Looking to the Future: Three "Hot Topics" for Investment Treaty Arbitration in the Next Ten Years
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LOOKING TO THE FUTURE: THREE "HOT TOPICS" FOR INVESTMENT TREATY ARBITRATION IN THE NEXT TEN YEARS

By Matthew Weiniger and Mike McClure*

As TDM marks its tenth anniversary, the landscape of investment treaty arbitration in 2013 is very different from 2003. In 2003, the practice was in its infancy with only 34 reported awards. Now there have been over 168.¹ As a result of those awards, a number of issues that were the subject of scholarly debate in 2003, such as the meaning of "investment" or "national", are now settled within comprehensible parameters. However, in 2013, scholars and practitioners are being presented with a host of new issues to debate. Are mass claims permissible within the ICSID framework? How should consent to such mass claims be interpreted? How are national courts performing their role of supervising investment treaty tribunals? There are many more issues. In addition, some issues that were debated in 2003 remain on the table, notably the scope and application of most favoured nation (MFN) provisions.

This article will consider three areas that have prompted debate in recent years that are likely to be "hot topics" for scholars and practitioners for the next ten years. These issues are: (i) mass claims; (ii) competence and judicial supervision (particularly post BG v Argentina); and (iii) precedent (with a focus on the MFN debate). A common theme for each "hot topic" is that they concern (to a certain extent at least) two of the fundamental issues for investment treaty practitioners, namely jurisdiction and consistency.

1. Mass claims – the fallout from Abaclat

The first "hot topic" is the issue of mass claims following the majority decision in August 2011 in Abaclat v Argentina² which affirmed that there is no impediment to mass claims under the ICSID Convention and Arbitration Rules. It has been described as

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² ICSID Case No. ARB07/15, Decision on Jurisdiction, 4 August 2011
"unprecedented"³ and a "landmark ruling"⁴. It is also a decision that is not without criticism, as well as featuring a strong dissenting opinion from Professor Georges Abi-Saab.

Background

The background to Abaclat arises from the Argentine financial crisis in 2001, in particular Argentina's default on its sovereign debt and suspension of government bonds. After a number of years of negotiations, an organisation called Task Force Argentina (TFA) commenced ICSID arbitration on behalf of over 60,000 bondholders alleging numerous breaches of the Argentina–Italy BIT.

There were a number of preliminary jurisdictional issues for the tribunal to determine, including whether the bonds satisfied the definition of "investment" under the ICSID Convention (applying the criteria in Salini v Morocco⁵) and whether the claims were treaty based rather than contract based. However, among the more usual jurisdictional issues was the new one of whether the tribunal had jurisdiction to hear 60,000 claims at the same time. In this regard, TFA's principle argument was that the mass aspect of the claim was merely procedural and, therefore, not a bar to establishing jurisdiction. In particular, it fell within the tribunal's powers to rule on procedure under Article 44 of the ICSID Convention, which provides, "[i]f any question of procedure arises which is not covered by this Section or the Arbitration Rules … the Tribunal shall decide the question." In contrast, Argentina asserted that⁶: (a) each investment gave rise to a separate claim which should be made separately rather than through TFA as agent; (b) neither the BIT nor the ICSID Convention provides for collective claims and, therefore, they are contrary to the ICSID system and not covered by the consent to arbitrate; and (c) Article 44 applies only to matters where the tribunal has jurisdiction already.

Majority decision

The majority took a twofold approach to determine whether it could hear a mass claim. First, it considered whether the tribunal had the competence to entertain the claims (i.e. jurisdiction issues). Within the context of a BIT, consent is generally considered to have been given when the investor commences arbitration, essentially "accepting" the State's

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³ Karen Halverson Cross, Investment Arbitration Panel Upholds Jurisdiction to Hear Mass Bondholder Claims Against Argentina, 15 ASIL INSIGHTS, 21 November 2011
⁵ ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001
⁶ N.b. The authors have used the labels "(a)", "(b)", and "(c)" for this article -- the issues were not listed in this way by Argentina or the tribunal
standing offer to arbitrate in the BIT. However, in *Abaclat*, not every investor claimant had filed a request for arbitration. Nonetheless, the majority concluded that the claimants had consented to the mass claim via a TFA Mandate Package each claimant had signed, which included an instruction letter and a power of attorney.\(^7\)

As regards Argentina's consent, the state accepted that it had consented "*in principle to ICISD arbitration with regard to a dispute falling within the scope of the BIT*".\(^8\) However, it argued that a mass claim in respect of sovereign debt restructuring fell outside the scope of ICISD arbitration. The majority determined that the subject of the dispute was irrelevant and the multiplicity of claimants was merely a "*procedural modality*".\(^9\) It further noted that if Argentina had wished to exclude mass claims from its consent under the BIT, it could have done so by notification to ICSID (under Article 25(4) of the Convention).\(^10\)

Second, the tribunal considered whether the claims were fit to be determined at all, by any body, given the unusual collective circumstances, particularly given that the BIT and the ICISD Convention are both silent on the issue of mass claims (i.e. admissibility issues). In this regard, the majority considered whether the Convention's silence regarding consolidating proceedings constituted "qualified silence", indicating that mass claims were prohibited, or was an unintended "gap", which the tribunal has the power to fill.\(^11\) It concluded it would be contrary to the spirit of ICISD to interpret the silence as "qualified silence" and thus it is a "gap", giving the tribunal the power to step in.\(^12\) Moreover, the majority noted that the alternative – separately dealing with each claim - was impossible, although it emphasised that mass proceedings were only acceptable where the claims were "*at least sufficiently homogeneous*"\(^13\) such that they could be heard together.

**The future post Abaclat**

*Abaclat* is undoubtedly a landmark ruling and has the potential to open the doors to a whole new class of BIT claims. Indeed, given the increasing number of BITs and sophisticated international investors, *Abaclat* will surely be the first of many mass investment arbitrations.\(^14\) Nonetheless, there are a number of concerns with the approach the majority took to process the bondholders' claims within the existing ICISD framework and if a legitimate framework

\(^7\) *Abaclat*, supra note 1, para 466  
\(^8\) *Ibid.* para 467  
\(^9\) *Ibid.* paras 468 and 492  
\(^10\) *Ibid.* para 477  
\(^11\) *Ibid.* para 517  
\(^12\) *Ibid.* paras 518-19  
\(^13\) *Ibid.* para 540  
\(^14\) On 8 February 2013, another BIT panel upheld jurisdiction in a case with 90 claimants, *Ambiente Ufficio v Argentine Republic* (ICSID Case No. ARB/08/9, Decision on Jurisdiction)
for dealing with mass claims is ever going to develop, these concerns will need to be addressed:

- The majority approach to the issue of consent overlooks two fundamental aspects of international law. First, consent to arbitrate does not of itself mean consent to consolidation or consent to be sued by multiple parties in a single arbitration. Consent (particularly consent to consolidation), therefore, should be a matter of jurisdiction alone, not a matter of both admissibility and jurisdiction. Second, Article 31 of the Vienna Convention provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". However, by refusing to enquire as to whether Argentina had actually consented to mass proceedings (and considering instead whether such claims were simply permissible), the majority's approach ignores the object and purpose of the BIT/ICSID Convention.

- The majority's interpretation of the alleged "silence" in the BIT is also questionable. First, as the WTO Appellate Body held in Canada-Term of Patent Protection, when interpreting any treaty, it is generally to be assumed that the parties have included the terms they wished to include and omitted those they did not wish to include. Second, as the Abaclat majority acknowledged, at the time of the conclusion of the ICSID Convention, even though collective proceedings were beyond anyone's reasonable contemplation, there were still some discussions with regard to multi-party arbitrations, albeit these discussions were not conclusive on the intention of the state parties to either accept or refuse multi-party arbitrations. There is no need to interpret silence as a "gap" that needs to be filled in such circumstances, particularly when the silence relates to an issue that was considered in negotiations (no matter how briefly). Indeed, it is disappointing that the Abaclat majority omitted to rationalise its decision in this regard, particularly given the concession that there were indeed some discussions about multi-party arbitrations at the drafting stage.

The merits phase of the arbitration will give rise to further difficulties. The majority stated that the merits phase will be split into two, with a general phase to determine core issues and the best method of examining them, followed by a second phase to proceed with the

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17 Abaclat, supra note 1, para 519
chosen mechanism of examination. The majority acknowledged that it would adopt a "simplified verification of evidentiary material" and that "... it is undeniable that the Tribunal will not be in a position to examine all elements and related documents in the same way as if there were only a handful of Claimants". Some commentators have described this as "practical, objective and fair minded", but taking a truncated approach may be difficult to reconcile with arbitral due process. The final Abaclat award will need to name and identify each claimant in a manner sufficient to assure their individual enforcement rights and specify exactly what relief each claimant is entitled to. The majority decision offers little insight into how these requirements will be met. Moreover, while the proposed procedure for Abaclat may work given the extensive coordination between counsel and TFA, the situation in future large scale ICSID proceedings may be different, for example, if co-operation between counsel (or claimants) was non-existent or broke down.

Overall, the Abaclat decision is ground-breaking yet unsatisfactory, with a number of questions remaining to be addressed before a true mass claims procedure can exist within the ISCSID framework. While there are likely to be further mass claims in the future, it bears emphasis that a number of factors (both legal and practical) need to align before a mass claim will even be viable: a significant number of claimants who have suffered similar and easily documented injuries; some organisation or entity with the ability and resources to identify and assemble the claimants; an arbitral institution with the specialised expertise and substantial resources required to process the claims; and – most important – a reasonably assured pot of funds to pay claims and the considerable costs of processing them. Nonetheless, if tribunals press ahead with fashioning a mass claims procedure for investment arbitration before states positively incorporate the necessary mechanisms into treaties, the issue of mass claims will remain a "hot topic" for investment arbitration practitioners in the coming years.

2. Competence and judicial supervision

The second "hot topic" is the issue of the law to be applied by national courts in reviewing investment treaty awards and whether national courts or arbitral tribunals should determine

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18 Ibid, paras 668 and 669
19 Ibid, para 531
20 Ibid.
22 Hans van Houtte and Bridie McAsey, Case Comment: Abaclat and others v Argentine Republic, ICSID Review, 18 October 2012, p. 1
23 Ibid.
24 Supra, note 14
whether an arbitral tribunal has jurisdiction to hear a particular claim. This was an arbitration
newsworthy issue in 2012 following the decision of a US federal court in *BG v Argentina*\(^\text{25}\) to
set aside an UNCITRAL arbitration award.

*Kompetenz-kompetenz*

This "hot topic" stems from the doctrine of *kompetenz-kompetenz*, which provides that an
arbitral tribunal has the ability to rule on questions of its own jurisdiction. The principle is
well established in international arbitration, and is accepted in many national laws (albeit the
precise parameters of the doctrine vary across national laws). It is also enshrined in the
UNCITRAL Arbitration Rules.\(^\text{26}\)

Nonetheless, most national laws also provide that national courts can review a tribunal's
jurisdictional decision anew. By way of example, in 2009, the English Supreme Court held in
*Dallah v Pakistan*\(^\text{27}\) that an order giving leave to enforce a French ICC arbitration award was
rightly set aside by the High Court as it had been established, pursuant to Section 103(2)(b)
of the Arbitration Act, that as a matter of French law the respondent government was not a
party to the arbitration agreement. The Supreme Court concluded that an application under
Section 103(2) required a rehearing of the facts in contention (in *Dallah* the existence of an
arbitration agreement), not just a review of the award.

There are similar provisions under US law (relevant in the content of the *BG* decision
discussed below) which provide that the courts can reconsider an arbitral tribunal's decision
concerning its jurisdiction, unless the parties clearly and unmistakably submitted jurisdiction
issues to the tribunal. These rules are grounded in the notion that arbitration agreements
are simple bilateral contracts between commercial parties, and their existence and validity
are suitable for courts to decide independently (without deference) because the decisions
involve ordinary state law contractual principles.\(^\text{28}\)

In the context of commercial arbitration, these issues can be more straightforward to
administer, as there will always be a "seat" and "governing law" for the arbitration and thus a
national law and national court that has effective supervisory jurisdiction (and experience of

\(^{25}\) 2012 WL 119558
\(^{26}\) Article 21(1) of the UNCITRAL Rules 1976 and Article 23(3) of the UNCITRAL Rules 2010
\(^{27}\) [2010] UKSC 46
\(^{28}\) *First Options v Kaplan* 514 U.S. 938 (Decision of the US Supreme Court) (as described by Marc Goldstein,
*What we learn from Canada's Cargill Case: Judicial Review and the Core Competence of Investment Tribunals*,
Marc J. Goldstein, Litigation & Arbitration Chambers, Arbitration Commentaries, 7 October 2011
(http://arbblog.lexmarc.us/2011/10/what-we-learn-from-canadas-cargill-case-judicial-review-and-the-core-
competence-of-investment-tribunals/)}
applying such principles). However, the issue is complicated in the context of investment treaty arbitration where tribunals (and therefore any national court exercising a supervisory role) must apply the more abstract concepts of international law.

**BG v Argentina**

In *BG*, an UNCITRAL tribunal determined that it had jurisdiction - and subsequently awarded damages to the investor - notwithstanding the fact that the investor had initiated arbitration without first commencing eighteen months of domestic litigation as required under the UK-Argentina BIT. Argentina then petitioned the Washington District Court to vacate the award (the investor also filed a cross-motion for recognition and enforcement of the award). The District Court denied Argentina's petition. However, the Federal Court of Appeals for the DC Circuit concluded that fulfilment of the BIT's condition precedent to arbitration (and, importantly, whether to waive it) was not within the arbitral tribunal's jurisdiction-deciding powers because the investor, having not complied with the litigation pre-condition, had no right to invoke the arbitral tribunal's jurisdiction in the first instance.

The UNCITRAL Rules provide that the arbitral tribunal shall have the power to rule on its own jurisdiction and it was clear from the *BG* award that the tribunal had analysed and considered whether it had jurisdiction under the terms of the relevant treaty. In addition, the Court of Appeals accepted that "... the intent of the contracting parties controls whether the answer to the question of arbitrability is to be provided by a court or an arbitrator." It also held "that the question of arbitrability is an independent question of law for the court to decide." Nonetheless, the Court of Appeals went on to undertake a de novo analysis of the tribunal's jurisdiction. Moreover, its analysis of the party's consent and that question of law was limited to reference to domestic US considerations. At no point did the Court of Appeals' review extend to attempting to construe the treaty by reference to the Vienna Convention or international law standards.

Without descending into the "merits" of the jurisdiction decision, interpretation of an international treaty (and thus whether the tribunal has jurisdiction to hear a treaty claim) is a matter for international law (including the Vienna Convention, albeit in the instance of the *BG* case it must be noted that the US is not a signatory to the Vienna Convention). While this does not prohibit national courts from reviewing and interpreting such treaties, it does not mean that national courts should undertake this exercise by reference to their own domestic

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29 *Supra* note 26
law as the question is not comparable to jurisdictional issues in commercial arbitration. That is not to say that national legal systems cannot have rules of treaty interpretation that differ from the Vienna Convention, or customary rules of treaty interpretation. Indeed, some national courts use the Vienna Convention in interpreting treaties, others do not. Nonetheless, if a national court is seeking to interpret an international treaty for international parties under international law, it should recognise the nature and intent of that treaty by reference to the international standards that the parties would expect.

This can be contrasted with the approach taken in some other jurisdictions. In England, the Court of Appeal has decided a jurisdiction challenge to an UNCITRAL Award rendered under a BIT by considering that the arbitration agreement is governed by international law. Having considered the question of governing law (upon which it was common ground between the parties that the governing law was public international law), the Court of Appeal held that "under English private international law principles, the agreement to arbitrate may itself be subject to international law, as it may be subject to foreign law ... although it is a consensual agreement, it is closely connected with the international Treaty which contemplated its making, and which contains the provisions defining the scope of the arbitrator's jurisdiction. Further, the protection of investors at which the whole scheme is aimed is likely to be better served if the agreement to arbitrate is subject to international law ...". In a further hearing of the actual dispute over jurisdiction, the Court of Appeal took a similar approach saying that "[t]he correct approach to the construction of a provision of a BIT is not significantly in dispute. The BIT is governed by public international law and, as a treaty, its construction is governed by the rules on treaty interpretation which are set out in the Vienna Convention of the Law of Treaties 1969. It is agreed between the parties that these rules represent customary international law and that we must apply them."  

Similarly, the Court of Appeal in Ontario, when hearing a jurisdiction challenge to a NAFTA award, considered the question of interpreting the underlying investment treaty by reference to the Vienna Convention.

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31 Occidental v Ecuador [2006] 2 W.L.R. 70, para 33
33 Mexico v Cargill Incorporated, 2011 ONCA 622, para 84
Conclusion

If an investment treaty arbitration is situated within a particular legal order, rather than being determined within the self-enclosed ICSID system, national courts may well end up reviewing any jurisdiction finding. Yet in conducting that review, they must be mindful of the fact that the arbitration agreement in question is not a standard commercial arbitration agreement. It arises out of a treaty governed by principles of public international law and reviewing national courts must take that into account as part of their process of review. That is not to say that national legal systems cannot have rules of treaty interpretation that differ from the Vienna Convention, or customary rules of treaty interpretation, but nonetheless if national courts are to follow the US approach and determine such issues exclusively by reference to domestic considerations, then this is another area that is likely to be a "hot topic" in coming years.34

3. Precedent in investment arbitration

The final "hot topic" is the issue of precedent in investment arbitration. While this is not a new topic per se for arbitration practitioners, it remains a delicate issue35 that is likely to be debated in coming years, particularly given a number of contrasting awards in 2011 and 2012 concerning the application of most favoured nation (MFN) clauses.

Precedent

The parameters of the precedent debate are relatively simple. On the one hand, most investment treaties provide that their awards should have no precedential value.36 However, on the other hand, most arbitrators and academics would agree that in practice tribunals refer to decisions of previous tribunals. In 2006, Jefferey Commission undertook a quantitative and qualitative analysis of investment treaty awards. He found that since the

34 As at 18 April 2013, BG Group has filed a petition for certiorari to the US Supreme Court which has not yet been determined and therefore there may be further developments in relation to this case.
36 Christoph Schreuer and Matthew Weiniger, *Conversations Across Cases – Is There a Doctrine of Precedent in Investment Arbitration?*, 5 January 2007 (http://www.univie.ac.at/intlaw/conv_across_90.pdf). For example, Article 53(1) of the ICSID Convention: "the Award shall be binding on the parties"; and Article 1136(1) of NAFTA: "An award... shall have no binding force except between the disputing parties and in respect of the particular case."
first ICSID decision in 1972\textsuperscript{37}, there had been a slow, but exponentially increasing practice of reference to and reliance on prior decisions, both by parties and tribunals.\textsuperscript{38}

The fact that parties and tribunals refer increasingly to earlier decisions is to be expected. More published awards are available and when faced with a particular problem, it is natural that arbitrators will want to know what others in similar situations have done.\textsuperscript{39} Nonetheless, tribunals have repeatedly pointed out that they are not bound by previous awards, whilst at the same time asserting there is no prohibition on considering and referring to such decisions. A succinct summary of this position was provided by the tribunal in \textit{AES Corp v Argentina}\textsuperscript{40}:

"Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem; but decisions on jurisdiction dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order to compare its own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solutions... precedents may also be rightly considered, at least as a matter of comparison and, if so considered by the Tribunal, of inspiration".

However, the problem with such an approach - as demonstrated by the MFN debate considered below – is that it creates the potential for contrasting awards articulating opposing results for fundamentally the same issue without any guidance as to which award or analysis is to be preferred.

\textbf{The MFN debate}

The inter-relationship between MFN clauses and dispute resolution provisions has proved a contentious topic for many years. Of course, not all MFN clauses are the same and, therefore, in some of the awards the differences in language may account for the different outcomes. Nonetheless, there is clearly a divide in the approaches certain arbitrators are taking to this issue. In summary there are two sides to the debate. On the one hand, MFN clauses should be interpreted broadly, so that MFN treatment includes not only substantive

\textsuperscript{37} Holiday Inns S.A., Occidental Petroleum Co. v Kingdom of Morocco (ICSID Case No. ARB/72/1, discontinued and settled)


\textsuperscript{40} ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, paras 30 to 31
protections such as fair and equitable treatment and freedom from expropriation, but also extends to procedural protections such as dispute resolution. Investors can then "import" arbitration provisions in other treaties that are perceived as more favourable, for example, because they do not require a period of negotiations or submitting a dispute to the local courts before commencing arbitration. A number of awards endorse this position, including *Maffezini v Spain*\(^{41}\), *Siemens v Argentina*\(^{42}\), and *RosInvest v Russia*\(^{43}\).

The opposing position is that MFN clauses relate to the substantial protections afforded to investors and, therefore, their reach should not extend to procedural issues. Procedural issues affect how the protections in the relevant BIT operate and are enforced, and that is fundamentally different from ensuring investors receive the most favourable treatment. Moreover, extending the scope of an MFN clause beyond the substantive protections offered may subvert the carefully negotiated balance of the BIT. There are also a number of awards endorsing this position, notably *Salini v Jordan*\(^{44}\) and *Plama v Bulgaria*\(^{45}\).

In 2011 and 2012, there were a number of additional MFN awards: *Impregilo v Argentina*\(^{46}\), *Hochtief v Argentina*\(^{47}\), *ICS Inspection and Control Services Ltd v Argentina*\(^{48}\), and *Daimler v Argentina*\(^{49}\). Each award related to a dispute between a foreign investor and Argentina. Two related to the MFN clause in the Argentina-Germany BIT\(^{50}\) and the other two related to the Argentina-Italy BIT\(^{51}\) and the Argentina-UK BIT\(^{52}\). In each case, notwithstanding each BIT provides an eighteen month litigation pre-requisite before an investor can commence arbitration, the investor commenced arbitration and argued that the relevant MFN clause allowed it to "import" a more favourable dispute resolution clause from another Argentina BIT without the litigation pre-requisite.

The dichotomy of views on the topic and the wider debate as to the role of precedent can be emphasised by considering these four awards alone. The majority on the *Impregilo* and *Hochtief* tribunals went one way concluding that MFN clauses can extend to dispute resolution. Yet ICS by unanimous decision and *Daimler* by majority went the other way concluding they could not. Furthermore, within these awards the strength of feeling on this

\(^{41}\) ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000
\(^{42}\) ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004
\(^{43}\) SCC Case No. V079/2005, Decision on Jurisdiction, 1 October 2007
\(^{44}\) ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004
\(^{45}\) ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005
\(^{46}\) ICSID Case No. ARB/07/17, Award, 21 June 2011
\(^{47}\) ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011
\(^{48}\) PCA Case No. 2010-9, Decision on Jurisdiction, 10 February 2012
\(^{49}\) ICSID Case No. ARB/05/1, Award, 22 August 2012
\(^{50}\) *Hochtief* and *Daimler*, *supra* notes 47 and 49
\(^{51}\) *Impregilo*, *supra* note 46
\(^{52}\) *ICS*, *supra* note 48
issue was demonstrated by strongly worded dissenting opinions, one of which described the majority stance as "unconvincing" and "profoundly wrong".53 Another included a warning from one arbitrator about the "great dangers"54 of allowing claimants to bypass a BIT's jurisdictional requirements. Indeed, in Hochtief, the tribunal noted that the inconsistencies in the previous MFN awards are such that either party is afforded the possibility of supporting its position by reference to earlier awards.55

Perhaps most importantly in a discussion about precedent, in Daimler, one arbitrator (Professor Domingo Bello Janeiro), changed his position on the question of MFN clauses. Previously, in Siemens v Argentina56, Bello Janeiro sat on a tribunal that had concluded unanimously that the relevant MFN clause could extend to dispute resolution provisions. However, in Daimler, he admitted to a "change of heart" and endorsed the majority view that MFN clauses do not extend to dispute resolution. In this regard, he noted that:

"... with regard to the practical possibility for an arbitrator on an ICSID tribunal to change, clarify or alter in any way his opinion or his position, he clearly has in principle complete freedom to do so, particularly after considering developments in the case and subsequent decisions rejecting the extension or maximum expansion of the ambit of the MFN clause to cover dispute resolution."57

The MFN debate is not the only area where there are inconsistent arbitral awards. Another example of the same arbitrator reaching different decisions on fundamentally the same issue is Professor Albert Jan van den Berg. In cases concerning the application of the same legal principle of international law (necessity) to fundamentally the same set of facts (Argentina's emergency laws in 2001), van den Berg has sat on tribunals that have both accepted the defence of necessity (LG & E v Argentina58) and rejected it (Enron v Argentina59). Indeed, Bello Janeiro referred to van den Berg when explaining his change in position on MFN clauses60. There are also inconsistent decisions (albeit not from the same arbitrators) in

53 Daimler, Dissent of Judge Brower, paras 8 and 38
54 Impregilo, Dissent of Professor Stern, para 99
55 Hochtief supra note 47, para 57
56 Supra note 42
57 Daimler, Opinion of Professor Janeiro, para 3
58 ICSID Case No. ARB/02/1, Award, 25 July 2007
59 ICSID Case No. ARB/01/3, Award, 22 May 2007
60 Daimler, Opinion of Professor Bello Janeiro, para 4
relation to the application of umbrella clauses\textsuperscript{61} and whether investors should have to observe "cooling off" periods before commencing arbitration\textsuperscript{62}.

**The future for "precedent"?**

As the above discussion highlights, there are a number of areas where tribunals are reaching inconsistent decisions. Some tribunals adopt a different solution without distancing themselves from earlier decisions. Others refer to earlier decisions and assert that they are unconvinced by the reasoning, or distinguish the facts of their problem or the wording of their treaty, such that they can justify departing from an earlier decision. The problem is particularly marked in the context of MFN clauses given the number of contrasting awards and the variety of views expressed in those awards.

However, the problem must not be overstated. In the context of MFN clauses (and, indeed, other areas where there are inconsistent decisions, such as umbrella clauses) the very existence of inconsistent decisions and the associated uncertainty regarding a particular BIT may conceivably stimulate caution and compliance (for example, if a hypothetical future claimant cannot be sure that a tribunal will allow it to circumvent an eighteen month domestic litigation pre-requisite, it may be more inclined to go to court to be safe). In addition, some states, such as the UK and the US, have sought to make the scope of the MFN protection in their treaties as clear as possible. Moreover, in the context of precedent more generally, most tribunals carefully examine earlier decisions, and where their reasoning diverges they tend to make their disagreement known. Indeed, there is also a strong argument that a \textit{de facto} system of precedent is developing in relation to other areas. Nonetheless, as the number of investment treaty awards increase, it is likely that there will be more contrasting awards, particularly in areas such as the MFN debate. Whether a \textit{de facto} system of precedent actually exists, and how to deal with contrasting and inconsistent awards, will remain another "hot topic" for many years.

**Conclusion on the "hot topics"**

All the "hot topics" identified are important. They each relate to issues that have either been created, or at the very least emphasised, by the increasing number of users, arbitrators and scholars in the investment treaty arena. They also all concern (to a certain extent at least) two of the fundamental issues for practitioners to consider, namely: (i) whether the tribunal has jurisdiction to hear such claims; and (ii) consistency.

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\textsuperscript{61} Cf. \textit{e.g.} \textit{Ethyl Corporation v Canada} (NAFTA/UNCITRAL) Decision on Jurisdiction, 24 June 1998, paras 76-88; \textit{Ronald S. Lauder v The Czech Republic} (UNCITRAL) Final Award, 3 September 2001

\textsuperscript{62} Cf. \textit{e.g.} \textit{Murphy Exploration v Ecuador} (ICSID Case No. ARB/08/4) Award on Jurisdiction, 15 December 2010; \textit{Burlington Resources v Ecuador} (ICSID Case No. ARB/08/5) Decision on Jurisdiction, 2 June 2010
Mass claims is probably the hottest of the "hot topics" at present, and while a procedure to deal with such claims is desirable, the ground-breaking Abaclat decision leaves a number of questions unanswered. Judicial supervision should become increasingly relevant and may even lead to forum shopping as states and investors look to secure procedural certainty. It is also an area that many state courts are yet to consider properly with an appreciation of the differences between commercial and investment arbitrations. The "hot topic" of precedent must not be overstated as there are a number of areas where the thinking of scholars and tribunals is relatively settled. Nonetheless, it is difficult to envisage how the MFN debate will be resolved within the current framework and it would appear that users are destined to receive inconsistent awards in this area at least for many years.

No doubt by the time of the twentieth anniversary of TDM there will be a number of new "hot topics", some of which are probably not even being contemplated by practitioners today. That is the beauty of investment arbitration and the ever internationalising world. Nonetheless, it will be interesting to see whether any of the three "hot topics" listed above have been resolved (and, if so, how), or whether they will still be on the table as issues for scholarly debate.