "*only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal*

[59] *Id*. at 5.
[60] *Id.* at 5-6.
[61] *Id.* at 6-7.
[62] *Id*. at 7 ftn 31.
[63] TOMUSCHAT, Christian. Expert Opinion [online]. para. 7 Available at http://www.italaw.com/sites/default/files/case-documents/ita1062.pdf (visited June 9, 2015).

interests between the parties. The Court's judgment must have some practical consequences in the sense that it can affect legal rights and obligations".[64] Judge Sir Gerald Fitzmaurice in his separate opinion to *Northern Cameroon case* stated that "*courts of law are not there to make legal pronouncements in abstracto*".[65] The great distinction from the *Northern Cameroons case* and the *Ecuador-US case* is, however, that in the former one the interpreted treaty was already terminated and, hence, there were really no practical consequences in rendering an interpretative decision.

Prof. Tomushat further states that in this respect "*the jurisprudence of the ICJ is absolutely consistent*".[66] However, regarding the cases described above[67], I experience hard times finding this "absolute consistency" in the ICJ case law. Moreover, the tribunal in the case concerning *Question of the Re-evaluation of the German Mark* explicitly mentioned the *Northern Cameroon case*, distinguished the decided case from it and ruled to the contrary.[68]

Even though the award in Ecuador-US dispute is not publicly available, authorities reported that the majority dismissed the claim for non-existence of a concrete dispute with practical consequences and the Ecuador's claim was held as purely theoretical.[69]

Generally speaking, the fear from allowing the tribunal to render a purely interpretative award is obviously the fear from judicial law-making. Here, an obvious difference between the perception of the binding effect of interpretative awards of the ICJ and of investment tribunals can be seen. Given the fact that the circumstances in Ecuador-US case were quite unique, there might be a case in the future where such claim for interpretative decision in State-to-State arbitration will be allowed.

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[64] *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom)*, ICJ, Judgment (2 December 1963) p. 34.
[65] *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom),* ICJ, Separate opinion Judge Sir Gerald Fitzmaurice, p. 98.
[66] TOMUSCHAT, Christian. Expert Opinion, para. 7.
[67] For example the *Avena case.*
[68] *Question of the Re-evaluation of the German Mark (United Kingdom v. Federal Republic of Germany), Decision (16 May 1980)* p. 89.
[69] ROBERTS, Anthea. State-to-State Investment Treaty Arbitration: A Hybrid Theory of Independent Rights and Shared Interpretative Authority. *Harvard International Law Journal*. 2014, Volume 55, Number 1, p. 8.

One of the possible scenarios would be if the State entity would pursue the State-to-State arbitration pressured by the demand of its citizens. The interpretation of the unclear wording of the respective BIT[70] may be crucial for individual investors as to whether they can bring a claim under the treaty. Here, the pre-emptive claim brought by the State for the interpretation of the treaty can have great practical consequences and can work as a huge cost saver, because it will be an aid to investors to assess, whether they have a claim or not. The interpretative award issued here would be of a value for the investors in the future and would contribute to the legal certainty in international investment law with respect to the particular treaty.

From what was stated, the following factors may be seen as determining for asserting whether the dispute on the interpretation will be decided by the tribunals or not: (i) the language of the treaty in question, whether there is an interpretative power delegated to the tribunal; and (ii) the practical consequences of the potential decision, whether the treaty was already terminated and whether there is somebody who can benefit from such interpretation. If, however, such interpretative decision is rendered, it would probably be binding on the future tribunals. None of the above stated tribunals objected to such binding effect and the *Avena case* even supported this view. It is the very purpose of the interpretative award rendered in State-to-State arbitration to solve the dispute on the interpretation with finality; otherwise it makes no sense to initiate such proceedings.

2.3. Conflicting Awards

The result of non-existence of the *stare decisis* doctrine in international law is the risk of existence of conflicting awards, because the tribunals are not legally bound to follow previous cases. "*[T]he problem with such an approach […] is that it creates the potential for contrasting awards articulating opposing results for fundamentally the same issue without any guidance as to which awards or analysis is to be preferred.*"[71] There are more voices expressing this concern.[72] Moreover, the practice

[70] For example: the unclear wording of the definition of investment.
[71] WEINIGER, Matthew, MCCLURE, Mike. Looking to the Future: Three „Hot Topics" for Investment Treaty Arbitration in the Next Ten Years. *TDM*. 2013, Vol. 10, Issue 4, p. 10.
[72] SCHREUER, Christoph H., *The ICSID Convention: A Commentary*. p. 1102.

of investment arbitration shows that this issue is not of purely theoretical nature, but it reflects the reality.

The independent attitude of tribunals, which allows the conflicting decisions to occur, stems from strict perception of the principal-agent relationship between the parties and the arbitrators. A tribunal in the case of *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic* from the August 12, 2010, in its Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, arbitrator, supported this view by expressing its opinion that "*[d]espite many statements made in ICSID awards affirming the necessity or the duty to achieve consistency through ICSID case law, the principle remains that each Tribunal is sovereign in its decision making*".[73]

Up to this date there is neither a body in international investment law that has the capacity to resolve inconsistencies among arbitral awards[74] nor is there a uniform mechanism how to deal with them[75].

It is true that the ICSID Convention provides for the annulment procedure. Under Art. 52 ICSID Convention a party may seek annulment of an arbitral award, however this annulment proceedings is limited to the following grounds: (i) that the tribunal was not properly constituted; (ii) that the tribunal has manifestly exceeded its powers; (iii) that there was corruption on the part of a member of the tribunal; (iv) that there has been a serious departure from a fundamental rule of procedure; or (v) that the award has failed to state reasons on which it is based.[76] It is obvious that none of these reasons is aimed at solving inconsistencies among arbitral awards.

Furthermore, the annulment process has to be distinguished from the system of appeal.[77] The first distinction rests in the result of each mechanism as the result of a successful annulment procedure is the invalidation of the original decision and the

[73] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction (19 December 2012) para 49.
[74] FRANCK, Susan D. The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions. p. 1522.
[75] *Id*. at p. 1546.
[76] Art. 52 ICSID Convention.
[77] SCHREUER, Christoph H., *The ICSID Convention: A Commentary*. p. 901.

annulment committee cannot replace the decision with its own one.[78] On the other hand, the result of a successful appeal is modification of the decision.[79] Secondly, the annulment committee is concerned strictly with the errors of procedure and, as opposed to appeal, does not have the power to scrutinize the substantive correctness and thus does not allow for review on the merits and correction of legal errors.[80] For these reasons, the consistency of the arbitral awards and the coherence of investment legal body cannot be achieved through the annulment procedure pursuant to Art. 52 ICSID Convention.

The problem with inconsistency is that it makes the decisions of international investment tribunals unpredictable for the investors and, hence, it undermines the most fundamental purpose of BIT and legitimacy of investment arbitration.[81] Susan D. Franck even speaks of a legitimacy crisis in investment treaty arbitration.[82] She notes that the existence of inconsistent awards creates the uncertainty and damages the legitimate expectations of an investor and a State.[83] Because of the inconsistency that goes against legitimate expectations of the parties to the dispute, the whole system of international investment arbitration is being reconsidered as to whether it is an appropriate dispute resolution mechanism.[84] She points out that "*[a]ny system where diametrically opposed decisions can legally coexist cannot last long. It shocks the sense of rule of law or fairness*".[85] It is crucial for the rule of law and application of it to be clear and consistent as without it those who are governed by the rules are not willing and even able to adhere to them, and this may lead to the legitimacy crisis.[86] Without consistency nobody can anticipate how to comply with the law and behave accordingly.[87] This does not, however, mean that tribunals are always required to

[78] *Id*.
[79] *Id*.
[80] *Id*.
[81] JONES, Doug. The Problem of Inconsistency and Conflicting Awards in Investment Arbitration. *German-American Lawyers' Association Practice Group Day*. 2011, p. 2.
[82] FRANCK, Susan D. The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions. p. 1521-1625.
[83] *Id.* at p. 1558.
[84] *Id.* at p. 1582.
[85] *Id.* at, p. 1583.
[86] *Id.* at p. 1584.
[87] *Id.*

adhere to previous rulings in similar cases, but for achieving consistency they have to make in their application distinction between the case at hand and the previous case.[88]

The examples of conflicting awards are three decisions rendered in the course of proceedings against actions taken by Argentinean government. These cases are namely: *CMS Gas Transmission Company v. The Republic of Argentina*[89] (the "*CMS*"); *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*[90] (the "*Enron*"); and *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*[91] (the "*LG&E*").

The factual background of these three cases was identical and yet the tribunals decided differently on the state of necessity defence invoked by Argentina. In 1989 Argentina introduced the economic reforms that were supposed to help Argentina to recover from an economic crisis the State had undergone in the late 1980s. These reforms included also privatisation of State-owned companies and the participation of foreign investment and gas transportation was one of the sectors in this reform. Conditions of the investment were stated in various legislative and regulatory enactments among them was the calculation of tariffs in US dollars, semi-annual adjustment of these tariffs according to changes in the US Producer Price Index (the "PPI") and the obligation that Government will not unilaterally amend the license granted to investors.

However, in the late 1999 another economic, social, and political crisis hit Argentina. Due to this crisis the government officials forced the investors into two agreements by which the PPI adjustments were postponed at first for 6-month and the second for a two-year period. After the second postponement the Argentine Ombudsman requested a judicial injunction against both agreements and the decree that executed those agreements. This injunction was granted and the companies

[88] *Id.* at p. 1585.
[89] *CMS Gas Transmission Company v. The Republic of Argentina,* ICSID Case No. ARB/01/8, Award (12 May 2005).
[90] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3 (also known as: *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*), Award (22 May 2007).
[91] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic,* ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006).

appealed. A final appeal of the companies to the Argentina was still pending at the time of the decision of the tribunals and the PPI adjustments were postponed till the final decision in this case.

Furthermore, the Argentine Republic enacted so called Emergency law which eliminated the right to calculate tariffs in US dollars, converting tariffs to pesos at a fixed exchange rate one dollar to one peso, the peso was devaluated and the PPI adjustments were terminated.[92] This "pesification" left investors reeling as it caused them to lose enormous amounts of money.

For all these actions taken by the government, claims were filed against the Argentine Republic. In all the above mentioned cases, Argentina invoked the state of necessity defence that would cause the Argentine Republic to be exempt from liability for a breach of the BIT. The table below shows details of these cases. All three disputes were decided under the same legal framework as in each case the applicable BIT was the Argentina-United States BIT.

[92] *CMS* paras. 53-67, *LG&E* paras. 34-71, *Enron* paras. 41-79.

Table 1: Tribunals in CMS, Enron and LG&E cases

Case	Date of Decisions	Arbitrators		BIT	Availability of the State of Necessity Defence
CMS	May 12, 2005	Francisco Orrego Vicuña	President	Argentina – United States	NO
		Marc Lalonde	Claimant's appointee		
		Francisco Rezek	Respondent's appointee		
LG&E	October 3, 2006	Tatiana B. de Maekelt	President	Argentina – United States	YES
		Albert Jan van den Berg	Claimant's appointee		
		Francisco Rezek	Respondent's appointee		
Enron	May 22, 2007	Francisco Orrego-Vicuña	President	Argentina – United States	NO
		Pierre-Yves Tschanz	Claimant's appointee		
		Albert Jan van den Berg	Respondent's appointee		

The table shows that under the exact same factual background tribunals reached different position as to whether Argentina is entitled to invoke the state of necessity defence and, therefore, whether it is exempt from liability for breach of the BIT. The decision of *LG&E* tribunal followed a year and a half after the *CMS* decision and yet reaches the opposite conclusions. Interestingly, a fact that even though the tribunal in *LG&E* refers to the *CMS* decision in the part of the award dealing with the fair and equitable treatment[93] and in the part discussing the umbrella clauses[94], it does not

[93] *LG&E* paras. 125-128.

mention the *CMS* decision while deciding on the state of necessity defence nor did it refer to any other decision. Therefore, it seems like the tribunal in *LG&E* when discussing the state of necessity issue suddenly decided to consider this issue solely based on the merits of the case at hand without any regard to the previous awards. This is even more remarkable due to the fact that arbitrator Francisco Rezek sat in both tribunals and must have been thus very well aware of the outcome reached in *CMS* based on the identical factual background. The disregard of the *CMS* decision was hence intentional.

Seven month after the *LG&E* case was decided, the *Enron* tribunal reached its decision on the state of necessity of Argentina. This tribunal again switched to not allowing this defence without addressing the *LG&E* case in the reasoning. The *Enron* tribunal again acknowledged and cited the *LG&E* decision while dealing with the fair and equitable treatment[95] and with the issue of umbrella clauses[96]. Notable is also the fact that even though the *Enron* tribunal reached the same conclusion as the *CMS* tribunal, it did not rely on the *CMS* award in its reasoning concerning the state of necessity. The *Enron* tribunal shared its arbitrators with the other two cases. Francisco Orrego-Vicuña presided over both, *CMS* and *Enron*; and Albert Jan van den Berg sat in the *LG&E* tribunal as well as in the *Enron* tribunal.

For the above stated reasons, it is absolutely clear that the conflicting awards were created intentionally (or with reckless disregard to the harmonious development of international investment law) and that the arbitrators even despite the identical factual background of these cases decided in complete isolation. Members of the tribunals did not feel any moral obligation to contribute to the predictability of the international investment law and left the investors without knowing what the interpretation of the law is when same arbitrators sitting in the tribunals based on the same factual and legal framework decided differently.

This contradiction can be designated as a contradiction *stricto sensu*, because it fulfils all three requirements: a similar set of facts, the same governing law, and

[94] *LG&E* para 171.
[95] *Enron* paras. 260-263.
[96] *Enron* para. 274.

conflicting legal conclusion.[97] These cases, therefore, belong among those where the tribunal did not bother with distinction from the previous cases, although the need for it was quite evident, and thus left the investment community wondering what is the rule they should adhere to in order not to be facing an investment claim for hundreds of millions of US dollars before the international arbitral tribunal. Unfortunately, this situation is not unicorn-like in investment treaty arbitration as will be shown on Lauder/CME v. Czech Republic.

Having discussed the consequences of conflicting awards and their negative effects on the stability and development of international investment law, it is important to outline possible ways leading from this situation. The international community currently speaks of five more or less possible solutions to the conflicting awards. These are namely: (i) giving the precedential value to the investment awards; (ii) the institutional reform creating the appellate or review mechanism; (iii) non-constitutional solutions such as consolidation and using principles of *res judicata* and *litis pendens*; (iv) the development of jurisprudence through academic work; and (v) the development of *de facto* precedent.[98] The following chapters describe these ways in greater details.

2.3.1. *De Jure* Precedent

The introduction of the *de jure* precedent would mean that the tribunals are legally bound to follow previous decisions of arbitral tribunal and therefore that it is not just their moral obligation to create consistent case law. The only instance where they

[97] SPOORENBERG, Frank, VINUALES, Jorge E. Conflicting Decisions in International Arbitration. *The Law and Practice of International Courts and Tribunals*. 2009, Vol. 8, p. 93.

[98] There are, of course, other proposed ways how to solve inconsistency of awards, but those go often against the concept of investment treaty arbitration, and thus, in my opinion, do not solve the problem rather they abandon the sinking ship when it still can be saved. Among the other ways are: (1) creating barrier for the access to investment arbitration, something like prior governmental approval which brings the investment arbitration near the original diplomatic protection and lefts the investor up to the will of the state; and (2) absolute rejection of arbitration. (See FRANCK, Susan D. The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions. *Fordham Law Review*. 2005, Volume 73, Issue 4, Article 10, p. 1587-1601).

would be allowed to depart from a consistent line of cases would be a presence of compelling reasons.[99]

The problem with this concept is usually seen in the non-existence of any hierarchy of international tribunals, in its decentralization,[100] and that there is simply no justification for allowing the first tribunal to decide the matter and forcing the other tribunals to follow that decision.[101] Another argument is that parties to the dispute are provided with a choice to initiate proceedings before national court if they wanted their dispute to be decided in an environment with a developed system of precedent.[102] Furthermore, the functioning system of *de jure* precedent requires full public availability of arbitral award, but now, the awards are only partially publicly available.[103]

2.3.2. Appellate or Review Mechanism

Another proposed way how to achieve consistency is to create an appellate or review mechanism. This has been set forth on October 26, 2004, in a discussion paper of the ICSID Secretariat called "Possible Improvements of the Framework for ICSID Arbitration".[104] The appellate mechanism would be distinct from the annulment procedure as it would allow for review of the awards on its merits and thus it would allow for achieving consistency in awards.

Proposed is a creation of a single comprehensive appeals facility.[105] The system is quite easy. There would be only one body functioning as the appellate instance and it would be addressing the inconsistencies and would be solving them. According to

[99] KAUFMANN-KOHLER, Gabrielle, Is Consistency a Myth? *Precedent in International Arbitration.* p. 146.
[100] *Id.* at p. 147.
[101] ETTEH, Nkaepe. Conflicting Decision in Investment Arbitration: How Do Inconsistent Decisions Arise and How Can They Be Avoided?. p. 9.
[102] *Id.*
[103] JONES, Dough. Investor-State Arbitration: The Problem of Inconsistency and Conflicting Awards. p. 12.
[104] ICSID Secretariat. "*Possible Improvements of the Framework for ICSID Arbitration" Discussion Paper* [online]. Available at https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf (visited June 9, 2015).
[105] JONES, Dough. Investor-State Arbitration: The Problem of Inconsistency and Conflicting Awards. p. 7.

some commentators "a*n appellate body could restore faith in the system, promote consistency, provide predictability, and reduce the risk of inconsistent decisions to make the system sustainable and legitimate in the long term.*"[106] The need is to have just one appellate body, otherwise, different appellate bodies can reach different conclusions, and there would be a new level of inconsistent decisions about inconsistent decisions.[107]

However, such a solution would require a change of the ICSID Convention in the Art. 53(1) which states that "*[t]he awards […] shall not be subject to any appeal or to any other remedy*"[108] This means amending the ICSID Convention and, therefore, all of 159 signatory and contracting States have to agree. Moreover, even when this is achieved it would be a solution only to inconsistencies among the ICSID cases and not solution for whole investment arbitration. To create an appellate system even for non-ICSID cases is far more ambitious and utopian. In this regard, Susan D. Franck speaks about creating the appellate body out of the International Court of Justice (the "ICJ") or the Permanent Court of Arbitration (the "PCA")[109] as these are already set institutions.

Creation of an appellate of review body is probably one of the most effective solutions; however, it requires the reform of many international documents not excluding the ICSID Convention. This makes it very politically complicated and thus its introduction is still a question for the future. Secondly, the establishment of an appellate body goes against one of the basic principles of arbitration which is the finality of decision and it postpones the moment when the award is fully binding upon the parties, and hence increases the costs of the arbitration, which are enormous anyway.

[106] FRANCK, Susan D. The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions. p. 1607.
[107] *Id.* at p. 1609.
[108] Art. 53(1) ICSID Convention.
[109] FRANCK, Susan D. The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions. p. 1609-1610.

2.3.3. Principles *Res Judicata* and *Lis Pendens* and Consolidation

The application of procedural principle of *res judicata* and *lis pendens* could be another way how to strive for consistency in investment treaty arbitration.

The application of *res judicata* causes that the matter before the tribunal is treated as already decided and, therefore, the tribunal cannot render another decision in the same case (it constitutes bar to substantive decision[110]), in other words the doctrine "*preclude the re-determination of disputes in subsequent proceedings between the same parties*".[111] The mechanism is of a preventive nature, because it prevents an occurrence of conflicting awards and does not solve already existing inconsistencies.

The principle of *res judicata* is widely recognized as a general principle of law, and thus pursuant to Art. 38(1)(c) is a source of the international law.[112] This principle was addressed in the case concerning the *Factory at Chorzow* decided on July 26, 1927, as a "*general principle of law recognized by civilized nations*".[113] *Res judicata* is primarily a principle of legal certainty as it assures "*the stability of law and legal relation by preventing the never-ending reassessment of disputes*".[114] It thus prevents a defendant from having to defend the same claim repeatedly.[115] It is also a principle of judicial economy as it would be costly to re-litigate what was already decided.[116]

In order to successfully apply the *res judicata* principle, so-called triple identity test has to be fulfilled. There must be (i) the identity in the matter sued; (ii) the identity of the cause of action; and (iii) the identity of parties.[117]

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[110] *CME Czech Republic B.V. v. The Czech Republic,* UNCITRAL, Judgement of SVEA Court of Appeal (15 May 2003) para. 95.
[111] JONES, Dough. Investor-State Arbitration: The Problem of Inconsistency and Conflicting Awards. p. 9.
[112] CHENG, Bin. *General Principles of Law as Applied by International Courts and Tribunals.* First Edition. New York: Cambridge University Press, 2006. p. 336 ISBN 05-210-3000-5; DE LY, Filip, SHEPPARD, Audley. Interim Report: "Res judicata" and Arbitration. *ILA, Berlin Conference 1*, 2004, p. 18.
[113] *Interpretation of Judgments Nos. 7 & 8 Concerning the Case of the Factory at Chorzow,* PCIJ, Jurisdiction (26 July 1927), Series A, No. 11. p. 27.
[114] GROUSSOT, Xavier, MINSSEN, Timo. Res Judicata in the Court of Justice Case-Law: Balancing Legal Certainty with Legality? *European Constitutional Law Review.* 2007, Issue 3, p. 388.
[115] *Id.*
[116] SCHREUER, Christoph, REINISH, August. *Legal Opinion in CME Czech Republic B.V. v Czech Republic* [online]. p. 5. Available at http://www.italaw.com/sites/default/files/case-documents/ita0961.pdf (visited June 10, 2015).
[117] MARTINEZ-FRAGA, Pedro J., SAMRA, Harout Jack, The Role of Precedent in Defining Res Judicata in Investor-State Arbitration. *Northwestern Journal of International Law & Business*. 2012,

(i) The *res judicata* principle applies when the matter in dispute is the same.[118] To fulfil this requirement, the same type of relief must be sought in different proceedings.[119]

(ii) The identity of the cause of action means the claims are based on the same legal grounds.[120]

And finally, (iii) in order to fulfil the requirement of identity of parties, the same claimant must bring suit against the same respondent as legal principle *res inter alios acta aliis neque nocet neque potest* (a thing done between others does not harm or benefit others) is applicable.[121] There are exceptions to this strict rule. These exceptions are made in favour of mother-daughter companies or based on a privity theory[122] which is usually understood as "*the relationship between a party to a suit and a person who was not a party, but whose interest in the action was such that he will be bound by the final judgment as if were a party*".[123]

The international community is not unanimous in whether those requirements are strict ones or if it suffices when they are met to substantial degree. Professor Ch. Schreuer in his legal opinion for *CME Czech Republic B.V. v Czech Republic* stated that the identity test requires that all three requirements are met to a substantial degree as "*[i]n order to avoid unnecessary re-litigation of already decided disputes it is necessary to look at the underlying nature of a dispute and not at its formal classification. Thus what may not appear to be literally identical, may be substantially identical.*"[124] On the other hand, the tribunal in this case refused to apply the *res*

Volume 32, Issue 3, p. 421; DIMSEY, Mariel, *The Resolution of International Investment Disputes.* First Edition. Utrecht: Eleven International Publishing, 2008. p. 89 ISBN 978-90-77596-52-4; *Interpretation of Judgments Nos. 7 & 8 Concerning the Case of the Factory at Chorzow,* PCIJ, Jurisdiction (26 July 1927), Series A, No. 11. p. 23 (dissenting opinion of Judge Anzilotti); JONES, Dough. IInvestor-State Arbitration: The Problem of Inconsistency and Conflicting Awards. p. 9.

[118] CHENG, Bin. *General Principles of Law as Applied by International Courts and Tribunals.* p. 342; DE LY, Filip, SHEPPARD, Audley. Interim Report: "Res judicata" and Arbitration, p. 20.

[119] SCHREUER, Christoph, REINISH, August. *Legal Opinion in CME,* p. 17.

[120] MARTINEZ-FRAGA, Pedro J., SAMRA, Harout Jack, The Role of Precedent in Defining Res Judicata in Investor-State Arbitration. p. 421.
CHENG, Bin. *General Principles of Law as Applied by International Courts and Tribunals.* p. 340.

[122] BREKOULAKIS, Stavros. The Effect of an Arbitral Award and Third Parties in International Arbitration: Res Judicata Revisited. *American Review of International Arbitration (Columbia University).* 2006, Vol. 16(1), p. 194; SCHREUER, Christoph, REINISH, August. *Legal Opinion in CME* , p. 15.

[123] SCHREUER, Christoph, REINISH, August. *Legal Opinion in CME* , p. 16.

[124] SCHREUER, Christoph, REINISH, August. *Legal Opinion in CME,* p. 24.

judicata principle and, as will be discussed below, leaned towards the strict perception of it and thus created conflicting awards.

The same triple identity test is applicable also to principle of *lis pendens*.[125] This doctrine does not, however, apply to the already decided cases, but on the still pending ones. It basically means that "*proceedings over the same dispute cannot be commenced in a second forum if the action is already pending in another one*".[126]

Consolidation comes into play "*when multiple disputes arise from the same contract, the same treaty or contain a similar set of facts and/or issues*".[127] This measure is also pre-emptive. The case in which consolidation would prevent creation of the conflicting awards is described below in the *CME/Lauder v. Czech Republic*.

Consolidation is the principle of judicial economy as well, as it significantly saves costs of the proceeding when instead of conducting two proceedings there is only one of them. The advantage of consolidation in contrast to *res judicata* is its broader use. The requirements for using the consolidation are not as strict and hence related cases could be consolidated even if they would not be suitable for application of *res judicata*.[128] This way consolidation is much more flexible and can prevent the existence of conflicting awards better. However, whether the cases will be consolidated or not is still in disposition of the parties of the dispute as they still are the principals and this is probably the greatest limitation of all.

Provisions allowing for consolidation are sometimes put right into the BIT. For example the 2012 United States Model BIT states: "*Where two or more claims have been submitted separately to arbitration under Article 24(1) and the claims have a question of law or fact in common and arise out of the same events or circumstances,*

[125] JONES, Dough. Investor-State Arbitration: The Problem of Inconsistency and Conflicting Awards. p. 9.
[126] Id.
[127] ETTEH, Nkaepe. Conflicting Decision in Investment Arbitration: How Do Inconsistent Decisions Arise and How Can They Be Avoided?. p. 11.
[128] JONES, Dough. Investor-State Arbitration: The Problem of Inconsistency and Conflicting Awards. p. 10.

any disputing party may seek a consolidation order […]"[129] To date, there is no consolidation provision in the ICSID Convention or in the ICSID Rules. Hence, amendment of the ICSID Convention, or amendment of all individual BITs is required for the introduction of the consolidation. As was set forth above, both of this is very politically difficult and in case of the latter unrealistic.

Professor Doug Jones raises a very good point when he notes that another drawback is that the consolidation favours the State party in the dispute as it makes the process of defending itself against multiple claims easier and less costly.[130] For the individual investors it is quite the opposite. The consolidated proceedings are lengthier and thus more expensive than bilateral arbitration, it is also more complicated as there are multiple investors with often different requests.[131]

An example of cases where these principles would possibly solve the problem of inconsistency is *CME Czech Republic B.V. v. The Czech Republic* (the "*CME*"), [132] and *Ronald S. Lauder v. The Czech Republic* (the "*Lauder*").[133]

The *Lauder case* was initiated on August 19, 1999, under the United States – Czech Republic BIT by Ronald S. Lauder, an American citizen exercising indirect voting control over CME Czech Republic B.V., a corporation organized under the laws of the Netherlands.[134] CME (formerly CEDC) and CET 21, Czech company whose general director was Vladimír Železný, entered into agreement under which CME would invest through an equity investment in CET 21 provided that CME is a direct participant in the CET 21's application for license.[135] The Media Law of the Czech Republic allowed for the application for license from companies with foreign equity participation.[136]

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[129] Art. 33, 2012 United States Model BIT available at http://www.state.gov/documents/organization/188371.pdf
[130] JONES, Dough. Investor-State Arbitration: The Problem of Inconsistency and Conflicting Awards. p. 12.
[131] *Id*.
[132] *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award (13 September 2001).
[133] *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Award (3 September 2001).
[134] *Lauder* paras. 11, 47.
[135] *Lauder* paras. 49-50.
[136] *Lauder* para. 48.

The participation of CME, signed in the Terms of Agreement, was 49% of redeemable preferred stock and of common stock.[137] Subsequently, CET 21 was granted a license for a radio and television broadcasting on 30 January 1993 and at that time the foreign capital in CET 21 was considered positive as it was a stabilisation factor.[138] CME, CET 21 and Česká Spořitelna (the "CS") were to jointly create a new Czech company named Česká nezávislá televizní společnost (the "CNTS") which would manage the television station, where CET 21 would provide the right to use, benefit from, and maintain the license and CME together with CS the necessary funds.[139] V. Železný was appointed as the general director of CNTS.[140] CNTS then started the television broadcasting as TV NOVA.[141]

On February 19, 1996, the Czech Parliament's Committee for Science, Education, Culture, Youth, and Physical Training PSP stated that CNTS is unauthorised to broadcast as it is not the holder of the license.[142] The Media Counsel responded to that statement that the structure has been discussed and approved and it is not violating any effective legal regulation.[143]

On 8 December 1995, the Medial Law was amended by the Czech Parliament as to the definition of "broadcaster" which became much narrower: the person to whom a license had been granted.[144] In the expert opinion issued by the State and Law Institute of the Academy of Science of the Czech Republic, the Institute stated that the administrative proceedings could be initiated against CNTS to impose a fine for unauthorized broadcasting.[145] For this reason, two agreements were drafted and the Institute then stated that the situation was correctly resolved as CET 21, and not CNTS, actually operated the broadcasting.[146]

On May 23, 1996, a new agreement was entered into stating that CET 21 is the holder of the license and the operator of the broadcasting, the non-transferable nature

[137] *Lauder* para. 52.
[138] *Lauder* para. 55.
[139] *Lauder* paras. 59, 69.
[140] *Lauder* para. 72.
[141] *Lauder* para .73.
[142] *Lauder* para. 74.
[143] *Lauder* para. 75.
[144] *Lauder* para. 79.
[145] *Lauder* para. 83.
[146] *Lauder* paras. 86, 87.

of the license, and that the license was not subject of contribution from CET 21 to CNTS.[147] CNTS just arranged the television broadcasting.[148] In June of the same year, the right to administer TV NOVA became subject of criminal investigation.[149] Media Council also initiated administrative proceedings against CNTS for unauthorized television broadcasting.[150]

For these reasons, another agreement was entered into in October 1996 providing that CET 21 is the operator of broadcasting and is entirely responsible before the Media Council[151] which raised concerns on the side of CME as it could allow CET 21 to choose another party to benefit from the license than CNTS.[152] This agreement was further confirmed in May 1997.[153] The criminal investigation was suspended[154] and administrative proceeding was stopped by the Media Council.[155]

Indeed, in February 1999 V. Železný stated that the 1997 agreement was of non-exclusive nature and thus CET 21 could request any services provided by CNTS from any other company.[156] In April, V. Železný was dismissed from his position as general director and chief executive of CNTS.[157] In August 1999, CET 21 withdrew from the agreement between CNTS and CET 21 for CNTS's failure on 4 August 1999 to submit the daily log containing the daily programming regarding the broadcasting for the following day.[158] On 19 August, 1999 the *Lauder* case was initiated.

Apart from commencement of the *Lauder* case, another investment treaty arbitration was initiated. CME initiated treaty arbitration on February 22, 2000, under the Netherlands – Czech Republic BIT.[159] In the *CME* case, the same actions taken by the Czech Republic as in *Lauder* case were considered, however, parties to the dispute and the governing law were different. On the other hand, what must be noted is the close relationship between Lauder and CME company as Lauder had indirect voting

[147] *Lauder para.* 89.
[148] *Id.*
[149] *Lauder* para. 91.
[150] *Lauder* para. 97.
[151] *Lauder* para. 102.
[152] *Lauder* para. 106.
[153] *Lauder* para. 117.
[154] *Lauder* para. 116.
[155] *Lauder* para. 121.
[156] *Lauder* para. 127.
[157] *Lauder* para. 132.
[158] *Lauder* para. 138.
[159] *CME, Partial Award*, paras. 2, 3.

control over this company.[160] Furthermore, even though the governing law of the arbitral proceedings was different, the applied provisions of the respective BITs were virtually the same.

The tribunal in *Lauder* case found on 3 September 2001 that the Czech Republic is not liable under the BIT. The *Lauder* tribunal found that the Czech Republic although it took discriminatory and arbitrary measures against Lauder and thus violated the treaty is not liable, because Lauder[161] failed to show that there did not exist intervening and superseding cause for the damage.[162] For this reason, the Czech Republic was not obligated to pay damages for its actions.

On 13 September 2001, ten days after the final decision in *Lauder* case, the *CME* tribunal issued its partial award in which it decided in favour of the investor and found the Czech Republic liable for breaching the investment treaty. The tribunal decided that Media Council breached the BIT "*by coercing CMT and CNTS into giving up legal security for CME's investment*" when it forced them to surrender the 1993 structure.[163] Furthermore, the tribunal held that Media Council actively supported the destruction of CME's investment[164] when it supported V. Železný in his endeavours to destroy the investment of CME by eliminating the exclusive nature of CNTS as service provider.[165] The tribunal then found, as opposed to the *Lauder* tribunal, the causal link between the coercion of the Media Council and the destruction of CME's investment.[166]

The *Lauder* tribunal acknowledged the existence of *CME v. Czech Republic* arbitration and even recognised that "*existence of multiple proceedings create a risk of incompatible decisions, a prospect of disorder 'that the principle of lis alibis pendens is designed to avert"*".[167] Here, the tribunal even though acknowledging the risk of incompatible awards, decided to apply the triple identity test in its strict form and decided that *lis alibis pendens* was not applicable as "*all other court and arbitration*

[160] *Lauder* para. 47 together with para. 93.
[161] *Lauder* para. 222.
[162] *Lauder* para. 234.
[163] *CME Partial Award* paras. 480, 538
[164] *CME Partial Award* para. 539.
[165] *CME Partial Award* paras. 558, 574.
[166] *CME Partial Award* para. 575.
[167] *Lauder* para. 168.

proceedings involve different parties and different cause of actions" and, therefore, it was not possible for other tribunals to render a decision similar to or inconsistent with the *Lauder* award.[168] Moreover, the tribunal noted that the *Lauder* was commenced earlier that the *CME* and that the Czech Republic, the respondent in both cases, refused consolidation of those two proceedings.[169]

The *CME* tribunal considered the existence of prior decision in almost identical matter. The tribunal also noted that the Czech Republic did not agree with the consolidation of both arbitrations[170] and further rejected the proposals of the claimant namely: "*(i) to have the two arbitration consolidated into single proceeding (ii), to have the same three arbitrators appointed for both proceedings, (iii) to accept the Claimant's nomination in this proceeding of the same arbitrator that Mr. Lauder nominated in the London proceeding (iv) to agree that the parties to this arbitration are bound by the London Tribunal's determination as to whether there has been a Treaty breach, (v) that after the submission of the parties' respective reply memorials and witness statements in this arbitration, the hearing be postponed until after the issuance of an award in the London Arbitration*".[171] The CME tribunal then found that by doing this, the respondent explicitly waived *lis pendens* and *res judicata* defences.[172]

Even if the respondent would not waive the defence of *res judicata*, the principle would not be, in the *CME* tribunal's opinion, applicable anyway.[173] The doctrine of *res judicata* was not applicable, because the parties in *Lauder* arbitration differed from the parties in *CME* proceeding and because the two arbitration were based on different BITs.[174] It noted that under some circumstances the parties to the proceedings do not have to be necessarily identical, for example when concept of "single economic entity" is applicable,[175] but here, Lauder although exercising the indirect voting control over CME was not the majority shareholder of the company and thus the

[168] *Lauder* para. 171.
[169] *Lauder* para. 173.
[170] *CME Czech Republic B.V. v. The Czech Republic,* UNCITRAL, Final Award (14 March 2003) para 428.
[171] *CME Final Award* para. 427.
[172] *CME Final Award* paras. 430-431.
[173] *CME Final Award* paras. 432-436.
[174] *CME Final Award* para. 432.
[175] *CME Final Award* para.. 436.

tribunal did not apply this concept.[176] The tribunal, therefore, used the strict triple identity test as well as the *Lauder* tribunal.

The Czech Republic then filed a motion to declare invalid, or, alternatively, to set aside the *CME* award in accordance with section 34 of the Arbitration Act. This motion was denied by the SVEA Court of Appeal.[177] The grounds for the appeal were of the procedural nature as it is not possible to challenge the substantive part of the decision. The grounds were namely: (i) the exclusion of one arbitrator from crucial parts of deliberation; (ii) failure to apply law which was the tribunal obligated according to the BIT; (iii) the lack of jurisdiction due to the application to *res judicata* and *lis alibis pendens* principles; (iv) basing the award on the existence of "joint tortfeasors", a ground not invoked by CME; (v) violating the instruction of the parties when examining the issue of the amount of damages; and (vi) exceeding its mandate when it applied the BIT to the alleged violations which occurred during a time the investment was held by an investor other than CME. [178]

As to the applicability of doctrines of *res judicata* and *lis alibis pendens* the appellate tribunal noted the sole fact that disputes were brought under different BITs does not preclude the application of these principles when it stated:

> "*a couple of arbitration awards have been invoked from which it at least is evident, that the dispute has been considered to be the same in different arbitration proceedings which were brought under two different treaties.*"[179]

[176] *Id.*
[177] *CME Czech Republic B.V. v. The Czech Republic,* UNCITRAL, Judgement of SVEA Court of Appeal (15 May 2003) para. 1.
[178] *CME Judgement of SVEA Court of Appeal* p. 7-9.
[179] *CME Judgement of SVEA Court of Appeal* p. 95.

However, the appellate tribunal chose not to apply the *res judicata* and *lis alibis pendens* principles because, in its opinion, there was not identity between a minority shareholders, although a controlling one, and the actual company.[180]

From the above stated opinions expressed by these three tribunals in these four different awards a conclusion may be drawn that the difference in BITs does not preclude the use of *res judicata* or *lis alibis pendens* principles from application. What does, however, cause that these cannot be used is the difference in parties which cannot be bridged with privity or with single economic entity theory. It is also important to note that a party may be considered to waive the right to use the *res judicata* or *lis alibis pendens* principles even when it once refused to use them.

2.3.4. Development of Jurisprudence through Academic Work

The development of academic literature is one of the preventive measures that is said to be able to help with inconsistency. This method is, however, useless in terms of correcting already existent conflicts of awards. It has been proposed that the academics can guide the arbitrators in their deliberations.[181]

The problem with this solution is that according to Art. 38(1)(d) of the Statute the teachings of the most highly qualified publicists of various nations are deemed to be only subsidiary means for determination of rules of law together with the judicial decisions. Doctrine and jurisprudence are here to bring some light into already established law, not to create the rules.[182] The commentary describes them as "*documentary 'sources' indicating where the Court can find evidence of the existence of the rules it is bound to apply*".[183] In some very restricted way, the development of doctrine can help in interpretation of already existent rules or in determination whether such a rule already exists.

[180] *CME Judgement of SVEA Court of Appeal* p. 98.
[181] See FRANCK, Susan D. The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions. p. 1614.
[182] ZIMMERMANN, Andreas, TOMUSCHAT, Christian, OELLERS-FRAHM Karin, *The Statute of the International Court of Justice: A Commentary*. p. 783.
[183] ZIMMERMANN, Andreas, TOMUSCHAT, Christian, OELLERS-FRAHM Karin, *The Statute of the International Court of Justice: A Commentary*. p. 784.

This standard is applicable only to writings of the most distinguished authors; other academic literature does not even reach the standard of subsidiary means for determination rules under the Statute. For this reason, other academic works would be even on lower persuasive level than the decisions of other tribunals. Therefore, arbitrators will be compelled to follow such writing only with their morality[184] and if they disagree with it, they can very easily form their own opinion without any reference to academic literature. If we take a look at the example set forth above, the *LG&E* tribunal certainly knew about the previous decision and still refused to even address it. The same can easily happen with academic literature.

Furthermore, there is no safeguard that the works of academics will not be in conflict as well. In fact, today it is possible to find an opinion of some scholar on almost every point of view and there is no tendency to change that. Hence, the development of academic literature cannot significantly help with solving the inconsistency in investment awards.

2.3.5. Development of *De Facto* Precedent

The last considered way of solving the problem of conflicting awards is the concept of organic development of *de facto* precedent, or in other words, a soft precedent. This means that the consistency in international investment case-law will be achieved solely by waiting and hoping for it to appear.[185] Professor Kaufmann-Kohler describes it by words "*good awards will chase bad ones*".[186]

This method of solving inconsistency is the simplest one and does not require any institutional change. Therefore, I believe that it can be the way out of the legitimacy crisis and the way towards a more predictable future of investment treaty arbitration.

For this reason, the second part of this thesis will further engage in this issue and look at chosen areas of international investment law to see, whether such soft or *de facto* precedent is already emerging and whether this method can be *The One* that will solve the inconsistency in investment treaty awards.

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[184] Moral obligation to follow past decisions is discussed in the third part of the thesis.
[185] KAUFMANN-KOHLER, Gabrielle. Is Consistency a Myth? p. 145.
[186] *Id.*

3. Development of *De Facto* Precedent in International Investment Law

As it was explained in previous chapters, arbitral tribunals while deciding investment treaty cases are not bound by past decisions or awards as no doctrine of *stare decisis* exist in international law. Prior arbitral awards may be nevertheless of some value.

Previous chapter also showed that one of the solutions to conflicting awards in international investment law is creation of *de facto* precedent. The *de facto* precedent, or sometimes designated as soft precedent, is then a situation in which tribunals are not legally bound to follow past awards and decisions, but there is some kind of obligation which makes tribunals look at what was previously decided and how other tribunals solved similar legal issues.

In this respect, many authors are using opinions of Lon L. Fuller. Professor Fuller described the creation of consistent and predictable rules as a part of inner morality of law and thus spoke about moral obligation of judges to follow previous decisions.[187]

Some features of the evolution of international investment law resemble Darwin's theory of evolution by natural selection. When professor Kaufmann-Kohler stated that "*good awards will chase bad ones*" [188] she was not far from what Charles Darwin expressed in his Theory of Species. The natural selection is a theory where individuals with good characteristics have increased chances of survival. These good characteristics are then inherited by their offspring and thus over the time these characteristics will spread.[189] Similar situation happens in the case of an award rendered by an investment tribunal. A good award will be in the system of *de facto* precedent further cited by other tribunals which will make the following decision good as it rests on a good opinion of the original tribunal. This way the whole investment community will benefit and over the time, there will be high-quality case law upon which the whole investment treaty arbitration will rest.

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[187] See generally: FULLER, Lon L. *The Morality of Law.* Revised Edition. New Heaven: Yale University Press. 1969. ISBN 0-300-01070-2.
[188] KAUFMANN-KOHLER, Gabrielle. Is Consistency a Myth? p. 145.
[189] See DARWIN, Charles. *On the Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life* [online]. Available at http://www.gutenberg.org/files/1228/1228-h/1228-h.htm (visited June 13, 2015).

The following subchapters highlight the importance of having consistent and predictable legal system with developed soft precedent, and present opinions of various tribunals that supports the development of *de facto* precedent. Lastly, this chapter also undertakes a quantitative analysis of awards to find out whether there is already emerging practice of tribunals to rely of past decisions and awards.

3.1. Consistency as an Important Attribute of Any Legal System

A precedential value of some kind is not only the basis of common-law *stare decisis* doctrine, but is inherent also to the continental legal culture. Even though the continental legal culture is being often put in the contradiction to the *stare decisis* doctrine, decisions of continental courts do in fact also play role as sources of law and do possess some kind of binding effect.[190] In continental legal system judges are not legally bound by former decisions as no doctrine of *stare decisis stricto sensu* exists there; however courts are creating a constant case law and especially the highest courts do play a significant role in its unification.

This practice is closely related to the principle of legal certainty and principle of predictability of law, as one of the most fundamental principles of a legal state.[191] These principles are grounded on the premise that similar matters must be decided similarly and different matters differently.[192] The mean which strengthens legal certainty and a predictability of law is a constant case law.[193] Z. Kühn notes that this is a core of any legal system as it stems from the natural human sense of justice.[194]

For the reasons stated above, it is necessary for any legal system to treat similar cases similarly for people to have trust in such a system and to be willing to submit themselves to such a system. It is even more crucial for the legal system as the international investment law is, as here people are left with an option to choose the

[190] KÜHN, Zdeněk. *Aplikace práva ve složitých případech, k úloze právních principů v judikatuře. First Edition.* Praha: Karolinum, 2002. p. 281 ISBN 80-246-0483-3.
[191] Legal state (*Rechtstaat* in German) is a continental concept of what is known as Rule of Law in common law countries.
[192] KNAPP, Viktor. *Teorie práva.* First Edition. Praha: C.H.Beck, 1995. p. 205-206 ISBN 80-7179-028-1, GERLOCH, Aleš. *Teorie práva.* Third Edition. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, p. 284 ISBN 80-86473-85-6.
[193] KNAPP, Viktor. *Teorie práva.* p. 206.
[194] KÜHN, Zdeněk. *Aplikace práva ve složitých případech, k úloze právních principů v judikatuře*, p. 283.

forum where their dispute will be heard. If legal certainty is not present in this system, potential parties to a dispute will tend to choose different forum and thus international investment treaty arbitration will not be developing at all and ultimately may even cease to exist.

Last but not least, the consistency in case law is also connected to the principle of efficiency. In this respect, Z. Kühn cites an excellent American lawyer B. Cardozo who asserted that no legal system can execute its social activity if it perceives each and every new question absolutely independent of already decided cases.[195] In the world today, where costs of international investment arbitration are often astronomical, this is an important matter to consider. Furthermore, deciding in the isolation from previously decided cases is prolonging the decision making process and thus the protection rendered by tribunals is not efficient in this aspect either.

3.2. The Drawbacks of Creating *De Facto* Precedent in International Investment Arbitration

While most of the authors agree that some form of precedential value should be attributed to arbitral awards, there are also voices to the contrary. One of them is Z. Douglas who points out that even the common law system existed for hundreds of years without the doctrine of *stare decisis* and "*it was not until the last decades of the nineteenth century that the doctrine became entrenched as a matter of judicial practice*".[196]

According to Z. Douglas, international investment law is too young to have a developed doctrine of *de jure* or *de facto* precedent. International investment law, in his view, should be left to develop its basic principles first and we should not bind it with previous decisions and thus make it more rigid.[197] This is because when we apply the doctrine of precedent, the arbitrator no longer has the full range of possible reasons available, he is restricted by the authority of previous decisions.[198]

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[195] KÜHN, Zdeněk. *Aplikace práva ve složitých případech, k úloze právních principů v judikatuře.* p. 287.
[196] DOUGLAS, Zachary. Can a Doctrine of Precedent Be Justifies in Investment Treaty Arbitration? ICSID Review - Foreign Investment Law Journal. 2010, Volume 25 Number 1, p. 105.
[197] *Id.* at 110.
[198] *Id.* at 106.

While it might be true that British common law existed for a great deal of time without the doctrine of precedent, it is important to see in what position the investment treaty arbitration is today. International investment law is not developing in isolation and uninfluenced by already developed legal systems. The parties to the potential dispute can actually choose between systems with already developed case law which provides them with predictability or they can choose the investment arbitration. If we accept the position to let the tribunals develop the law without referencing to previously decided cases and thus to render absolutely unpredictable decisions, only fools will be willing to opt for the investment treaty arbitration. It is especially so when investment cases are dealing with a lot of money.

In the situation where potential parties to the dispute tend to choose the non-arbitrational path, the investment law cannot develop at all. That would be the beginning of the way to the end of investment treaty arbitration. As was pointed out above, natural human sense of justice says that similar matters must be decided similarly and different matters differently.

In international investment arbitration we should seek for a compromise. We should proportionately obey the principle of predictability of law by citing and relying on previous decisions and, at the same time allow international investment law to develop. This can be achieved through relying on good past awards and distinguishing from the bad ones or at least providing reasons why such a solution is not appropriate for the case at hand. Arbitrators and tribunals will not be legally bound to follow bad decisions and will be left to develop the young law with having at least some kind of stability and predictability. This way it would be clear, for example, why the arbitrators in *CMS*, *LG& E* and *Enron* decided the way they did and investors would be left with a clue of what is the possible outcome of the next arbitration concerning Argentina's crisis.

3.3. The Case Law Supporting the Development of *De Facto* Precedent

As shown in previous chapter, tribunals are almost unanimous in the opinion that they are not bound by previous decisions. International investment tribunals, however,

recognized also the need for consistent case law as necessary element for a harmonious development of international investment law.

The tribunal in *Saipem S.p.A. v. The People's Republic of Bangladesh*[199] dealt with relevance of previous decisions or awards and in conformity with above mentioned expressly stated that:

> "*The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.*"[200]

This opinion is not sporadic. Another tribunal who considered the relevance of past awards was the one in *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*. [201] Even this tribunal took the exact same position as the one in *Saipem v. Bangladesh*.[202]

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[199] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award (30 June 2015).
[200] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award (30 June 2015) para. 90.
[201] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/29, Award (27 August 2009) para 145.
[202] The same opinion was also presented by tribunal in *Austrian Airlines v. The Slovak Republic*, UNCITRAL, Final Award (9 October 2009) para. 195; and *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008) para. 117.

Not only harmonious development of international law, but also its predictability and consistent interpretation of similar treaty provisions are important for enhancing legal certainty of investors and host-States. Tribunal in *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* recognized that when it looked at past decisions and "*has given them due consideration with the aim of enhancing consistent interpretation of comparable treaty language as applied to similar fact patterns*".[203]

Despite the opinion of Z. Douglas presented above, the tribunal in *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* noted: "*cautious reliance on certain principles developed in a number of those cases, as persuasive authority, may advance the body of law, which in turn may serve predictability in the interest of both investors and host States*".[204]

Other tribunals that leaned towards the use of past decisions were *Sociedad Anónima Eduardo Vieira v. República de Chile* who considered the awards to be auxiliary sources for determining the applicable law, although only binding upon the parties to the dispute.[205] Others were *Caratube International Oil Company LLP v. The Republic of Kazakhstan* together with *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, who stated the same as the *Caratube* tribunal. These tribunals were of the opinion, that the mere fact that they are not bound by previous decisions or awards does not preclude them from "*considering arguments of the Parties based upon them, to the extent that it may find that they shed any useful light on the issues that arise for decision in this case*".[206]

These are leading examples of decisions where tribunals stressed the importance of taking into consideration previous decisions or awards and the importance of departing from a constant case law only subject to compelling contrary grounds. However, none of these tribunals felt to be restricted in the way they looked on the

[203] *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award (11 June 2012) para. 897.
[204] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006) para. 293.
[205] *Sociedad Anónima Eduardo Vieira v. República de Chile*, ICSID Case No. ARB/04/7, Award (21 August 2007) para. 48.
[206] *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award (5 June 2012) para. 235; *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award (22 June 2010) para. 173.

case at hand as all of them noted that they are not bound by the past decisions and that they can depart from it.

In the following part of my thesis, I will engage in analysis whether these opinions are just sporadic cases or whether they show the tendency of nowadays arbitral tribunals.

3.4. The Quantitative Analysis of Decision and Awards Executed by J. P. Commission

In 2007, Jeffery P. Commission published an article concerning the development of soft precedent in investment treaty arbitration.[207] In this article, J. P. Commission surveyed 207 publicly available awards rendered by tribunals in investment treaty arbitration between the years 1972 and 2006, more specifically (i) 151 awards rendered by ICSID tribunals; (ii) 19 rendered by ICSID tribunals according to Additional Facility Rules; and (iii) 37 of arbitral awards rendered by non-ICSID tribunals.[208]

In this article, J. P. Commission used citation analysis to create number of tables witnessing the development of *de facto* precedent in investment treaty disputes. More specifically, he executed this citation analysis with regards to number of cited past decisions by tribunals. J. P. Commission did quantitative as well as qualitative analysis of these decisions. In this thesis, I will focus solely on the quantitative part.

The following tables are taken from the mentioned article and provide quantitative analysis on the development of soft precedent in investment treaty arbitration.

The first table maps cases rendered by ICSID tribunals between the years 1990 and 2001. The table reflects only citations to ICSID cases, and thus the number of cited non-ICSID decisions is unavailable to us.

[207] COMMISSION, Jeffery P. Precedent in Investment Treaty Arbitration, A Citation Analysis of a Developing Jurisprudence. *Journal of International Arbitration*. 2007, 24(2), p. 129-158.
[208] *Id.* at p. 132.

Table 2: Precedent in ICSID decisions and awards 1990-2001

Year	Number of decisions and awards	Number of citations to ICSID decisions and awards per award	Number of ICSID decisions and awards cited in total	Average number of citations to ICSID decisions and awards per award or decision
1990	3	1, 0, 0	1	0.33
1991	-	-	-	-
1992	1	1	1	1
1993	1	0	0	0
1994	1	5	5	5
1995	-	-	-	-
1996	1	1	1	1
1997	3	4, 0, 6	10	3.33
1998	2	0, 5	5	2.5
1999	6	5, 3, 3, 1, 2, 1	15	2.5
2000	12	3, 0, 0, 0, 0, 4, 0, 0, 2, 0, 5, 0	14	1.17
2001	11	0, 0, 0, 2, 0, 4, 4, 1, 4, 9, 2	28	2.55

Source: COMMISSION, Jeffery P. Precedent in Investment Treaty Arbitration, A Citation Analysis of a Developing Jurisprudence, p. 149.

The table shows that from 1990 till the end of 2001 *de facto* precedent has been slowly developing in international investment law. However if we take a look on the numbers of citations on case by case basis, there are huge differences. Even in 2001 a lot of tribunals do not cite prior cases at all and sometimes they cite as many as nine previous cases. For this reason, the conclusion of development of *de facto* precedent is not without some reservations as the overall tendency is not to cite prior awards. There is also no wonder that in past tribunals did not cite previous cases that often as there

were not many citable cases and as such cases appeared tribunals started to cite them. For this reason, the development in following tables is far more interesting.

These tables picture years from 2002 to 2006 and ICSID and non-ICSID awards are kept separately in different tables.

Table 3: Precedent in ICSID awards 2002-2006

Year	Number of decisions and awards	Number of citations to ICSID decisions and awards per award	Number of ICSID decisions and awards cited in total	Average number of citations to ICSID decisions and awards per award or decision
2002	2	2, 4	6	3
2003	4	7, 13, 0, 7	27	6.75
2004	2	0, 9	9	4.5
2005	2	5, 18	23	11.5
2006	7	7, 24, 4, 13, 12, 2, 3	65	9.3

Source: COMMISSION, Jeffery P. Precedent in Investment Treaty Arbitration, A Citation Analysis of a Developing Jurisprudence, p. 150.

Based on the results showed in the table above, tribunals do increasingly cite prior ICSID decisions and awards, however the increase is not exponential and there are also some drops in numbers some years. Unfortunately, the survey concerning ICSID decisions and awards only reflects citations to other ICSID cases. It is, therefore, not visible whether the reference to non-ICSID decisions has been increasing as well.

The following table scrutinize the non-ICSID decisions and awards. Here, J. P. Commission reflected both: citations to ICSID decisions and to non-ICSID ones.

Table 4: Precedent in non-ICSID Decisions and awards 2002-2006

Year	Number of decisions and awards	Number of citations to ICSID decisions and awards per award	Number of citations to non-ICSID treaty awards and decisions	Number of decisions and awards cited in total	Average number of citations to treaty decisions and awards per award
2002	7	0, 2, 2, 0, 0, 0, 4	0, 2, 3, 0, 1, 1, 0	15	2.14
2003	3	13, 0, 5	1, 0, 0	31	6.3
2004	3	3, 14, 8	0, 3, 2	27	9
2005	5	3, 6, 7, 9, 0	0, 1, 1, 4, 0	19	6.2
2006	7	29, 6, 11, 5, 22, 10, 10	10, 3, 7, 6, 3, 4, 3	129	18.43

Source: COMMISSION, Jeffery P. Precedent in Investment Treaty Arbitration, A Citation Analysis of a Developing Jurisprudence, p. 151.

Similarly to the survey of ICSID cases, development is apparent from the results with a few buts. The overall tendency is to increasingly rely on prior awards. Almost unbelievable distinction lies between the years 2002 and 2006. Tribunals in 2006 cited in an average 16 more decisions per award than in the year 2002.

From the results of the J. P. Commission's survey, it is apparent that some kind of *de facto* precedent is developing in international investment law. However, the tables also show that the number of cited awards is not increasing exponentially. Some years have drops in the number of cited cases as opposed to previous years. Despite that, a conclusion may be drawn that tribunals also between the years 2002-2006 tend to increasingly cite prior awards and thus rely on them more.

3.5. The Quantitative Analysis of the 2004-2015 Decisions and Awards

This valuable survey made by J. P. Commission is today, however, nine years old. While some authors are of the opinion that there is an increasing practise of tribunals

of reliance on and reference to past decisions;[209] there are also voices to the contrary saying that tribunals do not increasingly cite prior awards.[210]

Looking at the tables, nine years in development of investment treaty arbitration is a significant period of time. A valid question is then what is the tendency since that time and whether the soft or *de facto* precedent is further developing or whether it rather stays frozen in time.

The following quantitative analysis takes a closer look at the decisions and awards rendered by ICSID tribunals in 2004, 2005, 2006, and 2013, 2014, and 2015. This is because J. P. Commission in his article did not precisely specify his methodology and, therefore, to see the development from the year 2006 and to make my survey more precise, I analysed awards rendered in those years.

In this analysis I surveyed 62 decisions or awards[211] of ICSID and non-ICSID tribunals, which were made publicly available in English language on the webpage www.italaw.com as of May 26, 2015. The citation analysis was applied only on the tribunal's analysis part of the decision as analysis of the parties' position does not testify of a development of *de facto* precedent. Each case cited by respective tribunal was counted only once, therefore, the analysis does not reflect how many times the case was cited in the same decision.

3.5.1. The ICSID Awards and Decisions

The first table shows the overall tendency of ICSID tribunals to cite past awards irrespective of the source of the awards, i.e. which body rendered it.

[209] WEINIGER, Matthew, MCCLURE, Mike. Looking to the Future: Three „Hot Topics" for Investment Treaty Arbitration in the Next Ten Years. p. 10.
[210] GRISEL, Florian. Precedent in Investment Arbitration: The Case of Compound Interest. p. 223.
[211] Excluding partial awards, decisions on jurisdictions and excerpts from awards.

Table 5: Precedent in ICSID decisions and awards 2004-2006 and 2013-2015

Year	Number of **ICSID** decisions and awards	Number of citations to decisions and awards per award	Number of decisions and awards cited in total	Average number of citations to treaty decisions and awards per award
2004	5	0, 7, 21, 0, 23	51	**10.2**
2005	3	27, 7, 6	40	**13.33**
2006	8	25, 25, 3, 15, 15, 7, 16, 23	129	**16.13**
2013	11	7, 14, 16, 0, 13, 1, 26, 36, 14, 43, 12	182	**16.55**
2014	9	22, 8, 13, 24, 14, 30, 22, 18, 11	162	**18.0**
2015	6	20, 25, 5, 20, 24, 38	132	**22.0**

The table shows how many cases were surveyed each year and also how many citations were made in each particular case. The most important column for the analysis is the last one, where the development of *de facto* precedent is apparent.

In 2015, the average number of cited awards and decisions is more than double what it was in 2004. The growth between the years 2004 and 2005 was in average by approximately three awards. Between the years 2005 and 2006 it was another three awards in average. However, there is gap of stagnation between the years 2006 and 2013. It is a period of 7 years during which the tribunals, for some reason, did not increase their reliance of past awards. The growth can be seen again in the last two years. The most significant development came in the year 2015 where the average is higher by four cited decisions per award.

Therefore, it can be said, that both previously mentioned authors were correct. There is almost no difference between the years 2006 and 2013. I might be that for seven years, the growth stopped and the tribunals did not increasingly cite or rely on

prior awards. In this scenario, F. Grisel would be correct in stating that tribunals do not increasingly cite prior awards. On the other hand, between the years 2004-2006 and 2013-2015 there is development of *de facto* precedent and increasing practice of arbitral tribunals to cite prior awards as noted by M. Weiniger and M. McClure.

Next table takes a closer look at the cited awards. It divides the cited cases into ICSID cases and non-ICSID cases. Among non-ICSID cases are cases rendered for instance by Stockholm Chamber of Commerce, International Court of Justice, Permanent Court of International Justice, European Court of Human Rights and similar.

Table 6: Detailed description of awards cited in ICSID decisions and awards 2004-2006 and 2013-2015

Year	Number of **ICSID** decisions and awards	Number of citations to ICSID decisions and awards per award	Number of citations to non-ICSID treaty awards and decisions	Average number of citations to ICSID decisions and awards per award	Average number of citations to non-ICSID decisions and awards per award
2004	5	0, 6, 13, 0, 13	0, 1, 8, 0, 10	**6,4**	**3,8**
2005	3	12, 3, 5	15, 4, 1	**6,67**	**6,67**
2006	8	13, 15, 2, 8, 9, 4, 4, 14	12, 10, 1, 7, 6, 3, 12, 9	**8,63**	**7,50**
2013	11	6, 11, 11, 0, 11, 1, 23, 28, 13, 29, 7	1, 3, 5, 0, 2, 0, 3, 8, 1, 14, 5	**12,73**	**3,82**
2014	9	20, 7, 11, 13, 10, 24, 12, 14, 8	2, 1, 2, 11, 4, 6, 10, 4, 3	**13,22**	**4,78**
2015	6	12, 15, 4, 19, 13, 32	8, 10, 1, 1, 11, 6	**15,83**	**6,17**

This shows the development in a very interesting way. While one might have thought that the increase in citation practice of tribunals is equally divided between ICSID cases and non-ICSID cases it is quite the opposite. There is an enormous growth of citations to ICSID cases while at the same time the non-ICSID cases are sometimes even decreasing in number of citations. The whole development of *de facto* precedent is then more like development of *de facto* precedent in the ICSID system and not in the whole international investment law. With respect to two perceptions of arbitral tribunal discussed in the first chapter, arbitrator in the ICSID system is truly more than just an agent of parties. This development shows that in ICSID system he is also an agent of the whole community and also that this system underwent some kind of constitutionalization.

3.5.2. The non-ICSID Awards and Decisions

Having looked at the development of *de facto* precedent in the system of ICSID awards, let's now turn the attention to the non-ICSID tribunals, most frequently the Stockholm Chamber of Commerce. The structure of this subchapter is the same as was in the case of ICSID awards. The first table shows the overall tendency of tribunals and whether they tend to increasingly cite past awards while making their decision. The second table then divides the citations into references to ICSID and non-ICSID decisions or awards.

Table 7: Precedent in non-ICSID decisions and awards 2004-2006 and 2013-2015

Year	Number of **non-ICSID** decisions and awards	Number of citations to decisions and awards per award	Number of decisions and awards cited in total	Average number of citations to treaty decisions and awards per award
2004	2	0, 12	12	**6**
2005	2	0, 18	18	**9**
2006	3	13, 19, 12	44	**14.67**
2013	2	0, 13	13	**6,5**
2014	5	18, 43, 11, 1, 13	86	**17.2**
2015	1	8	8	**8**

Contrary to the table of ICSID cases, here, the development of *de facto* precedent is not apparent. In the system of non-ICSID tribunals arbitrators do not tend to increasingly cite to past decisions or awards. There are ups and downs over the years but no consistent line of development can be taken from that.

In fact the average number of citations in 2015 is almost the same as in 2004 or 2005, but it is lower is more than 6 awards than in the year 2006. Nothing therefore indicates, that *de facto* precedent is developing in non-ICSID system of awards, at least not based on the quantitative analysis.

The development of *de facto* precedent is also not apparent from the table with detailed division between the ICSID and non-ICSID awards.

Table 8: Detailed description of awards cited in non-ICSID decisions and awards 2004-2006 and 2013-2015

Year	Number of **non-ICSID** decisions and awards	Number of citations to ICSID decisions and awards per award	Number of citations to non-ICSID treaty awards and decisions	Average number of citations to ICSID decisions and awards per award	Average number of citations to non-ICSID decisions and awards per award
2004	2	0, 6	0, 6	**3**	**3**
2005	2	0, 7	0, 11	**3.5**	**5.5**
2006	3	9, 7, 8	4, 12, 4	**8**	**6.67**
2013	2	0, 8	0, 5	**4**	**2.5**
2014	5	14, 22, 2, 0, 11	4, 21, 9, 1, 2	**9.8**	**7.4**
2015	1	5	3	**5**	**3**

By looking at the last two columns a conclusion may be drawn that non-ICSID tribunals do quite equally cite ICSID and non-ICSID awards, tending a little bit more to cite ICSID ones. Moreover, if compared to *Table 6* which shows the detailed development in ICSID system, the tendency to cite non-ICSID decisions or awards in more or less the same in both systems. For this reason, it cannot be said that non-ICSID tribunals are referring to non-ICSID decisions or awards more than ICSID tribunals do.

3.6. The Efficiency of Arbitral Tribunal's Decision-Making Process

One of the said advantages of *de facto* precedent is more effective decision-making of tribunals. There are many ways of measuring efficiency, number of these often leading to doubtful results. Z. Douglas in his article "Can a Doctrine of Precedent Be Justified in Investment Treaty Arbitration" proposed that one way of

measuring the efficiency of tribunals decision-making process is by the number of pages of an award.[212]

Measuring efficiency by length of the award makes sense and can serve its purposes in a very limited way. Furthermore, other ways of measuring (e.g. by number of hours needed for the decisions) are unavailable for survey. The reason for taking the length of a decision or award into account is that by relying on past decisions, tribunals do not need to lengthily explain reasons for this particular position they took and they do not need to reinvent the wheel every time.

Being aware of the fact, that there are many more factors heavily influencing the efficiency of a tribunal (complexity of the case, length of parties' briefs, length of narration in the decision, writing style of the tribunal or its case docket), surveying number of awards over six years can produce results showing at least the basic tendency.

The first table shows the length of ICSID decisions and awards in the same years in which the quantitative analysis has been done.

[212] DOUGLAS, Zachary. Can a Doctrine of Precedent Be Justified in Investment Treaty Arbitration? p. 106-7.

Table 9: Length of ICSID awards in pages

Year	Number of **ICSID** decisions and awards	Number of pages per decision or award	Total number of pages	Average number of pages per decision or award
2004	5	126, 94, 77, 33, 69	399	**79.8**
2005	3	147, 25, 147	319	**106.33**
2006	8	104, 160, 39, 107, 89, 103, 36, 58	696	**87**
2013	11	73, 170, 164, 35, 98, 54, 143, 60, 52, 369, 152	1370	**124.55**
2014	9	184, 138, 57, 83, 69, 226, 134, 178, 168	1237	**137.44**
2015	6	64, 71, 144, 162, 116, 153	710	**118.33**

Even though the number of pages do not escalate over time as much as one may have initially expected, the outcome is clear. The length of arbitral awards rendered by ICSID tribunals does not reduce with the development of *de facto* precedent. Quite to the contrary, the length is increasing in time.

The next table pictures the development in length in non-ICSID cases.

Table 10: Length of non-ICSID awards in pages

Year	Number of **non-ICSID** decisions and awards	Number of pages per decision or award	Total number of pages	Average number of pages per decision or award
2004	2	56, 53	109	**54.5**
2005	2	21, 301	322	**161**
2006	3	75, 59, 74	208	**69.33**
2013	2	31, 384	415	**207.5**
2014	5	208, 579, 102, 28, 215	1132	**226.4**
2015	1	118	118	**118**

As established above, *de facto* precedent seems not to be developing in non-ICSID system of awards. For this reason, the development of length of pages in system with not developed *de facto* precedent can serve as a useful comparison.

Even here, the number of pages is increasing the same way as in ICSID awards. It seems like the stadium of development of *de facto* precedent play no role in the length of arbitral awards.

This outcome, of course, does not itself mean that tribunals are less efficient in decision-making process when they rely on past decision or awards. This analysis only states, that tribunals, while referring to prior decisions, are not more efficient in the amount of reasoning and explanation of rules.

The quantitative analysis is, of course, not a self-standing proof of development of *de facto* precedent in investment treaty arbitration. It is the first step. This survey only shows us that ICSID tribunals are increasingly relying on and referring to past awards, especially past ISCID awards.

The second step in the analysis whether soft precedent has developed or is developing is a qualitative analysis. The qualitative analysis should answer a question whether there is really consistent line of reasoning in certain area of law and whether

tribunals cite the same cases in order to come to consistent outcome. Without the qualitative analysis, tribunals can increasingly cite prior awards, but always different one and thus not coming to consistent solution of certain legal question.

Furthermore, only repeating conclusions achieved in other proceedings do not contribute to the development of international investment law. The reliance on past awards should be conducted consciously and while being aware of differences between the case at hand and the prior one. This opinion was recognized by *AES* tribunal when it noted that:

> "*Repeating decisions taken in other cases, without making the factual and legal distinctions, may constitute an excess of power and may affect the integrity of the international system for the protection of investments.*"[213]

What is then crucial for tribunals is to conscientiously look at awards and decisions already rendered and compare them to the present case. In case of similarities, it is necessary for legal certainty to apply similar rules in similar way or to depart from the opinion expressed by different tribunal, but at the same time stating reasons for such departure. Only this way international investment law may develop in a harmonious way with optimal level of legal certainty on the side of parties to the dispute and with legitimacy of those who are deciding the disputes.

This method of dealing with inconsistencies can be the way out of the legitimacy crisis and if applied properly, can increase the predictability of international investment law.

[213] *AES Corporation v. Argentina*, ICSID Case No. ARB/02/17, Decision on Jurisdiction (26 April 2005), para. 22.

Conclusion

This thesis brought the attention to the binding effect of arbitral awards rendered in investment treaty arbitration. It looked at the binding effect in the way an award binds parties to the dispute and also how it binds future tribunals deciding on the same or very similar issues and how it should bind them.

It is practically undisputed that there is no doctrine of *stare decisis* in international (investment) law and the award is legally binding only upon the parties to the dispute. This causes some deal of troubles as it results in many conflicting awards that contribute to unpredictability of international investment law and threatens legal certainty of investors and States.

In theory, many solutions to the occurrence of conflicting awards were proposed. Among those was the introduction of *stare decisis* doctrine, development of academic work, creation of appellate or review mechanism, proper use of *res judicata*, consolidation and *lis pendens* principles, and the use of *de facto* precedent. Most of these are very politically complicated.

The thesis then focused solely on the *de facto* precedent and its development in investment treaty arbitration. The reason being, that the development of *de facto* precedent as a method of solving inconsistencies is very elegant in the way that it does not require consensus of a large number of States, change of major document or creation of a whole new body. *De facto* precedent may emerge solely by practice of tribunals without any intervention of States. It is a situation where tribunals are not legally bound by past decisions, but it is only a moral obligation that makes them rely on prior awards in their reasoning and thus create consistent line of case law.

The Question of this thesis was: “Is there a development of *de facto* precedent in international investment law?”

The answer to the Question is “yes”, or more precisely “probably yes”. There is *de facto* precedent emerging in investment treaty arbitration at least from the point of view of quantitative analysis. This development is apparent only in the system of

ICSID awards as in non-ICSID awards the tendency to cite prior awards goes up and down and does not increase exponentially every year.

Furthermore, the quantitative analysis maps the tendency of tribunals to cite prior arbitral awards and other decisions. It does not, however, map the qualitative part, whether there is a really consistent line of case-law on which tribunals rely.

The quantitative analysis focused on awards rendered between the years 2004-2006 and 2013-2015 and in total covered 62 decisions of ICSID and non-ICSID tribunals. In 2015 the increase as opposed to the year 2004 was in average by 12 cited awards per decision. In 2014 the increase was almost by 8 awards per decision. It is an enormous difference that tells us that tribunals are more than willing to refer to and rely on past decisions.

The first chapter distinguished between two different perceptions of tribunals: the principal-agent relationship where tribunal acts only as an agent of parties to the dispute independent of other tribunals; and tribunal as an agent of parties and also agent of the whole investment community. The development of *de facto* precedent in ICSID systems shows that arbitrators in this system are perceived according to the second theory. They are, therefore, not only agents of the parties to the dispute, but also agents of the whole international investment community and are thus responsible for a harmonious development of this area of law. On the other hand, arbitrators in the non-ICSID system are seen more in the light of strict principal-agent theory, independent of other investment treaty tribunals.

In the end of the thesis I made second analysis inspired by the opinion expressed by Prof. Z. Douglas. Professor Douglas proposed that the de facto precedent does not help arbitrators work more efficiently as the length of awards is increasing over the time. For this reason, I analysed the length of ICSID and non-ICSID awards. The increase in length of awards is comparable in both systems, therefore it is comparable in the system where there is developing *de facto* precedent and where there is not. The de facto precedent thus has no effect on the number of pages of each award. The conclusion of this analysis is that the length of an award is independent of stadium of development of *de facto* precedent. It is either a poor way how to measure efficiency of tribunals or *de facto* precedent does not contribute to such efficiency. However,

even if *de facto* precedent does not influence efficiency, it still influences the consistency.

The main contribution of this thesis is the quantitative analysis of awards rendered in 2004-2006 and 2013-2015. This analysis maps awards rendered in years that have not been surveyed so far. The last quantitative analysis was executes by J. P. Commission and was 9 years old. Thanks to analysis produced in this thesis, last 9 years were also mapped and thus, there are up-to-date results of development of *de facto* precedent in international investment law. The analysis also tells us whether this method can be the way out of conflicting awards. Looking at the increased willingness of tribunals to cite prior awards and to find solutions adopted by other tribunals, this indeed can be the right method that will end discussion about creation of an appellate or review mechanism or about introduction of *de jure* precedent in investment arbitration.

Another contribution of this thesis is the analysis of numerous awards rendered by various investment tribunals in respect to their opinion on soft precedent. These cases are highly relevant, but not ordinarily mentioned in articles concerning this topic, and thus their analysis here is valuable.

Interesting study which can be conducted in the future is the quantitative analysis of decisions awards rendered in 2007-2013. It is still a question whether there was stagnation in the development of *de facto* precedent, or whether there were increases equally balanced by decreases and the whole development looked like roller-coaster.

However, the quantitative analysis is only one piece of puzzle. To come to almost indisputable conclusion of development of *de facto* precedent, qualitative analysis must be conducted as well. In the qualitative part certain areas of international investment law should be scrutinized to find whether in those areas tribunals cite awards that together create a consistent line of case law. With results only from quantitative analysis tribunals can cite prior awards, but always different ones. This way they would not be achieving consistent conclusions and rendering consistent

awards. It is, therefore, crucial for more exact result to execute the qualitative analysis as well.

For the purposes of this work, however, the conclusion is that the *de facto* precedent is already emerging and it is only a matter of time, when international investment law will have a recognizable line of good cases for investors and States to rely on and to predict the decisions of arbitral tribunals. Using the words of professor Kaufmann-Kohler good awards are chasing bad ones.

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Abstract in English

The Binding Effect of Arbitral Awards in International Investment Disputes

The purpose of this thesis is to analyse binding effect an award has on parties to the dispute and most importantly on future tribunals. Further discussed is the *de facto* precedent and its development in international investment treaty arbitration. Theoretical research is supported by an empirical study of case law. The reason for my research is the existence of conflicting awards in international investment law which undermines legal certainty of investors and States.

The thesis is divided into three parts. The first part is introductory and concerns with the general characteristics of international investment dispute. This part describes the system of bilateral treaties for the reciprocal encouragement of investment and the dispute mechanism in which investors are left with a choice before which body the dispute will be heard. The chapter then distinguishes two different perceptions of tribunals: the principal-agent relationship where tribunal acts only as an agent of parties to the dispute independent of other tribunals; and tribunal as an agent of parties and also agent of the whole investment community.

The second chapter focuses on the binding nature of an award. It looks at the wording of ICSID Convention and of the Statute and how is the award binding upon the parties. The second chapter composes of three subchapters that deals with the existence (or non-existence) of *stare decisis* doctrine in international investment law; with the specific nature of interpretative awards; and with the problem that is caused by non-existence of *stare decisis* doctrine – conflicting awards. This part of the thesis also depicts proposed ways of solving the occurring inconsistencies. One of which is the development of *de facto* precedent.

The third, and also last, chapter concentrates on the development of *de facto* precedent as a solution for inconsistent decisions. The empirical study contained in this part embodies a citation analysis of 62 decisions and awards rendered in investment treaty arbitration.

The conclusion of the thesis is that the *de facto* precedent is evolving. However, it is not evolving in the international investment law in general, but only in the ICSID system.

Abstrakt v českém jazyce

Závaznost rozhodčích nálezů v mezinárodních investičních sporech

Účelem této práce je analyzovat závaznost rozhodčích nálezů, a to ve vztahu ke stranám sporu, především ale pro budoucí tribunály. Práce se dále zabývá *de facto* precedentem a jeho vývojem v mezinárodním investičním právu. Teoretický výzkum je podpořen empirickou studií investičních rozhodčích nálezů. Důvodem pro tento výzkum byla existence konfliktních nálezů v mezinárodním investičním právu, která podrývá právní jistotu jednotlivých investorů a států.

Diplomová práce je rozdělena do tří částí. První část je úvodní a zabývá se obecnou charakteristikou mezinárodních investičních sporů. Tato část popisuje systém dvoustranných dohod na podporu a ochranu investic a systém řešení sporů, lterý ponechává investorovi volbu fóra, ktere bude daný spor rozhodovat. Kapitola dále rozlišuje dvě možná vnímání role rozhodce: prvním je vztah „*principal-agent*“, kde je rozhodce pouhým agentem stran a je zcela nezávislým na ostatních tribunálech, druhým je potom postavení arbitra nejen jako agenta stran sporu, ale také agentem celé mezinárodní investiční komunity.

Druhá kapitola se zaměřuje na samotnou závaznost rozhodčího nálezu. Tato část diskutuje znění Úmluvy ICSID, a také statutu Mezinárodního soudního dvora ve smyslu toho, jak nález zavazuje strany sporu. Tato kapitola se dále skládá z tří subkapitol. Ty se pak zaobírají existencí (nebo spíše neexistencí) doktríny *stare decisis* v mezinárodním investičním právu; dále pak speciální povahou interpretačních nálezů; a problémem, který nepřítomnost *stare decisis* doktríny způsobuje - existence konfliktních nálezů. Tato kapitola také uvádí navrhovaná řešení tohoto problému. Jedním z těchto řešení je i vývoj *de facto* precedentu.

Třetí, a zároveň poslední, kapitola se zaměřuje na vývoj *de facto* precedentu jako způsobu řešení konfliktních nálezů. Empirická studie obsažená v této části se skládá z citační analýzy 62 investičních nálezů.

V závěru práce shledávám, že se *de facto* precedent vyvíjí. Nelze však konstatovat, že k vývoji dochází obecně v mezinárodním investičním právu, ale vzrůstající praxe tribunálů citovat předchozí rozhodnutí se vyskytuje pouze v ICSID systému.

Teze v českém jazyce

Závaznost rozhodčích nálezů v mezinárodních investičních sporech

Úvod

Jedním z velkých problémů dnešní investiční arbitráže je nekonzistentnost rozhodčích nálezů vydaných jednotlivými tribunály. K tomu dochází z důvodu difúzní povahy mezinárodní investiční arbitráže, kde je každý tribunál nezávislý na jiném. Tento problém může vést k tomu, že investoři nebudou ochotni si mezinárodní investiční arbitráž pro řešení svých sporů z investic vybírat. V nejzazším případě tedy může tento systém zcela zaniknout.

Teorie navrhla mnoho možných způsobů řešení tohoto problému. Nejčastěji navrhované jsou: (i) zavedení doktríny *stare decisis* v mezinárodním investičním právu, a tedy vytvoření *de jure* precedentu; (ii) institucionální reforma v podobě vytvoření apelačního mechanismu; (iii) využití principů *res judicata*, *lis alibis pendens* a využití konsolidace; (iv) vývoj právní vědy skrz akademické práce; a (v) vývoj *de facto* precedentu.

Tato práce se zabývá závazností rozhodčích nálezů, a tak je i samotný výzkum zaměřen právě na řešení problému konfliktních nálezů skrz institut závaznosti, tedy skrz vývoj *de facto* precedentu mezinárodním investičním právu. Tomu je pak věnována celá třetí kapitola. Výzkumná otázka, kterou se tato práce zabývá, zní: „Vyvíjí se *de facto* precedent v mezinárodním investičním právu?“

1. Mezinárodní investiční spory

Práce se zabývá nálezy rozhodčích tribunálů, které řeší převážně spory mezi investorem na straně jedné a hostujícím státem, tedy státem, ve kterém byla učiněna investice, na straně druhé. Nejčastěji se tyto spory řídí ustanoveními příslušné dvoustranné dohody na ochranu a podporu investic (dále jen „BIT“).

Z hlediska závaznosti určitého nálezu pro jiný tribunál je důležité pojetí postavení arbitra. V teorii se objevují dvě hlavní koncepce: (i) vztah „*principal-agent*“, kde je rozhodce pouhým agentem stran zcela nezávislým na ostatních tribunálech; a (ii) postavení arbitra nejen jako agenta stran sporu, ale také jako agenta celé mezinárodní investiční komunity.

(i) „*Principal-agent*“ vztah – rozhodce jako agent stran

Dle této teorie je arbitr pouhým agentem stran. Tento vztah vzniká okamžikem, kdy se strany sporu shodnou na osobě arbitra, který je zmocněn k tomu, aby o jejich sporu rozhodl. V tomto pojetí jsou strany tzv. pánové sporu a arbitr je pouze jejich zmocněncem, na kterého delegovaly moc rozhodnout spor. Strany sporu také vybírají procesní pravidla, kterými je arbitr při svém rozhodování vázán.

Přirozeným důsledkem této koncepce je, že arbitr či tribunál je při rozhodování „izolován“ od ostatních tribunálů. Tato izolace je způsobena delegací pravomocí jen ve vztahu k danému případu. Tribunál tedy vydává nález, s dosahem omezeným pouze na strany sporu. Tato koncepce často vede tribunály k lhostejnosti vůči předchozím nálezům vydaným jinými tribunály. Lehce tak může nastat situace konfliktních rozhodnutí a nekonzistencí v mezinárodním investičním právu.

(ii) Rozhodce jako agent stran, a zároveň celé mezinárodní investiční komunity

Teorie „*principal-agent*“ vztahu je některými autory považována za již překonanou. Nově prosazovaná teorie je založena na domněnce, že mezinárodní investiční právo bylo konstitucionalizováno. Nejvíce je tato konstitucionalizace zřetelná v systému ICSID, kde je ztělesněna Úmluvou ICSID a Rozhodčími pravidly ICSID. Další „ústava“ je spatřována v tzv. normách se speciálním statusem. To jsou například normy *ius cogens*, základní lidská práva a svobody nebo procesní záruky spojované s právem na spravedlivý proces a na přístup ke spravedlnosti. Zde je rozhodce v jiném postavení, protože není pouze zmocněncem stran sporu, na kterého

byla delegována pravomoc spor rozhodnout, ale je také zmocněncem celé mezinárodní investiční komunity.

Tento model podporuje vývoj *de facto* precedentu, protože rozhodce není omezen pouze na předložený případ. Rozhodce by měl vzít v úvahu předešlé nálezy, odlišit se od nich či použít jejich závěry a měl by být odpovědný za vydání konfliktního nálezu. Vývojem *de facto* precedentu se dále zabývá třetí kapitola této práce.

2. Závaznost rozhodčích nálezů

Rozhodnutí vydané rozhodčím tribunálem je pro strany sporu závazné. Tento základní právní princip je v prostředí mezinárodního investičního práva zakotven v čl. 53 Úmluvy ICSID, který říká, že „*[r]ozhodčí nález bude pro strany závazný…*" Podobné ustanovení navíc nalezneme i v mnohých jiných mezinárodních úmluvách a také ve statutu Mezinárodního soudního dvora. Ten ve svém čl. 59 říká, že „*[r]ozhodnutí Dvora je závazné jen pro strany a tu jen, pokud jde o určitý případ*". Toto pravidlo je tak základní, že je považováno za obecnou zásadu právní, a tedy za primární zdroj mezinárodního práva na základě čl. 38 odst. 1 písm. c Statutu.[214]

Nález je ale závazný (i) jen ve vztahu ke stranám daného sporu a (ii) jen v souvislosti s daným případem.

Omezení závaznosti rozhodnutí pouze pro strany sporu znamená, že žádné třetí straně nemůže tribunál nálezem ukládat povinnosti, ani přiznávat práva. Toto omezení vychází z nedostatku souhlasu třetích stran s arbitráží. Kvůli tomu, že strany nedaly souhlas k řešení svých práv a povinnosti, není mezi nimi a tribunálem založen žádný „*principal-agent*" vztah. Jinak by se celý systém příčil právní jistotě investorů a států.

Druhé omezení, je limitace nálezu pouze ve smyslu vznesených žalobních nároků. Závazný navíc není nález jako celek, ale pouze jeho výrok, tedy ta část, kde tribunál autoritativně rozhoduje o právech a povinnostech stran sporu a kde rozhoduje o vznesených nárocích. Obecně pak platí, že odůvodnění nálezu není závazné.

[214] Povahou obecných zásad právních se zabýval i tribunál ve věci *Inceysa Vallisoletana S.L. proti Ekvádoru.*

Výjimečně může dojít k částečné závaznosti odůvodnění, pokud je tato část nepostradatelná pro pochopení a implementaci výroku.

2.1. Neexistence *stare decisis* doktríny

Ačkoliv jsou nálezy rozhodčích tribunálů závazné pro strany sporu, nemají již takovou závaznosti pro ostatní tribunály rozhodující o podobných záležitostech. Doktrína *stare decisis* je chápána jako vázanost rozhodovacího orgánu předchozími rozhodnutími, tedy závazek následovat již vydaná rozhodnutí.

Ačkoliv Úmluva ICSID explicitně *stare decisis* doktrínu nevylučuje, ustanovení článku 53 je všeobecně chápáno ve smyslu, který její aplikaci vylučuje. V takovémto duchu mluví také komentáře k Úmluvě ICSID. Podobně jsou psána např. i pravidla UNCITRAL. Neexistenci doktríny *stare decisis* v mezinárodním (investičním) právu dovozují i rozhodnutí mnoha tribunálů, na příklad *AES Corporation proti Argentině, Wintershall Aktiengesellschaft proti Argentině, AES Summit Generation Limited a AES-Tisza Erömü Kft proti Maďarsku* a *Burlington Resources Inc. proti Ekvádoru (rozhodnutí o jurisdikci).*

2.2 Interpretační nálezy

Nálezy s povahou nejvíce podobnou doktríně *stare decisis*, jsou tzv. interpretační nálezy. Jedná se o zcela speciální kategorii nálezů ve smyslu závaznosti pro budoucí tribunály, kterými daný tribunál rozhoduje o interpretaci určitého ustanovení příslušné BIT. Otázkou tedy je, jestli by takovýto nález měl být závazný pro budoucí tribunály aplikující ustanovení v něm vyložená.

Na základě „*principal-agent*“ doktríny, která je popsána výše, pravomoc interpretovat dané ustanovení BIT je delegována na tribunál, který má rozhodnout daný spor o interpretaci. Komentář ke statutu Mezinárodního soudního dvora explicitně říká, že rozhodnutí, kde má soud za úkol interpretovat mezinárodní úmluvu, jsou závazná i pro budoucí tribunály, a to přinejmenším v případech týkajících se stejných stran sporu. Na podporu svého názoru uvádí komentář dva případy: rozhodnutí ve věci *LaGrand* a případ *Avena*.

Pokud bychom se zaměřili na prostředí mezinárodní investiční arbitráže, pak bychom zde nenalezly příliš mnoho rozhodnutí vydaných ve sporu mezi dvěma státy. Ve skutečnosti existují pouze tři taková rozhodnutí. Z těchto tří se jen jedno týká interpretace, a navíc v tomto případě nebyl finální nález povolen ke zveřejnění. Jedná se o případ *Ekvádor proti Spojeným státům americkým* ze dne 29. září 2012, kde jsou ale zveřejněny alespoň podání stran sporu, a tedy lze sledovat alespoň průběh řízení a argumentaci obou stran.

Ačkoliv nebyl konečný nález zveřejněn, A. Roberts říká, že tribunál zamítl žalobu Ekvádoru pro nedostatek faktických důsledků případného interpretačního nálezu. Bylo tomu tak nejspíše proto, že Ekvádor zahájil spor po rozhodnutí tribunálu ve věci *Chevron Corporation (USA) a Texaco Petroleum Company proti Ekvádoru*. Ekvádoru se v tomto nálezu nelíbila interpretace určitého ustanovení BIT mezi Ekvádorem a USA. Je možné usuzovat, že kdyby Ekvádor takovýto spor vedl ještě před *Chevron* případem, pak by jeho žaloba nebyla zamítnuta.

2.3 Konfliktní nálezy

Nejkřiklavější důsledek neexistence doktríny *stare decisis* v mezinárodním (investičním) právu a striktního vnímání vztahu „*principal-agent*“ je vznik konfliktních nálezů. Situace je dále eskalována faktem, že v systému mezinárodní investiční arbitráže neexistuje žádný orgán, který by měl pravomoc vzniklou nekonzistentnost řešit a ani zde nejsou stanovena žádná pravidla jak postupovat.

Hlavním problémem konfliktních rozhodnutí je, že činí mezinárodní investiční právo nepředvídatelným pro osoby, které se v jeho rámci pohybují, a tedy podrývají legitimitu investiční arbitráže. Susan D. Franck v této souvislosti mluví o krizi legitimity. Říká, že konfliktní nálezy ohrožují právní jistotu investorů a státních subjektů a že jde proti jejich legitimním očekáváním. Kvůli tomuto je dokonce zvažováno, jestli je mezinárodní investiční arbitráž tím správným prostředkem k řešení investičních sporů. S. D. Frank dále poukazuje na to, že žádný systém, kde existují diametrálně si odporující rozhodnutí, nemůže existovat dlouho, jelikož porušuje základní smysl pro spravedlnost. To však neznamená, že by precedenční systém měl být do té míry rigidní, že tribunálům nebude vůbec povoleno se odchýlit od názoru

přijatého některým předchozím tribunálem. Je ale žádoucí, aby se tribunály odchylovaly od názorů v předchozích nálezech odůvodněně.

Jako příklad nekonsistentních rozhodnutí uvádím tři investiční případy (*CMS Gas Transmission Company proti Argentině*; *Enron Corporation a Ponderosa Assets, L.P. proti Argentině*; a *LG&E Energy Corp., LG&E Capital Corp., a LG&E International, Inc. proti Argentině*), které se všechny týkají ekonomické krize Argentiny, konkrétně se zabývají otázkou, jestli se Argentina může odvolávat na stav nouze, a tedy nebýt odpovědná za porušení BIT mezi Argentinou a USA vůči jednotlivým investorům. Jednalo se tedy o posouzení totožné otázky na základě stejné BIT. Přesto tyto tři tribunály došly k rozdílným názorům. Co hůř, vědomě nenásledovaly předchozí rozhodnutí, ač z nálezů vyplývá, že s nimi byly srozuměny. Další investoři jsou tak ponecháni v nejistotě, neboť nedokáží předvídat rozhodovací proces budoucích tribunálů v jejich potenciálních sporech.

Vzhledem k závažnosti důsledků konfliktních nálezů, mnoho akademiků navrhuje různé cesty z této situace. Nejčastěji navrhované jsou: (i) zavedení doktríny *stare decisis* v mezinárodním investičním právu, a tedy vytvoření *de jure* precedentu; (ii) institucionální reforma v podobě vytvoření apelačního mechanismu; (iii) využití principů *res judicata*, *lis alibis pendens* a využití konsolidace; (iv) vývoj právní vědy skrz akademické práce; a (v) vývoj *de facto* precedentu.

Jelikož se tato práce zabývá závazností rozhodčích nálezů, je i samotný výzkum zaměřen právě na řešení konfliktních nálezů skrz institut závaznosti, tedy skrz vývoj *de facto* precedentu v mezinárodním investičním právu.

3. Vývoj *de facto* precedentu

Předchozí kapitoly ukázaly, že tribunály nejsou právně vázány rozhodnutími předchozích tribunálů z důvodu neexistence doktríny *stare decisis* v systému mezinárodním investiční arbitráže. Jelikož její zavedení a tedy zavedení *de jure* precedentu by bylo velice složité a možná až nerealizovatelné, možným řešením zůstává vývoj *de facto* precedentu.

Řešení ve formě *de facto* precedentu spočívá v tom, že tribunály sice nemají právní povinnost předchozí nálezy následovat, ale je zde jakási mimoprávní, mnohdy označována jako morální, povinnost předchozí rozhodnutí následovat, a tak přispívat k harmonickému vývoji daného právního odvětví.

I tato metoda má však své odpůrce. Jedním z nich je profesor Zachary Douglas, který považuje mezinárodní investiční právo za příliš mladé pro jeho svázání takovýmto systémem a přirovnává ho k britskému prostředí, které po několik stovek let také fungovalo bez precedenčního systému. Dle názoru profesora Z. Douglase, zavedení *de facto* precedentu v mezinárodním investičním právu limituje arbitry v jejich rozhodování. Tím, že je svazujeme předchozími rozhodnutími, již nemají k dispozici plnou škálu možných odůvodnění. Na takový systém je, dle Z. Douglase, mezinárodní investiční právo ještě příliš mladé, jelikož zde ještě nejsou plně vyvinuty základní principy.

Na druhou stranu, ačkoliv může být pravdou, že britské právo existovalo stovky let bez precedentu, mezinárodní investiční právo se nenachází ve shodném postavení jako tehdy britské právo. Pokud bude v důsledku konfliktních názorů jednotlivých tribunálů investiční právo pro investory a státy nepředvídatelné a nebude zde existovat právní jistota, pak tyto potenciální strany sporu mají pořád možnost zvolit jiné fórum pro řešení svého sporu. Tímto by se mohla dostat mezinárodní investiční arbitráž do ještě větších problémů. Nebudou-li si totiž potenciální strany sporu vybírat toto fórum, bude zde klesat počet rozhodnutých sporů a doktrinální vývoj, jakož i vývoj jednotlivých principů, kterým prof. Z. Douglas chce dát prostor, upadne.

Rozhodnutí rozhodčích tribunálů podporující vývoj *de facto* precedentu jsou na příklad: *Saipem S.p.A. proti Bangladéši, Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. proti Pákistánu, EDF International S.A., SAUR International S.A. a León Participaciones Argentinas S.A. proti Argentině, ADC Affiliate Limited and ADC & ADMC Management Limited proti Maďarsku, Sociedad Anónima Eduardo Vieira proti Čile, Caratube International Oil Company LLP proti Kazachstánu,* a také *Liman Caspian Oil BV and NCL Dutch Investment BV proti Kazachstánu*.

3.1. Kvantitativní analýza z pera J. P. Commissiona

V roce 2007 zveřejnil Jeffery P. Commission studii zabývající se vývojem *de facto* precedentu v prostředí mezinárodní investiční arbitráže. J. P. Commission v této studii prošel 207 veřejně zpřístupněných nálezů vydaných tribunály mezi léty 1990 až 2006 a udělal jejich citační analýzu. Na základě této analýzy vypracoval řadu tabulek sledujících vývoj *de facto* precedentu jak v systému ICSID, tak i mimo něj.

První tabulka ukazuje vývoj od roku 1990 do roku 2001.

Rok	Počet rozhodnutí	Počet citovaných ICSID nálezů dle jednotlivých nálezů	Počet citovaných ICSID rozhodnutí celkem	Průměrný počet citovaných ICSID nálezů
1990	3	1, 0, 0	1	0,33
1991	-	-	-	-
1992	1	1	1	1
1993	1	0	0	0
1994	1	5	5	5
1995	-	-	-	-
1996	1	1	1	1
1997	3	4, 0, 6	10	3,33
1998	2	0, 5	5	2,5
1999	6	5, 3, 3, 1, 2, 1	15	2,5
2000	12	3, 0, 0, 0, 0, 4, 0, 0, 2, 0, 5, 0	14	1,17
2001	11	0, 0, 0, 2, 0, 4, 4, 1, 4, 9, 2	28	2,55

Ačkoliv je patrné, že určitý vývoj zaznamenán byl, nemůžeme učinit závěr, že se s určitostí *de facto* precedent v tomto období vyvíjel. Výhrady k takovému závěru vznikají zejména při pohledu na třetí sloupec, kde je patrno, kolik citací předešlých rozhodnutí se objevilo v jednotlivých nálezech. Mezi tribunály existují obrovské

rozdíly, kde v roce 2001 někteří citují až devět předchozích nálezů, zatímco celá řada ostatních zůstává na nule. Nelze tedy s určitosti uzavřít, že tendence tribunálů je zvýšeně citovat a spoléhat se na předchozí rozhodnutí.

Další tabulka potom sleduje vývoj mezi léty 2002 až 2006 v ICSID systému.

Rok	Počet rozhodnutí	Počet citovaných ICSID nálezů dle jednotlivých nálezů	Počet citovaných ICSID rozhodnutí celkem	Průměrný počet citovaných ICSID nálezů
2002	2	2, 4	6	3
2003	4	7, 13, 0, 7	27	6,75
2004	2	0, 9	9	4,5
2005	2	5, 18	23	11,5
2006	7	7, 24, 4, 13, 12, 2, 3	65	9,3

Tabulka mapuje pouze citace ICSID rozhodnutí jiných ICSID rozhodnutí, nereflektuje tedy bohužel citace tribunálů na rozhodnutí vydaná mimo systém ICSID. Zde již je vývoj patrný. V roce 2006 již není žádný tribunál, který by vůbec necitoval a nespoléhal se na předchozí rozhodnutí.

Citační vývoj mimo systém ICSID od roku 2002 do 2006 popisuje následující tabulka.

Rok	Počet rozhodnutí	Počet citovaných ICSID nálezů dle jednotlivých nálezů	Počet citovaných ne-ICSID nálezů dle jednotlivých nálezů	Počet citovaných rozhodnutí celkem	Průměrný počet citovaných nálezů
2002	7	0, 2, 2, 0, 0, 0, 4	0, 2, 3, 0, 1, 1, 0	15	2,14
2003	3	13, 0, 5	1, 0, 0	31	6,3
2004	3	3, 14, 8	0, 3, 2	27	9
2005	5	3, 6, 7, 9, 0	0, 1, 1, 4, 0	19	6,2
2006	7	29, 6, 11, 5, 22, 10, 10	10, 3, 7, 6, 3, 4, 3	129	18,43

S pár výhradami je i zde patrný vývoj *de facto* precedentu, jelikož je zde vidět tendence tribunálů se ve svých nálezech stále více spoléhat na předešlá rozhodnutí jiných tribunálů.

3.2. Kvantitativní analýza nálezů vydaných mezi roky 2004 a 2015

Studie vytvořená prof. J. P. Commissionem je dnes již devět let stará. Oprávněnou otázkou tedy je, jaká je tendence současných tribunálů a jestli se počet citovaných rozhodnutí stále zvyšuje, nebo zda se *de facto* precedent v prostředí mezinárodní arbitráže na dlouho neuhnízdil.

Z tohoto důvodu se diplomová práce zabývá citační analýzou 62 nálezů a rozhodnutí ICSID a ne-ICSID tribunálů vydaných v letech 2004, 2005, 2006 a 2013, 2014 a 2015. Tato léta byla vybrána z toho důvodu toho, že J. P. Commission ve své práci bohužel detailněji nepopisuje svoji metodologii, pro přesné výsledky jsem tedy musela zanalyzovat dle mnou zvolené metodologie i rok 2006. Vědoma si možných výkyvů v jednotlivých letech jsem pro ještě větší zpřesnění výsledku zanalyzovala vždy tři roky v daném období.

První tabulka ukazuje všeobecný vývoj *de facto* precedentu v systému ICSID.

Rok	Počet **ICSID** rozhodnutí	Počet citovaných nálezů dle jednotlivých nálezů	Počet citovaných rozhodnutí celkem	Průměrný počet citovaných nálezů
2004	5	0, 7, 21, 0, 23	51	**10,2**
2005	3	27, 7, 6	40	**13,33**
2006	8	25, 25, 3, 15, 15, 7, 16, 23	129	**16,13**
2013	11	7, 14, 16, 0, 13, 1, 26, 36, 14, 43, 12	182	**16,55**
2014	9	22, 8, 13, 24, 14, 30, 22, 18, 11	162	**18,0**
2015	6	20, 25, 5, 20, 24, 38	132	**22,0**

Zde je zcela patrný vývoj citační praxe rozhodčích tribunálů. V roce 2015 je dokonce průměrný počet citovaných rozhodnutí o více jak deset rozhodnutí více, než tomu tak bylo v roce 2004. Dále je vidět, že každý rok počet citovaných případů narůstá. Otázkou ale zůstává, jaký byl vývoj mezi léty 2006 a 2013, jelikož růst zde neodpovídá růstu v okolních letech. Nabízí se možnost, že růst v tomto období zcela stagnoval, nebo že různě rostl a klesal. Důležitý závěr ale je, že se *de facto* precedent, v letech sledovaných v této diplomové práci, vyvíjel.

Další tabulka podrobněji rozkresluje růst předestřený v tabulce předcházející.

Rok	Počet **ICSID** rozhodnutí	Počet citovaných ICSID nálezů dle jednotlivých nálezů	Počet citovaných ne-ICSID nálezů dle jednotlivých nálezů	Průměrný počet citovaných ICSID nálezů	Průměrný počet citovaných ne-ICSID nálezů
2004	5	0, 6, 13, 0, 13	0, 1, 8, 0, 10	**6,4**	**3,8**
2005	3	12, 3, 5	15, 4, 1	**6,67**	**6,67**
2006	8	13, 15, 2, 8, 9, 4, 4, 14	12, 10, 1, 7, 6, 3, 12, 9	**8,63**	**7,50**
2013	11	6, 11, 11, 0, 11, 1, 23, 28, 13, 29, 7	1, 3, 5, 0, 2, 0, 3, 8, 1, 14, 5	**12,73**	**3,82**
2014	9	20, 7, 11, 13, 10, 24, 12, 14, 8	2, 1, 2, 11, 4, 6, 10, 4, 3	**13,22**	**4,78**
2015	6	12, 15, 4, 19, 13, 32	8, 10, 1, 1, 11, 6	**15,83**	**6,17**

Data zanesená do této tabulky napovídají, že vývoj *de facto* precedentu v systému ICSID není rovnoměrně rozdělen mezi ICSID a ne-ICSID rozhodnutí. Naopak, celý vývoj se odehrává pouze ve vztahu k ICSID nálezům a rozhodnutím, a tedy nelze dospět k názoru, že se *de facto* precedent vyvíjí v celém mezinárodním investičním právu.

Jako další zkoumá tato diplomová práce tzv. ne-ICSID rozhodnutí.

Rok	Počet **ne-ICSID** rozhodnutí	Počet citovaných nálezů dle jednotlivých nálezů	Počet citovaných rozhodnutí celkem	Průměrný počet citovaných nálezů
2004	2	0, 12	12	**6**
2005	2	0, 18	18	**9**
2006	3	13, 19, 12	44	**14.67**
2013	2	0, 13	13	**6,5**
2014	5	18, 43, 11, 1, 13	86	**17.2**
2015	1	8	8	**8**

Na rozdíl od ICSID systému se zde *de facto* precedent nevyvíjí. Dochází zde k občasnému růstu citační praxe tribunálů, který je však záhy vyvážen náležitým poklesem. Ne-ICSID tribunály nemají tedy tendenci zvýšeně se spoléhat na předešlá rozhodnutí.

Závěr

Otázka, která stála na počátku této diplomové práce, zněla: „Vyvíjí se *de facto* precedent v mezinárodním investičním právu?“. Odpověď na tuto otázku je, že nejspíše ano.

Neobejdeme se ale zde bez určitých výhrad. První a nejhlavnější výhradou je, že k vývoji *de facto* precedentu dochází pouze při rozhodování tribunálů v systému ICSID. Co víc, dokonce ani zde nedochází ke zvýšené citační praxe tribunálů rovnoměrně ve vztahu ke všem předchozím rozhodnutím, tedy ke všem rozhodnutím bez ohledu na orgán, který je vydal. Vývoj je patrný pouze ve vztahu k předchozím rozhodnutím vydaným také v ICSID systému. Závěr tedy musí znít, že v *de facto* precedent se nevyvíjí obecně v mezinárodním investičním právu, ale pouze v rámci systému ICSID.

Tento vývoj nasvědčuje tomu, že se tyto tribunály přiklánějí k druhé teorii vztahu tribunálu a stran sporu, která byla vyobrazena v úvodu práce. Arbitr je tedy vnímán nejen jako zmocněnec stran, ale také jako zmocněnec celé mezinárodní investiční

komunity a nese tedy svůj díl odpovědnosti za harmonický vývoj tohoto právního prostředí.

Keywords: precedent, investment, arbitration

Klíčová slova: precedent, investice, arbitráž