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Aristotle's Statistics: Consistency and Accuracy in International Mass Claims

Veijo Heiskanen and Sandrine Giroud***

I Introduction

It is hardly controversial to say that consistency and accuracy are among the most important principles that inform judicial and arbitral decision-making. Consistency is about compatibility—consistency—with relevant earlier decisions, or *jurisprudence constante*, whereas accuracy refers to the legal and factual correctness of the decision taken.

Ideally, of course, one would hope that a judge or an arbitrator try to meet both requirements and make decisions that are both consistent with relevant earlier decisions and, in one's own view at least, correct in terms of both fact and law. However, there are situations in which it will not be possible to be both consistent and correct at the same time or, stated differently, there are situations in which consistency trumps accuracy, or vice versa.

This paper will argue that accuracy is more important than consistency in one-off arbitral decision-making, whereas consistency is more important than accuracy in a mass claims situation. This argument is explored in the particular context of investment treaty arbitration where the issue has now become relevant, as a result of the recent emergence of mass investor claims.

II Arbitration and Accuracy

Accuracy in arbitral decision-making is a debated and long-standing issue.[1] While there are prominent international arbitrators and arbitration

* Partner, LALIVE, Geneva, Switzerland.

** Counsel, LALIVE, Geneva, Switzerland. This article has been adapted from a speech given at the Eighth Annual Fordham Law School Conference on International Arbitration and Mediation held in New York on 11 April 2013 on "Consistency and Accuracy in International Mass Claims."

1 *See e.g.* Park William, "Arbitrators and Accuracy", in *Journal of International Dispute Settlement*, Vol. 1, No. 1, 2010, notably at p. 49.

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practitioners who argue that it is important, and indeed that international arbitrators even have a duty,[2] to follow *jurisprudence constante*, few arbitrators would probably go so far as to say that they have to follow precedent no matter what, even when they fundamentally disagree with it, that is to say, even when in their view the earlier jurisprudence on a particular issue is simply wrong.[3] In other words, there is no "expectation of absolute consistency;" arbitral tribunals are not compelled to always rule consistently with decisions issued by other, earlier tribunals.[4] Indeed, most international arbitrators and arbitration practitioners would probably agree that accuracy, or correctness, of their decision is more important than consistency with earlier arbitral jurisprudence, in

2 *See Saipem SpA v Bangladesh*, Decision on jurisdiction and recommendation on provisional measures, ICSID Case No. ARB/05/07; IIC 280 (2007) at para. 67: "*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*" (internal citations omitted, emphasis added).

3 For cases in which the arbitrators have explicitly mentioned that prior awards are to be "*considered*" or "*taken into account*", *see* e.g. *Bayindir Insaat Turizm Ticaret ve Sanayi A Ş v Pakistan*, Decision on Jurisdiction, ICSID Case No. ARB/03/29; IIC 27 (2005) at para. 76; *El Paso* Energy *International Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, (2006) at para. 39; *AES Corporation v Argentina*, Decision on jurisdiction, ICSID Case No. ARB/02/17; IIC 4 (2005); 12 ICSID Rep 308 at paras. 30–33. On the notion of precedent in international arbitration, *see* e.g. Guillaume Gilbert, "The use of precedent by international judges and arbitrators", in *Journal of International Dispute Settlement*, Vol. 2, No. 1, 2011 (Lalive Lecture June 2010); Kaufmann-Kohler Gabrielle, "Arbitral Precedent: Dream, Necessity or Excuse?", in *Arbitration International*, Vol. 23, No. 3, 2007; Kaufmann-Kohler Gabrielle, "Is Consistency a Myth?", available at http://www.arbitration-icca.org/media/0/12319141360720/00950062.pdf (last visited August 4, 2013); Rivkin David, "The Impact of International Arbitration on the Rule of Law", 11th Clayton Utz Sydney University International Arbitration Lecture, 2012, p. 11; Schreuer Christoph and Weiniger Matthew, "Conversations across cases-is there a doctrine of precedent in investment arbitration?", in *The Oxford Handbook of International Investment Law*, Muchlinski/Ortino/Schreuer (eds.), Oxford University Press, 2008; Weidemaier Mark, "Towards a theory of precedent in arbitration", in *William and Mary Law Review*, Vol. 51, p. 1895.

4 Laird/Weiler (eds.), *Investment Treaty Arbitration and International Law*, Vol. III, JurisNet, 2010, p. 287.

case of conflict, even in investment treaty arbitration which is generally a more transparent mechanism than international commercial arbitration.[5]

Unlike the dispute resolution system of the World Trade Organization, for instance, the system of international investment arbitration, which is "decentralized" in the sense that it is dominated by bilateral investment treaties rather than one multilateral legal regime, is not designed to put premium on consistency but rather on accuracy.[6] Nor is there any strict "doctrine of precedent," as reflected for instance in Article 53 of the Convention on the Settlement of Investment disputes between States and Nationals of other States (the "ICSID Convention"), which confirms that the award shall only be binding on the parties. While one can debate whether the apparent inconsistency of certain decisions taken by investment treaty tribunals has affected its legitimacy in the eyes of its users,[7] it is evident in any event that, in case of conflict, in investment treaty arbitration accuracy is likely to trump consistency, and few would argue with this proposition, including those who support the creation of an appeals system to enhance the consistency of arbitral jurisprudence. The underlying premise in such efforts is not to enhance consistency at any cost; the underlying premise is to enhance consistency with the correct precedent—while recognizing that this is precisely where the views differ.

III Mass Claims and Consistency

It is arguable that in international mass claims the reverse is true: consistency tends to trump accuracy, at least up to a point.

There is no generally accepted definition of mass claims programs or processes in international law. As a general matter, international mass claims programs cover ad hoc tribunals, quasi-judicial commissions and administrative programs established to resolve claims for compensation or property restitution "when a large number of parties have suffered damages arising from

5 *See* e.g. Cate Irene, "The Costs of Consistency—Precedent in Investment Treaty Arbitration", in *Columbia Journal of Transnational Law*, Vol. 51, p. 418, 2013, at pp. 456, 458, and 469.

6 Dolzer Rudolf, "Perspectives for investment arbitration: consistency as a policy goal?" in *Transnational Dispute Management* Vol. 9, Issue 3, 2012.

7 United Nations Conference on Trade and Development, "Recent Development in Investor-State Dispute (ISDS)", in UNCTAD, No. 1, May 2013, available at http:/www.http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf (last visited August, 4 2013) (identifying the persistence of different interpretations of identical or similar provisions in international investment agreements—such as umbrella clauses or MFN provisions—as one of the main systemic challenges).

the same diplomatic, historic or other event . . . sometimes borrowing concepts and procedures from each other, but often inventing unique solutions in light of particular legal and practical perspectives."[8] International mass claims programs put a premium on speed and efficiency. They are established to deal with compensation or restitution claims of a substantial number of claimants at a substantially lower transaction cost than ordinary judicial or arbitral proceedings, and aim at consistent treatment of all similarly situated claimants.[9] The principal—and obvious—reason for this is that in a mass claims situation, the factual circumstances out of which the claims arise are virtually identical, whereas outside the mass claims context, this is not the case.

The similarity of claims in international mass claims programs is a consequence of the extraordinary circumstances out of which the claims arise such as wars, armed conflicts, revolutions and other similar circumstances which give rise to massive population movements and, as a result, to a multiplicity of claims.[10] More recently, mass claims have also arisen as a result of financial and economic crises such as the economic crisis in Argentina in 2001, which underlies the first mass investor claims filed with the International Centre for Settlement of Investment Disputes ("ICSID").[11]

The similarity of circumstances also extends to the governing legal framework. In a mass claims context, the legal framework governing the process, including the applicable substantive law, is often created ad hoc, *i.e.*, after the claims have arisen, the Iran-United States Claims Tribunal and the United Nations Compensation Commission ("UNCC") being cases in point. In the context of mass investor claims, the situation is more complicated as the claims tend to arise under the existing network of bilateral investment treaties. Consequently, while in a mass claims situation the respondent is always the same, in a mass investor claims situation claimants may originate from different jurisdictions and accordingly several different investment treaties may apply. As a result, in the absence of a compulsory mechanism for con-

8 Holtzmann Howard M., Mass Claims, in Max Planck Encyclopedia of Pub. Int'l L. para. 1, available at http://www.mpepil.com, (last visited June 12, 2009).

9 Das Hans, "The Concept of Mass Claims and the Specificity of Mass Claims Processes", *in Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges* 3, pp. 9–10, (Permanent Court of Arbitration ed., 2006).

10 *See* e.g. Hakimi Monica, "International Claims Litigation I: Is Rough Justice Too Rough?", in 99 Am. Soc'y Int'l L. Proc. 87.

11 *Abaclat and Others v Argentina*, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/07/5; IIC 504 (2011).

solidation, there may be several parallel mass claims processes against one and the same host State.

Whenever there is a situation where tens, hundreds or even thousands of claims arise out of the same factual setting, inconsistent decisions are much more difficult to justify. Given that the factual circumstances out of which the claims arise are virtually identical, it is much harder to argue that different outcomes are justified *on the facts*.[12] If also the applicable law is the same, or at least very similar, it is more difficult to accept that different decisions are justified because different decision-makers possess differing legal views—such differences tend to undermine the perception that arbitrators are taking decisions on the basis of generally recognized, objective legal standards rather than on the basis of their personal views of what the law should be. Consequently, in a mass claims situation inconsistent decisions tend to raise issues about the legitimacy of the system much more easily than in the context of the ordinary, one-off arbitral decision-making. In such circumstances, there is no legitimate rationale for the parties to be treated differently—in particular the respondent which in a mass claims situation is always the same—as the facts and the law are virtually the same.

Consistency is therefore important in a mass claims situation because it raises fundamental issues of equality.[13] Paraphrasing Aristotle, one could say that consistency is the temporal aspect of equality.[14] Those in the same factual situation should be treated equally, even if the decisions concerning them are not taken simultaneously but over time. Consistency is equal treatment over time. If the facts are the same, then the law should be the same and should be applied equally. Consistency need not mean of course that mass claims bodies can never deviate from their own earlier decisions. They can, or at least should be able to, but then they need to explain and justify why they treat two

12 *See* e.g. Franck Susan, "The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decisions", in *Fordham Law Review*, Vol. 73, p. 1521, 2004–2005, notably p. 1558 *et seq*.

13 Cate Irene, "The Costs of Consistency—Precedent in Investment Treaty Arbitration", in *Columbia Journal of Transnational Law*, Vol. 58, 2013, at p. 448; Schauer Frederick, "Precedent", in *Stanford Law Review*, Vol. 39, 1987, p. 571.

14 Aristotle, "Nicomachean Ethics", V.3. 1131a10–b15 (referring to Plato and formulating the principle of formal equality "treat like cases as like" as being one of the principles underlying justice). *See also* Das Hans, *Resolving Mass Claims*, July 2004 citing Adams Maurice, *De precedentwerking van rechterlijke uitspraken: Een rechtstheoretische en rechtsvergelijkende studie* (1997) and Coons John E., "Consistency", in *California Law Review*, Vol. 75, No. 59, pp. 65, 1987.

claimants that are apparently in the same situation differently.[15] However, on a systemic level, unlike in arbitral decision-making, in a mass claims process consistency tends to trump accuracy, in case of conflict.

This is not to suggest that mass claims programs are designed to produce a lower level of justice, or "rough justice."[16] This is true only to the extent that the mass claims situation itself necessarily affects the quality of available evidence: documents and other evidence may be destroyed or may not be otherwise available as claimants may have been displaced, either because of the circumstances out of which the claims arise, or because the lapse of time between the date the claims arose and the date the claims program is set up and claims may be made; this latter aspect has been an issue in many of the Holocaust-related mass claims programs.[17] But these evidentiary shortcomings do not mean that decision-making in mass claims programs is necessarily less accurate than in one-off arbitral or judicial decision-making. On the contrary, mass claims programs create conditions for a different type of accuracy—systemic accuracy—in particular when tools such as statistical analysis are available and authorized by the constituent legal regime. Precisely because mass claims arise out of the same factual circumstances, statistical extrapolation techniques enable reliance on evidence collected from all of the claims in the resolution of claims where no or little evidence is available.[18]

15 *See* e.g. the Concurring Statement appended by Professor Domingo Bello-Janeiro, who also heard the Siemens case, to the award in *Daimler Financial Services AG v Argentina*, Award, ICSID Case No. ARB/05/1; IIC 560 (2012).

16 *See* generally Van Houtte Hans & Yi Iasson, "Due Process in International Mass Claims", in *Erasmus L. Rev.* 63 (2008) (analyzing mass claims programs in light of Article 6 ECHR, considering that standards of due process applicable to individual justice cannot apply directly to mass claims proceedings but that such proceedings must still meet the test of due process, albeit in a slightly different form, and assessing the fairness of the analyzed mass claims programs).

17 *See* Heiskanen Veijo, "CRT-II: The Second Swiss Banks Claims Process." In: Boisson de Chazournes/Quéguiner/Villalpando (eds.), *Crimes de l'histoire et réparations : les réponses du droit et de la justice*, Editions Bruylant, 2004, pp. 147–162.

18 *See* Heiskanen Veijo, "Speeding the resolution of mass claims using information technology," in *Dispute Resolution Journal*, 2003, Vol. 58, pp. 79–84.

IV Accuracy and Consistency in Practice

The general thesis outlined above can be illustrated by a few practical examples, including the first mass investor claims arising out of the Argentine financial crisis, the *Abaclat* case, the *CME* and *Lauder* decisions, the claims raised against the Lao People's Democratic Republic, and recent mass claims programs such as the Iran-United States Claims Tribunal and the UNCC.

A *Investment Treaty Arbitration*

1 The Argentine Cases

One could argue that the legitimacy of the ICSID system has sustained some damage, whether justifiably or not, because of a number of apparently inconsistent decisions[19] taken by different ICSID tribunals dealing with claims

19 In this context, over 40 arbitrations have taken place or are still pending. Some of these awards contain diverging, or even contradictory, views regarding procedural and substantive issues. *See* in relation to the necessity defence raised by Argentina: *CMS Gas Transmission Company v Argentina*, Award, ICSID Case No. ARB/01/8; IIC 65 (2005); *CMS Gas Transmission Company v Argentina*, Decision on Application for Annulment, ICSID Case No. ARB/01/8; IIC 303 (2007); *LG&E Energy Corp and ors v Argentina*, Decision on Liability, ICSID Case No. ARB; *Enron Corporation and Ponderosa Assets, LP v Argentina*, Award, ICSID Case No. ARB/01/3; IIC 292 (2007); *BG Group plc v Argentina*, Final award, Ad hoc—UNCITRAL Arbitration Rules; IIC 321 (2007); *Sempra Energy International v Argentina*, Award, ICSID Case No. ARB/02/16; IIC 304 (2007) 02/1; IIC 152 (2006); (2007) 46 ILM 36. *See* in relation to the Most-Favoured-Nation clause: *Siemens v Argentina*, Decision on Jurisdiction, ICSID case No. ARB/02/8, IIC 226 (2004); *Wintershall Aktiengesellschaft v Argentina*, Award, ICSID Case No. ARB/04/14; IIC 357 (2008); *Hochtief AG v Argentina*, Decision on Jurisdiction, ICSID Case No. ARB/07/31, IIC 513 (2011); *Daimler Financial Services AG v Argentina*, Award, ICSID Case No. ARB/05/1; IIC 560 (2012); *Camuzzi International SA v Argentina*, Decision on Objections to Jurisdiction, ICSID Case No. ARB/03/7; IIC 282 (2005); *Gas Natural SDG SA v Argentina*, Decision on jurisdiction, ICSID Case No. ARB/03/10; IIC 115 (2005); *Suez and ors v Argentina*, Decision on Jurisdiction, ICSID Case No. ARB/03/17; IIC 236 (2006); *National Grid PLC v Argentina*, Decision on Jurisdiction, Ad hoc—UNCITRAL Arbitration Rules; IIC 178 (2006); *Suez and ors v Argentina*, Decision on Jurisdiction, ICSID Case No. ARB/03/19; IIC 232 (2006); *AWG Group Ltd v Argentina*, Decision on Jurisdiction, Ad hoc—UNCITRAL Arbitration Rules, IIC 21 (2006). *See* in relation to umbrella clauses: *El Paso Energy International Co v Argentina*, Decision on Jurisdiction, ICSID Case No. ARB/03/15; IIC 83 (2006); *Pan American Energy LLC and BP Argentina Exploration Co v Argentina*, and joined case, Decision, Preliminary Objections, ICSID Case Nos. ARB/03/13, ARB/04/8; IIC 183 (2006); *Siemens AG v Argentina*, Award and Separate Opinion, ICSID Case No. ARB/02/8; IIC 227 (2007). For general discussions relating to the divergences relating to these

arising out of the 2001 financial crisis in Argentina.[20] A couple of States have denounced the ICSID Convention,[21] apparently at least in part because of the fallout created by the Argentine cases.[22] Proposals have been made—and buried—to create an appeals body within the ICSID system to ensure consistency of decisions.[23] Some authors have suggested that a system of preliminary rulings be introduced and others have urged arbitrators to follow a consistent

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standards *see* e.g. the presentations of Banifatemi Yas, "Most-Favoured-Nation Treatment in Investment Arbitration", pp. 241–273, Cheng Tai-Heng, "Precedent and Control in Investment Treaty Arbitration", pp. 149–182, Kinnear Meg, "The continuing development of the fair and equitable treatment standard", pp. 209–240 and Sinclair Anthony, "The Umbrella Clause Debate", pp. 275–312 in *Investment Treaty Law, Current Issues III, Emerging Jurisprudence of International Investment Law*, Bjorklund/Laird/Ripinsky (eds.), British Institute of International and Comparative Law, 2009.

20 *See* e.g. Blackaby Nigel, "Testing the Procedural Limits of the Treaty System: The Argentinean Experience", in *Transnational Dispute Management*, Vol. 2, Issue 2, 2005; Payne Cymie, "Argentina's ICSID arbitrations and the UNCC experience: consistency and capability in mass claims", in *World Arbitration and Mediation Review*, Vol. 6, Issue 3, p. 427, 2012; Reinisch August, "Necessity in International Investment Arbitration-An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on *CMS v Argentina* and *LG&E v Argentina*", in *Journal of World Investment and Trade*, Vol. 8, Issue 2, 2007; Schill Stephan, "International Investment Law and the Host State's power to handle economic crises, Comment on the ICSID Decision in LG&E", in *Journal of International Arbitration*, Vol. 24, Issue 3, 2007, pp. 265–286; Suarez Anzorena Carlos Ignacio, "Multiplicity of Claims under BITs and the Argentinean Case", in *Transnational Dispute Management*, Vol. 2, Issue 2, 2005.

21 For the time being, the following States have denounced the ICSID Convention: the Republic of Bolivia on 2 May 2007, the Republic of Ecuador on 6 July 2009, the Bolivarian Republic of Venezuela on 24 January 2012; in each case, the denunciation took effect six months after the receipt of the notice (Art. 71 ICSID Convention).

22 *See also* Mourra Mary (ed.), *Latin American Investment Treaty Arbitration, The Controversies and Conflicts*, Kluwer Law International, 2008.

23 Yannaca-Small Katia, "Improving the system of investor-State dispute settlement: an overview", in *OECD Working Papers on International Investment* No. 2006/1. *See also* Kaufman-Kohler Gabrielle, "In search of transparency and consistency: ICSID reform proposal", in *Transnational Dispute Management*, Vol. 2, Issue 5, 2005; Laird Ian, Askew Rebecca, "Finality versus consistency: does investor-state arbitration need an appellate system?", in *Journal of Appellate Practice and Process*, 2005; "Appeals and Challenges to Investment Treaty Awards: is it Time for an International Appellate System?", in *Transnational Dispute Management*, Vol. 2, Issue 2, 2005.

line of arbitral jurisprudence on any issue where such exists, i.e., so-called *jurisprudence constante*.[24]

Instead of setting up an appeals body, a better—although for the time being eminently unrealistic—way to deal with the Argentine cases would have been to establish one tribunal to deal with all the claims against Argentina arising out of the 2001 financial crisis. There would have been a number of advantages in such a solution: not only would have been the decisions on key substantive legal issues more consistent (while keeping in mind that the claims did not arise under one and the same bilateral investment treaty so some—legitimate—variation would have been necessary); there would also have been major savings in costs as the respondent in particular would have been able to produce and refer to global submissions covering several claims and would not have had to duplicate its legal work before multiple fora. One tribunal no doubt would also have been faster and more effective as it would not have had to start from scratch with each new case—it would have gathered a wealth of experience and familiarity with the factual situation in Argentina in 2001 from its early decisions and would have been able to learn from its own experience.

It is readily granted, as noted above, that this solution would have been unrealistic in the circumstances, for obvious reasons of moral hazard. As there is no existing legal mechanism to allow the parties to create one arbitral tribunal to deal with all claims arising out of a mass claims situation such as the Argentine crisis, or to compel claimants to submit their claims to one and the same arbitral tribunal, it is only understandable from a microeconomic perspective (even if not necessarily acceptable from a macroeconomic or policy perspective) that each claimant seeks to maximize the likelihood of a favorable decision by submitting its claims to an ad hoc tribunal that will only deal with that one particular claim, and whose composition it will be able to influence, and whose decision will be less likely to be influenced by other decisions relating to the same event (as these would have been taken by other tribunals) than a tribunal dedicated exclusively to the task (as it would have to consider the consistency of the decision with its own earlier decisions). In other words, if one wished to ensure consistency in decision-making in a mass claims situation, a legal mechanism for consolidation of claims before one and the same tribunal must be established *before* the event occurs that creates a mass claims

24 Schreuer Christoph, "Preliminary Rulings in Investment Arbitration", available at http://www.univie.ac.at/intlaw/prel_rul_article.pdf (last visited August 4, 2013); Kaufmann-Kohler Gabrielle, "Is Consistency a Myth?", available at http://www.arbitration-icca.org/media/0/12319141360720/00950062.pdf (last visited August 4, 2013).

situation; after the fact, any such effort is bound to fail for obvious reasons of moral hazard.

2 The *Abaclat* Case

The ICSID Convention in its current form does not allow for the creation of one tribunal to deal with a mass claims situation. However, one such tribunal has been created to deal with a particular aspect of the Argentine financial crisis—the *Abaclat* tribunal.[25]

In *Abaclat*,[26] Argentina was faced with a claim filed initially by 180,000 Italian nationals (subsequently reduced to some 60,000 claimants), represented by one single entity. The arbitral tribunal found jurisdiction to hear the case and that the claims were admissible, while recognizing the need to adapt standard practice under Article 44 of the ICSID Convention and Rule 19 of the ICSID Rules of Procedure for Arbitration Proceedings (the "ICSID Arbitration Rules") to the circumstances of the case. The ICSID framework will certainly present some challenges if and when the tribunal seeks to apply mass claims processing techniques to resolve the claims on their merits, but these are arguably not insurmountable.[27] In reaching its decision, the tribunal explored "whether Claimants have homogeneous rights of compensation for a homogeneous damage caused to them by potential homogeneous breaches by Argentina of homogeneous obligations provided for in the BIT," which it found to be the case.[28] The tribunal indicated that the merits phase would be

25 For further discussion regarding the relationship between arbitration and mass claims *see* e.g. Carrillo Arturo and Palmer Jason, "Transnational Mass Claim Processes (TMCPs) in International Law and Practice", in *Berkeley Journal of International Law*, Vol. 28:2, p. 343, 2010; Karrer Pierre, "Mass Claims Proceedings in Practice, A Few Lessons Learned", in *Berkeley Journal of International Law*, Vol. 23:2, p. 343, 2005; Norton Ellie, "International Investment Arbitration and the European Debt Crisis", in *Chicago Journal of International Law*, Vol. 13, No. 1, p. 291, 2012; Park William, "La jurisprudence américaine en matière de "class arbitration": entre débat politique et technique juridique", in *Revue de l'Arbitrage*, Vol. 2012, Issue 3, p. 507, 2012; Strong S.I., "Does Class Arbitration Change the Nature of Arbitration? Stolt-Nielsen, AT&T and a Return to First Principles", in *Harvard Negotiation Law Review*, Vol. 17, 2012; Waincymer Jeff, "The Process of an Arbitration, Complex Arbitration", in *Procedure and Evidence in International Arbitration*, 2012.

26 *Abaclat and Others v Argentina*, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/07/5; IIC 504 (2011).

27 *See* Heiskanen Veijo, "Arbitrating Mass Investor Claims: Lessons of International Claims Commissions," in In: *Permanent Court of Arbitration* (Ed.), Chapter 12, "Multiple Party Actions in International Arbitration", Oxford University Press, 2009, pp. 297–323.

28 *Abaclat and Others v Argentina*, paras. 541 and 543.

divided in two parts: the first will be "a general phase aimed at determining the core issues regarding the merits of the case, and in particular establishing what conditions must be fulfilled for further resolving Claimants' claims and determining the best method to examine these issues and conditions."[29] In the second phase the tribunal will "rule on how to examine the relevant issues and conditions" and "put in place an appropriate mechanism of examination and will proceed with such examination."[30]

These procedures outlined by the tribunal seem designed to ensure the consistency of its decisions across the tens of thousands of claims it will have to resolve. However, while this approach may achieve its goal for the claims handled by the *Abaclat* tribunal, there is obviously no guarantee or even mechanism to ensure that the decisions of the *Abaclat* tribunal will be consistent with decisions taken by other arbitral tribunals dealing with claims arising out of the Argentine financial crisis. Indeed, this is no longer feasible insofar as the *Abaclat* tribunal will in any event not be in a position to redress apparent inconsistencies between decisions already taken.

3 The *CME* and *Lauder* Decisions

A further example to illustrate the tension between correctness and accuracy would be the two decisions rendered by the *CME* and *Lauder* tribunals some ten years ago.[31] These two decisions prompted a heated debate at the time, and called attention to the apparent inconsistency of the decisions taken by the two tribunals.[32] Many saw in these decisions a problem that risked undermining the legitimacy of arbitration as a method of resolving investment disputes.

The two awards arose out of a dispute relating to broadcasting licenses which had been revoked by the Czech Media Council, a government agency. The *Lauder* case was filed by Mr Lauder, the controlling shareholder of CME, under the Czech-United States BIT. A few months later, the parent company through which this investment had been made, CME Czech Republic, filed a claim under the Netherlands-Czech BIT; this case became known as the *CME*

29 *Ibid.*, para. 671.

30 *Ibid.*, para. 671.

31 *Lauder v Czech Republic*, Final Award, Ad hoc—UNCITRAL Arbitration Rules; IIC 205 (2001); *CME Czech Republic BV v Czech Republic*, Partial award and separate opinion, Ad hoc—UNCITRAL Arbitration Rules, IIC 61 (2001).

32 *See* e.g. Brower Charles, Sharpe Jeremy, "Multiple and conflicting international awards", in *Journal of World Investment and Trade*, Vol. 4, Issue 2, 2003; Kühn Wolfgang, Klein Bohuslav, Carver Jeremy and Bagner Hans, "How to avoid conflicting awards, the Lauder and CME cases", in *Journal of World Investment and Trade*, Vol. 5, Issue 1, 2004.

case. The circumstances out of which the two cases arose were the same, although as the *CME* tribunal recognized, the relevant facts could have been presented to the two tribunals differently.[33]

In its award, the *Lauder* tribunal found that Mr Lauder had been treated in a discriminatory manner, but awarded no compensation for lack of proof of causation. The *CME* tribunal came to the opposite conclusion and found that causation had been sufficiently proven and awarded compensation amounting to approximately USD 270 million. Many commentators found it difficult to reconcile the two decisions, and the well-known debate ensued.

The *CME*/*Lauder* situation is certainly not a mass claims situation in the sense that it only involved two different claims, however it does highlight the same issue: consistency tends to become more important than accuracy—accuracy as viewed by different arbitrators—whenever the facts are the same. In other words, when the facts are the same, the differing legal views of arbitrators, which otherwise might not be considered an issue at all, acquire new importance. While differences between legal points of view are understandable and even desirable as they tend to drive the development of the law, the lesson of the *Lauder* and *CME* saga seems to be that, in a mass claims situation, or in a situation where claims arise out of the same set of facts, international arbitrators are encouraged to defer sorting out their subjective differences about law to academic debate and conferences, and not deal with them in the context of arbitral decision-making, at the expense of the parties' legal rights and obligations.

4 Claims against the Lao People's Democratic Republic

One final example points to a practical solution to address the consistency issue in parallel arbitration proceedings. Two investment treaty claims have recently been brought against the Lao People's Democratic Republic.[34] One was brought by an investment firm from Macao, the other by its Dutch parent

33 *CME Czech Republic BV v Czech Republic*, Partial award and separate opinion, Ad hoc—UNCITRAL Arbitration Rules, IIC 61 (2001), at para. 412. The tribunal however noted in the final award when discussing *res judicata* that it "*cannot judge whether the facts submitted to the two tribunals for decision are identical and it may well be that facts and circumstances presented to this Tribunal have been presented quite differently to the London Tribunal*", *CME Czech Republic BV v Czech Republic*, Final Award and Separate Opinion, Ad hoc—UNCITRAL Arbitration Rules, IIC 62 (2003), at para. 432.

34 *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6; "Tribunals selected to hear two parallel investment treaty claims brought by casino investors against Laos", in *Investment Arbitration Reporter*, 3 Apr. 2013; Hepburn Jarrod and Peterson Luke Eric, "Laos has yet to pay $56 million arbitral debt, but new investors line

company. The factual background in this case is similar to the *CME* and *Lauder* cases: the same measures taken by the State give rise to claims under two different BITs (the China-Laos BIT and the Netherlands-Laos BIT), therefore leading to two parallel arbitral proceedings.

It is interesting to note that in the *Lao* case, the parties selected the same two co-arbitrators to hear the cases and only the president of the tribunal was different. In the *Lauder* and *CME* cases, however, there was no coordination between the two proceedings on the level of the composition of the tribunals, the Czech Republic having refused the claimant's suggestion to consolidate the arbitrations and requesting that "each action [be] determined independently and promptly."[35] This decision was recognized by the tribunal as opening the door to potentially conflicting awards.

V Conclusion

The tension between consistency and accuracy in arbitral and judicial decision-making is hardly a novel issue. However, while there may be no solution to the issue at a conceptual level (and one may not even be desirable), this is not to say that the tension is not manageable in the context of concrete arbitral and judicial decision-making.

The thesis explored in this brief note—accuracy trumps consistency in one-off arbitral decision-making, whereas consistency trumps accuracy, at least up to a point, in a mass claims context—sheds hopefully some light on how to balance the two classic legal virtues, accuracy and consistency, and how to navigate between their extreme forms—the Scylla of personal authority and the Charybdis of empty formalism. Since just as blind focus on accuracy may lead to extreme adhocracy in decision-making where decisions are justified solely by reference to the authority of the person who took them, excessive deference to consistency may lead to empty formalism where decisions are justified merely by reference to their consistency with precedent.

On a more mundane level, the principal challenge in any attempt to ensure the proper balance between accuracy and consistency in investment treaty arbitration is the lack of any mechanism for channeling mass investor claims to one and the same arbitral tribunal. While this would arguably be the best

up to sue; Chinese claimant says MFN clause circumvents narrow arbitration clause", in *Investment Arbitration Reporter*, 19 Aug. 2012.

35 *CME Czech Republic BV v Czech Republic*, Partial award and separate opinion, Ad hoc—UNCITRAL Arbitration Rules, IIC 61 (2001), at paras. 40 *et seq*. and 412.

way to promote and protect the legitimacy of investment treaty arbitration in a mass claims situation, the likelihood that such a mechanism will be established any time soon is relatively low. This would require an amendment of the ICSID Convention, and just as it has proven difficult to amend the International Monetary Fund's Articles of Agreement to deal with issues of moral hazard, the amendment of the ICSID Convention is likely to be at least equally, it not more, difficult.[36]

36 *See* the aborted attempt made by Anne O. Krueger, the First Deputy Managing Director of the IMF, to create an international mechanism for sovereign bankruptcy (sovereign debt restructuring mechanism); Anne O. Krueger, "A New Approach to Sovereign Debt Restructuring," IMF, 2002, available at http://www.imf.org/external/pubs/ft/exrp/sdrm/eng/ (last visited August 4, 2013).