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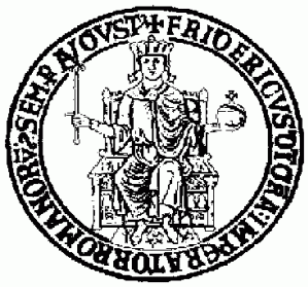

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MANAGING PARALLEL PROCEEDINGS IN INVESTMENT ARBITRATION

TUTOR

Prof. Massimo Iovane

Prof. Loukas A. Mistelis

CANDIDATO

Avv. Giovanni Zarra

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MANAGING PARALLEL PROCEEDINGS IN INTERNATIONAL INVESTMENT ARBITRATION

Doctoral thesis of G. Zarra
Supervised by Prof. M. Iovane and Prof. L. A. Mistelis

Introductory remarks, scope of the work, methodology, structure and literature review

It is commonly said that international arbitration is the most popular method of dispute resolution for international commercial disputes. This is probably even truer with regard to international disputes which involve, on the one side, private investors and, on the other side, the States where such investors made their investments (so-called international investment arbitration). It is, indeed, possible to say that investment arbitration has become the natural judge of this kind of disputes, due – first of all – to the perceived bias of the main other available form of dispute settlement, i.e. litigation in national courts of the host State, and – secondly – to the impossibility to foresee the possible outcomes of the traditional remedy provided by international law, i.e. diplomatic protection.

The huge growth of the number of investment arbitration cases is a recent phenomenon. At the beginning of its activity, the International Centre for the Settlement of Investment Disputes (ICSID), established by the 1965 Washington Convention and today the main institution administering investment arbitration proceedings, registered very few cases per year. However, the entry into force of thousands of Bilateral Investment Treaties (BITs), as well as of several investment contracts containing arbitration clauses, has lead to a rapid change of this situation. BITs always contain an offer (i.e. an advanced consent) by the State hosting the foreign investment to arbitrate future possible disputes with investors with the nationality of the other signatory State before neutral arbitral tribunals. Such arbitral tribunals will be entitled to settle disputes by usually applying the provisions of the same BITs, international law and the law of the host State. The abovementioned offer is aimed at encouraging foreign investments, by guaranteeing to investors that any dispute against the host State will not be settled by national courts, which are perceived to be biased in favour of the host State.

States' consent to arbitration is usually expressed in very broad terms. Indeed, it involves disputes arising from all kind of investment encompassed the definition of "investment" contained in the same BIT. Such a definition usually refers to "every kind of asset", including also shares and indirect interests in companies incorporated in the host State.

The expansion of investment arbitration, however, is also due to the very flexible approach that arbitrators have had in assuming jurisdiction. Indeed, tribunals have usually strictly applied the criteria for treaty interpretation set forth in the 1969 Vienna Convention on the Law of Treaties (in particular, among such criteria, tribunals have usually stressed the importance of a literal interpretation of consent expressed in BITs and of definitions of investment) and this approach has entitled them to broaden the number of disputes that potentially may be brought before investment arbitration tribunals, due to the already mentioned very wide formulation of such clauses.

This has lead to the risk of possible abuses by investors. By structuring their companies with a multinational structure, investors may take advantage of several BITs at the same time and start several parallel proceedings arising from the same facts. The same may happen if several shareholders of the same company, all of them having the right to start an investment claim, all start separate investment claims for the same damage suffered by the company. It may also happen that, being a contract between the host State and the investor in force, the investor starts both an arbitration under the arbitration clause contained in the contract and another arbitration according to the offer contained in the BIT.

In all these cases, from a formal point of view, investors are exercising their rights and are fully entitled to do so. Moreover, if one analyses parallel proceedings from the perspective of the three requirements commonly used to identify a legal dispute (namely identity of the parties, of the object and of the ground of the claim), the parallel proceedings are usually formally different, due to the lack of identity of at least one of such requirements. This means that, if the traditional rules on preclusion (such as *res judicata*) are strictly applied (and such a strict application, requiring perfect identity of all the above requirements, is currently endorsed by the majority of Authors and arbitral tribunals), there is no bar to the continuance of the second duplicative process.

However, several policy considerations militate against this outcome. Indeed, in today's international commerce, values such as coherence, finality of decisions and efficiency of the methods of dispute resolution are of extreme importance. Parallel proceedings in investment arbitration lead to never ending disputes, they undermine legal certainty with the risk of conflicting outcomes and increase time and costs for the parties of the dispute. These problems are even greater if one considers that one of the parties in investment arbitration is a State, which takes part to these proceedings by spending public resources. Furthermore, these disputes usually involve sectors of the States' economy that are essential for the public life, such as water, electricity, and telecommunications. For the above reasons, parallel proceedings constitute a waste of public money and risk to have bad effects on the quality of life of people of the State involved in the dispute.

Finally, allowing parallel proceedings would mean also undermining the same function of arbitration as a method of dispute settlement. It is strongly arguable, indeed, that arbitration fulfils its function if and when it finally settles the dispute underlying the claims of the parties. If, when proceedings terminate, the claims are settled but the dispute between the parties still exists and is pending in another arbitration, which is only formally different from the first one, it is arguable that arbitration has failed in fulfilling its function. In conclusion, the prevalence of the formalities of the process over the real substance of legal relationships may lead to a lack of trust in arbitration as a method of dispute settlement.

A solution is therefore required.

Such a solution, however, may not be found at the jurisdictional stage of arbitral proceedings. Indeed, jurisdiction in arbitration is based on the golden rule of consent and arbitrators do not have the power to decline a validly conferred jurisdiction. All solutions that have been imagined for solving the problem of parallel proceedings at the jurisdictional stage are therefore very artificial (indeed, it is very unlikely that an investor will renounce to its right to bring its separate claim).

On the contrary, a solution to the problem of parallel proceedings might be found at the admissibility stage of arbitral proceedings, i.e. the stage of proceedings where arbitrators may decide that the exercise of the validly conferred jurisdiction is not appropriate for the interest of justice. Here, by way of preliminary objections, the parties may ask to arbitrators to examine certain merit issues, which have the potential to absorb (i.e. to preclude) the discussion of the entire dispute. Such preliminary questions may be related to the existence of a previous award (or of already pending proceedings) on the same dispute.

The goal of this book is to identify the existence of certain principles of international law that may be used by arbitrators in order to justify a declaration of inadmissibility of duplicative proceedings. Such principles might be identified in the principle of good faith and the principle of finality (*ne bis in idem*). The former is the legal basis for the application of the doctrine of abuse of process, while the latter is the concept underlying the doctrines of claim preclusion (*res judicata*) and issue preclusion (collateral estoppel). The core of the analysis will therefore be aimed at understanding whether abuse of process, *res judicata* and collateral estoppel may constitute useful tools in order to prevent the issuance of two awards arising from the same dispute.

The central thesis underlying this research is that arbitral tribunals should endorse a flexible, pragmatic and substance oriented approach to the principles of abuse of process, *res judicata* and collateral estoppel in order to limit the effects of parallel proceedings, to prohibit abuses of the method of dispute settlement by investors and, finally, to safeguard the credibility of investment arbitration. Such a transactional approach, which has been several times defined as highly desirable and which has recently found some disparate applications in investment arbitration,[1] is not the product of the imagination of the author, but comes from a re-elaborated version of several theories originated in municipal systems (and sometimes already applied in international law) as adapted to the framework of international investment arbitration.

Scope of the work and delimitation

This book will assume the perspective of an arbitral tribunal dealing with an international investment dispute in the context of two or more parallel proceedings

[1] *S Grynberg, Stephen M Grynberg, Miriam Z Grynberg, and RSM Production Corporation v Grenada*, ICSID Case No ARB/10/6, Award, 10 December 2010; *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014.

and will try to understand how such a tribunal can manage the issues arising from such a situation. This research does not cover the issue of parallel proceedings between arbitral tribunals and national courts, as well as between arbitral tribunals and other international courts and tribunals. It only covers parallel proceedings between two arbitral tribunals dealing with investment disputes and the legal issues strictly related or functional to the analysis of the main topic of the research.

Methodology

The entire analysis carried out in this book is based on a main assumption, i.e. that international investment arbitration fulfils a public and substantial function. Indeed, as already stated, the author starts from the assumption that investment arbitration is not only a way to settle the claims that are brought before arbitrators, but is a way to finally settle the underlying disputes and to finally stabilize the underlying legal relationship. This approach is due, *inter alia*, to the necessity to ensure that a form of arbitration that has several public features and that decides on issues that are of vital importance for the involved States cannot be administered for the sole interest of the formal parties and by giving prevalence to the interests of the investors over the ones of the States.

The research will be, therefore, policy-oriented. The necessities to promote coherence, predictability of solutions and legal certainty, as well as to ensure finality and reduce times and costs in arbitration, will be the main drivers of the research. It is strongly arguable, indeed, that international investment arbitration has today become the natural forum for disputes on foreign investment and, therefore, it shall not only be driven by the interest of investors (possibly aimed at increasing the forums which could hear the same dispute in order to get more chances of success) but also by policy considerations developed by scholars and practitioners aimed at granting the reliability and the credibility of this method of dispute settlement. This kind of reasoning, deeply developed by Thomas Hale,[2] is an essential policy driver of this research. If, as stated by Hale,[3] institutions and methods of dispute settlement are considered reliable by operators on the basis of the policy outcome of their decisions (i.e. the degree of satisfaction of both parties involved in the dispute, which directly affects their credibility), it is essential that phenomena like parallel proceedings, which

[2] Hale, *Between Interests and Law* (2015), 9 and ss. and 51 and ss. This Author, at 11, states that "within the boundaries imposed by material interests, legal ideas and the communities of experts that promote them have often been the most proximate drivers of institutional variation", even against the market powers of market actors which have created and used an institution and/or a method of dispute settlement in order to serve their interests. All considerations *de jure condendo* made in this book are therefore aimed at a policy driven improvement of international investment arbitration aimed at granting the credibility and the reliability of this method of dispute settlement.

[3] *Id.* 52 and ss. The Author speaks about a requirement of neutrality for arbitral institutions, which shall not give prevalence to the interests of one of the categories involved in the dispute: in the case of investment arbitration, if arbitral tribunals are perceived to be biased in favor of investors, they will loose credibility from the perspective of States. Considering that States are the subjects which finally grant the existence of investment arbitration, such a loss of credibility may finally put at risk the same existence of investment arbitration as a method of dispute settlement.

– being perceived as an undue disadvantage for the interests of the State involved in the dispute – undermine the credibility (and, finally, the same existence) of the entire method of dispute resolution given by investment arbitration, are avoided or at least limited. This could be done, as it will be seen in Chapter 3 of this book, by applying already existing legal rules (such as abuse of process, *res judicata* and collateral estoppel) in a less formal way, as proposed by several scholars and, today, also by certain arbitral tribunals. This approach follows the idea that "[t]he practice of law forces actors to logically deduce a 'correct' principle from a body of text and practice, and so we should expect *logics of appropriateness to be particularly prominent*" (emphasis added).[4] This means that, among the various interpretations of the aforementioned legal principles, it is necessary to adopt the one that better safeguards the credibility of investment arbitration, by striking a balance between the various interests involved in investment disputes.

However, it is not possible to ignore some values that, in principle, may conflict with the aforementioned policy considerations. The reference goes, in particular, to the necessity to ensure party autonomy and due process, as well as to the desirability to have awards that are the most possible fair and just. For this reason, the author has tried to highlight in the text these clashes of values anytime they may realize in practice and has also tried to offer some balanced solutions to such clashes that should not undermine any of the aforementioned values. Striking this balance is essential in order to safeguard all the interests involved in investment disputes, without giving prevalence to State parties or investors.

Finally, it is worth noting that the subject of this book involves several terminological problems. Labels such as "parallel proceedings", "*lis pendens*", "*ne bis in idem*" and "*res judicata*" are often used with different meanings and, seldom, the recourse to such names is made improperly. For this reason, in order to avoid confusion, in the course of the book the meaning with which this labels are used will be always clarified.

Structure of the work

The first question that this book tries to answer – in introduction to Section 1 – is whether a dissertation on parallel proceedings in investment arbitration is actually required. In order to answer to such a question, this work starts from an analysis of the main criticisms that have been moved against investment arbitration, namely that it is a partial (pro-investor) method of dispute settlement, that it lacks of openness and accountability and that it lack of coherence, predictability and legal certainty. It will be demonstrated that all these criticisms have been remedied by operators unless the lack of coherence, predictability and legal certainty (Paragraph 0.1).[5] This lack of coherence is particularly due to the phenomenon of parallel proceedings, i.e.

[4] Hale (2015) (n. 2), 74.

[5] European Federation for Investment Law and Arbitration (EFILA), *A response to the criticism against ISDS*, 17 May 2015 (2015).

substantially identical disputes which have the potential to end with very different outcomes, which undermine the credibility of investment arbitration. The paradigm of this situation is represented by the well known *Lauder*[6] and *CME*[7] cases, where the final owner of a chain of companies and one of such companies initiated two parallel disputes against the Czech Republic, arising from the same facts, which ended with opposite judgments. However, prior to say that a solution to this situation is required, it will be also necessary to ascertain whether a certain degree of orderliness is required in investment arbitration: if one says that investment arbitration tribunals operate without taking into account the work of each other, this means that there is no need of coherence. Anyway, it is arguable that there are several systemic features in investment arbitration, which lead us to talk about a network requiring internal coherence (Paragraph 0.2). This imposes to seek for a solution to parallel proceedings.

In dealing with the problem of parallel proceedings, the research starts, in Chapter 1, with a description of the taxonomy of parallel proceedings (Paragraph 1.1) and with an analysis of the most likely reasons behind the growth of this phenomenon (Paragraph 1.2). Chapter 1, finally, deeply analyses the already mentioned policy considerations at the basis of the research (Paragraph 1.3).

The following structure of the research follows the temporal sequence of the various phases of arbitration where the problem may emerge, namely jurisdiction, admissibility and post-award.

The analysis starts – at Chapter 2 – by examining the jurisdictional stage, where, as it will be demonstrated, there are no solutions to the problem of parallel proceedings. Indeed, this phase is based on the *grundnorm* of consent and there are no available legal tools that allow arbitrators to decline jurisdiction disregarding party autonomy (Paragraph 2.1). Similarly, remedies based on a sole exercise of discretion (such as comity) are not reliable in order to find a predictable solution to the problem of parallel proceedings (Paragraph 2.2).

The research then moves to the analysis of the remedies available at the stage of admissibility. This methodologically imposes to preliminary deal with several other questions, such as the legal foundation of the distinction between jurisdiction and admissibility (Paragraph 3.1), the analysis of the inherent powers (if any) of arbitrators to safeguard the interests of justice while administering their proceedings, and the law applicable in international investment arbitration (with a particular focus on the applicability of general principles of international law) (Paragraph 3.2). We will first of all demonstrate that international law provides us with some instruments in order to avoid parallel proceedings (not including *lis pendens*, as demonstrated in Paragraph 3.3), namely the principles of good faith and finality (Paragraph 3.4). These principles respectively furnish the grounds for the doctrine of abuse of process, on the one side, and *res judicata* and collateral estoppel, on the other side. It will be then necessary to understand how and whether these tools may be applied in investment arbitration

[6] *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001.
[7] *CME v. Czech Republic*, UNCITRAL, Final Award 14 March 2003.

(Paragraphs 3.5, 3.6 and 3.7). This will require, firstly, an analysis of these doctrines in international law and, secondly, a comparative analysis of how they have been applied in different municipal systems (with a particular focus on the distinction between civil law and common law systems). It will finally emerge that such doctrines have been applied also in a flexible and substance-oriented way, which would be very helpful in order to limit parallel proceedings. This approach is, indeed, highly desirable. Chapter 3 also demonstrates how these doctrines may operate in concrete (Paragraph 3.8) and put forward a proposal of amendment of rules of international arbitration in order to limit parallel proceedings and, at the same time, ensure the respect of due process (Paragraph 3.9).

Finally, remedies available at post-award stage will be examined in Chapter 4. These remedies are different with regard to ICSID awards – being ICSID a self-contained regime – and with regard to non-ICSID awards, which shall be enforced according to the provisions of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In the former case, we will try to understand whether the remedy of annulment provided by the ICSID Convention may be useful in order to avoid the existence of two duplicative awards (Paragraph 4.1). In the latter case the only available means to preclude the enforcement of a duplicative award is the public policy exception set forth in Art. V(2)(b) of the New York Convention. The analysis of the public policy exception involves several difficulties due to the involvement of municipal laws and courts and will require an examination of the national rules of private international law regulating the problem of conflicting judgments (Paragraph 4.2). Finally, Paragraph 4.3 will try to understand whether the existence of duplicative awards may be a ground for annulment at the place of the seat of arbitration.

Literature review

The subject of parallel proceedings in investment arbitration, as of today, has not been widely discussed. There are, however, four monographs that – directly or indirectly – regard the subject, as well as some articles. Finally, the International Law Association, due to the uncertainty related to this topic, has issued certain *Recommendations on Lis Pendens and Res Judicata in International Arbitration*.[8] Such Recommendations, issued for the context of commercial arbitration, may be somehow helpful for an analysis regarding investment arbitration, provided that one keeps always into account the differences existing between these two forms of arbitration.

The starting point of a research aimed at assessing concurring jurisdiction in international law is Yuval Shany's seminal work on "*The Competing Jurisdictions of*

[8] De Ly, Sheppard, *ILA Final Report on Lis Pendens and Arbitration*, Arbitration International (2009), 3 and ss.; De Ly, Sheppard, *ILA Final Report on Res Judicata and Arbitration*, Arbitration International (2009), 35 and ss.

International Courts and Tribunals".[9] This book is very helpful in order to understand the relations and possible interactions between international courts and tribunals, as well as between international courts and tribunals and national courts. Furthermore, this book is one the first works that has proposed a flexible approach to the doctrines applicable in order to avoid parallel proceedings.

The second main source for a work on parallel proceedings in investment arbitration is Prof. McLachlan's book recalling his course held in 2009 at the Hague Academy of International Law, entitled *Lis Pendens in International Litigation*,[10] in which the application of *lis pendens* and *res judicata* in arbitration (mainly commercial) is largely debated.

Another good source, encyclopaedic in its exposition, is prof. Hober's book recalling his course held in 2013 at the Hague Academy of International Law,[11] which has discussed the subjects also from the perspective of investment arbitration, even if without being particularly innovative.

Finally, the main (and only) book directly regarding the subject is Hanno Wehland's monograph entitled *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*.[12] However, this book largely differs in its scope and goals from the present one. First of all it largely examines the issue of parallel proceedings between investment tribunals and national courts (that is not within the scope of the present book). Secondly, and mainly, it endorses a very formalistic approach to the doctrine of *res judicata* that is rejected by the present Author. Finally, it does not deal with abuse of process and collateral estoppel, which are largely discussed in the present book. In conclusion, Wehland's book, helpful for its wide analysis of the subject and for its very extensive bibliography, does not propose solutions to the problem of parallel proceedings.

Only four articles directly deal with the issue of abuse of process in investment arbitration from the perspective of parallel proceedings.[13] With regard to *res judicata* and investment arbitration, it is worth highlighting six articles[14] and one legal opinion issued in the framework of an investment case.[15] Finally, only one recent article has

[9] Cambridge University Press (2013).
[10] Publications of The Hague Academy of International Law, (2009).
[11] Hober, *Res Judicata and Lis Pendens in International Arbitration*, Recueil de courses vol. 366 103 (2013).
[12] Oxford University Press (2013).
[13] Ascensio, Chinese Journal of International Law (2014), 763 and ss.; De Brabandere, Journal of International Dispute Settlement (2012), 609 and ss.; Gaffney, Journal of World Investment and Trade (2010), 515 and ss.; Brown, Transnational Dispute Management (2011), 1 and ss.
[14] Reinisch, The Law and Practice of International Courts and Tribunals (2004), 37 and ss; Reinisch, *The Backlash against Investment Arbitration* (2010), 113; Martinez Fraga, Samra, Northwestern Journal of International Law and Business (2012), 419 and ss.; Shany, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=999021 (2007), 1 and ss.; Id., American Review of International Law (2005), 835 and ss., Dodge, Hastings International & Comparative Law Review (2000), 357 and ss.
[15] Schreuer, Reinisch, *Legal opinion in the CME v. Czech Republic case*, www.italaw.com (2002)

dealt with collateral estoppel in investment arbitration.[16] Some books and articles have dealt with the problem of parallel proceedings in general terms.[17]

Due to this scarcity of sources, it has been necessary to make recourse, first of all, to books and articles related to general international law,[18] secondly to works on international commercial arbitration[19] and, thirdly, to works related to municipal systems.[20] All these sources have been of extreme utility in order to develop new approaches and solutions for investment arbitration.

Finally, with regard to ILA's Recommendations, they are useful because they recall the current practice of national laws, as well as of international courts and tribunals, in order to offer the complete framework regarding the current status of *res judicata* in investment arbitration. However, such Recommendations are not decisive for the goals of the present book, first of all because they are mainly directed to international commercial arbitration practitioners and, secondly, because their scope

[16] Kotuby, Egerton-Vernon, ICSID Review FILJ (2015) 486 and ss.

[17] Cremades, Lew (eds.), *Parallel States and Arbitral Procedures in International Arbitration* (2005), Savarese, www.federalismi.it (2009), Cremades, Madalena, *Parallel Proceedings in International Arbitration*, 24 *Arbitration International* (2008), 507 and ss., Carver, Journal of World Investment and Trade (2004), 23 and ss., Spoorenberg, Vinuales, Law & Practice of International Courts & Tribunals (2009), 91 and ss., Hansen, Modern Law Review (2010) 523 and ss., Klein, Journal of World Investment and Trade (2004), 19 and ss., Yannaca-Small, *The Oxford Handbook of International Investment Law* (2008), 1010 and ss.

[18] For the aim of the present book the following are some very significant works: Lowe, African Journal of International & Comparative Law (1996), 38 and ss., Id., Australian Yearbook of International Law (1999), 191 and ss., Scobbie, Australian Yearbook of International Law (1999), 299 and ss., Al-Qahtani, The Law and Practice of International Courts and Tribunals (2003), 269 and ss., Bonafè, *La protezione degli interessi di Stati terzi davanti alla Corte internazionale di Giustizia* (2014), Palombino, *Gli effetti della sentenza internazionale nei giudizi interni* (2008), Oellers-Frahm, Max Panck UNYB (2001), 67 and ss., Gaja, *The Statute of the International Court of Justice* (2012), Cannizzaro, European Journal of Legal Studies www.ejls.eu (2007), Abi-Saab, New York University Journal of International Law and Politics (1999), 919 and ss., Treves, New York University Journal of International Law and Politics (1999), 809 and ss., Charney, New York University Journal of International Law and Politics (1999), 697 and ss., Dupuy, New York University Journal of International Law and Politics (1999), 791 and ss., Romano, International Law and Politics (1999), 709 and ss., Palchetti, Max Planck UNYB (2002), 139 and ss., Forlati, Rivista di diritto internazionale (2002), 99 and ss., Virzo, *Il regolamento delle controversie nel diritto del mare: rapporti tra procedimenti*, (2008), Zoppo, *La soluzione delle controversie commerciali tra Stati tra multilateralismo e regionalism* (2013), Palombino, Leiden Journal of International Law (2010), 909 and ss.

[19] See, *inter alia*, Radicati di Brozolo, ssrn.com/abstract=1842685 (2011), Gunes, Transnational Dispute Management (2015), 1 and ss., de Lotbiniére McDougall, Transnational Dispute Management (2012), 1 and ss., Brekoulakis, American Review of International Arbitration (2005), 1 and ss., Ricci, Rivista di diritto processuale (1989), 655 and ss., Hanotiau, Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions* (2006), Permanent Court of Arbitration (ed.), *Multiple Party in International Arbitration* (2009), Brekoulakis, *Third Parties in International Commercial Arbitration* (2010).

[20] See, *inter alia*, Allorio, *La cosa giudicata rispetto ai terzi* (1935), 1 and ss., Carnelutti, *Istituzioni del processo civile italiano* (1956), 79, Carnelutti, Studi di diritto processuale (1925), 443, Vestal, St. Louis University Law Journal 29 (1964-1965), Vestal, Iowa Law Rev. (1968) 1 and ss., Casad, Clermont, *Res Judicata, An Handbook on Its Theory, Doctrine and Practice* (2001), Volpino, *L'oggetto del giudicato nell'esperienza americana* (2007), Chizzini, *L'intervento adesivo* (1991), Gestri, Rivista di diritto internazionale (1999), 5 and ss., Byers, McGill Law Journal (2002), 389 and ss.

is not to offer new solutions, but only to provide the reader with the state of art regarding the applicability of the doctrine.

In conclusion, as of today, the available literature on the subject is very poor and there is a lack of solutions for the problem of parallel proceedings in investment arbitration.

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SECTION 1

The problem of parallel proceedings in international investment arbitration: the necessity for a solution beyond party autonomy

Introduction

Parallel proceedings as a crucial problem of investment arbitration

0.1 *The criticism relating to investment arbitration. A critic to the critics and the reaffirmation of arbitration as the preferred form of investment dispute settlement.*

In recent times investment arbitration has attracted severe criticisms[1] and, as a consequence, the reactions of many States against this form of dispute resolution.[2] Generally speaking, the whole mechanism has been considered non-respondent to the necessities of a form of justice that involves by definition strong features of public law adjudication, and arbitrators have been accused of pro-investors bias.[3] This introduction will make a very brief analysis of such critics and of the answers that have been found for the majority of them. The results of this analysis will lead us to understand why it is today essential to find a solution to the problem of parallel proceedings in investment arbitration. As it will be seen below, indeed, it actually appears that parallel proceedings are the only completely unanswered problem of investment arbitration. The research for a solution to parallel proceedings appears therefore essential in order to stop the critics and confer more legitimacy to such form of dispute resolution.

Starting from the assumption that investment arbitration is a form of public adjudication, investment arbitration has been subject to four main critics. In particular, according to Gus Van Harten, a dispute resolution mechanism should satisfy four main requirements: independence, openness, accountability and

[1] See Perry (2014), reporting a debate regarding the various issues concerning investment arbitration. See also Waibel, Kaushal, Chung and Balchin (2010), 1 and ss., and Campbell, Nappert, Nottage (2013), i and ss.. See also Sornarajah, Appeals Mechanism in International Investment Disputes (2008), 55 and ss., who has strictly related the legitimacy crisis of international investment law – that will be discussed in paragraph 1.5.1 below – to the expansive approach of international investment tribunals.

[2] Bolivia, Ecuador and Venezuela have withdrawn from the ICSID Convention and terminated many of their BITs. Australia has declared that it will stop including provisions setting forth investment arbitration in its investment treaties, while Indonesia has terminated some of its BITs. According to Cosmas, International Journal of Scientific and Research Publications (2013), 2 and ss., also South Africa, Zimbabwe, Liberia, Russia, Thailand, Senegal, Kyrgyzstan and Germany have shown dissatisfaction with investment arbitration.

[3] Van Harten, *Investment Treaty Arbitration and Public Law* (2007), 152 and ss. See also Cosmas, (2013), (n. 2), 1-3 who referred to inconsistent decisions, lack of transparency, lack of impartiality and independence, lack of an appeal mechanism and very high costs.

coherence.[4] In the opinion of such Author none of the mentioned requirements is currently satisfied by investment arbitration.

With regard to the first of such requirements, it is argued that arbitrators lack independence because they depend from appointing authorities and prospective claimants and therefore they act in order to appease such people. Concerning openness, Van Harten has stated that the public does not have access to information about adjudicative decision-making. Accountability is allegedly lacking because there are no appeal methods in order to render accountable the public for the interpretation of public law (i.e. international investment law). Finally the incapability of arbitrators to resolve inconsistencies arising from conflicting decisions generates the lack of coherence of investment arbitration. In conclusion, the mechanism of settlement of investment disputes should be reformed through: (i) the provision of an increased domestic scrutiny of arbitral awards;[5] (ii) the creation of a permanent international investment court.[6] Starting from Van Harten's critics, a long debate on the appropriateness of investment arbitration to solve disputes between States and investors has taken place. The last episode of this saga has been the issuance by the European Federation for Investment Law and Arbitration (EFILA) of "*A response to the criticism against ISDS*",[7] where an attempt to reply to some of such criticism has been made. As it will be seen below, such attempt may be considered successful with regard to all the critics that have been moved to investment arbitration, unless the one regarding inconsistency and incoherence of investment arbitration.

Prior to move to an analysis of the abovementioned criticisms, it is worth noting that these problems have arisen very recently. Indeed, has it has been recently noted, "a system [i.e. investment arbitration], working quietly in the background and virtually unknown to those outside this field fifteen years ago, has garnered influence, developed internal contradictions and attracted political vitriol that threatens to destroy it".[8] In the opinion of the present author, in fact, many of the criticisms directed to investment arbitration depend on the fact that certain rules of international commercial arbitration (e.g. confidentiality) have been often applied to investment disputes, disregarding the circumstance that investment arbitration presents many differences from the classical private international commercial disputes. Investment arbitration, indeed, involves the participation of a State and,

[4] Van Harten (2007) (n. 3), 152 and ss. See also D'Agostino, Virginia Law Review (2012), 203 and ss., who has talked about seven main problems of the mechanism, namely: (i) endless chain of claimants; (ii) multiple recovery; (iii) multiple venues and forum shopping; (iv) inconsistent results; (v) equally worthy non-parties recovering nothing; (vi) local investors' treatment differs from that of foreign investors; and (vii) no closure. Such categories may be easily inserted in Van Harten's broader classification. In particular points (i) to (iv) and (vii) may be involved in the lack of coherence, point (v) and (vi) may be categorized as involved in the lack of openness and accountability.

[5] Van Harten (2007) (n. 3), 175 and ss.

[6] *Id.*, 180 and ss.

[7] EFILA, *A response to the criticism against ISDS* (2015), 1 and ss.

[8] D'Agostino, (2012) (n. 4), 200.

therefore, considerations of public interest are at stake.[9] This circumstance renders inappropriate a full reliance on the rules of a system of adjudication – such as commercial arbitration – that is private and confidential by definition.[10] This problem has clearly emerged with the recent growth of the number of international investment disputes.

However, it is also true that arbitrators and academics are gradually finding answers to the problems of investment arbitration through the adaptation of existing rules to the needs and features of such form of dispute settlement. The present author shares the view of those who think that investment arbitration is still the best mechanism for the settlement of investment disputes and that the solutions to the challenges that investment arbitration is facing shall be found within the same legal framework of investment arbitration.[11] The following sub-paragraphs will be therefore aimed at demonstrating that three of the four Van Harten's critics, namely independence, openness and accountability, are ill founded in light of the recent evolution of investment arbitration. As it will be seen in the paragraph 1.4, the only true critical point of the mechanism is the lack of coherence generated by parallel proceedings. The rest of the book will be aimed at finding a solution for this issue.

0.1.1 *Independence*

Starting from the arbitrator's alleged lack of independence, Van Harten has stated that it is "the most troubling issue that arises from the use of private arbitration to resolve regulatory disputes".[12] As already said, this is allegedly due to the fact that arbitrators are appointed on a case-by-case basis; from this circumstance it should therefore derive that arbitrators are, *by definition*, pro-investors biased because they would be willing to get new appointments.

In this regard it should be first of all noted that Van Harten's statement "is not supported by any empirical evidence".[13] On the contrary, evidence shows that respondent States win the majority of investment disputes.[14] Perhaps critics of the

[9] Mistelis, Arbitration International (2005), 211. For an analysis of the differences between commercial and investment arbitration see Bockstiegel, Arbitration International (2012), 577 and ss. The Author focuses on the following elements of difference: (i) interests at stake; (ii) legal framework and applicable law; (iii) arbitrators (selection and challenge); (iv) jurisdiction; (v) case management; (vi) confidentiality and transparency; and (vii) predictability of decisions.

[10] Mistelis, (2005) (n. 9), 211.

[11] Spoorenberg, Vinuales, The Law and Practice of International Courts and Tribunals (2009), 91. Boddicker, American University International Law Review (2010), 1070. This Author, speaking about the impossibility of a global reform of investment arbitration, has focused on the necessity of adapting pre-existing rules to the features of investment arbitration.

[12] Van Harten (2007) (n. 3), 167.

[13] Meyers, works.bepress.com/Daniel_meyers/2 (2008), 17. On the matter see also Schultz, Dupont, ssrn.com/abstract=2399179 (2014), 1 and ss.

[14] EFILA (2015) (n. 7), 6 and ss. In this regard see also Franck, Harvard Journal of International Law (2009), 440, who stated that "there are reasons to be cautiously optimistic about the system of investment treaty arbitration and its relationship with development variables". The Author, at 445 and ss., has empirically demonstrated that the system is not biased against developing countries.

system are confusing the fact that Tribunals have assumed jurisdiction in the vast majority of the cases (even if such cases, as it will be seen below, may appear as abuses of investment arbitration) with a pro-investor bias. In this regard it should be noted, first of all, that "there is no causal link between a finding of jurisdiction and an arbitral tribunal ultimately being pro-investor on the merits of the case"[15] and, secondly, that (as explained in paragraph 1.2 above) the same States have generated the abovementioned pro-jurisdictional approach through very broad clauses defining investments and investors in BITs.[16]

Moreover, even if one would accept Van Harten's idea that investment arbitration Tribunals are pro-investor biased, this does not mean that another forum would be less biased. In particular, national courts (at least in several countries) are not – in the opinion of this author – better positioned in order to issue a decision that is by definition more fair and neutral than the one issued by arbitrators.[17] Indeed "the problem with most state courts is that they are not – or at least they are not perceived to be – sufficiently neutral in resolving disputes between foreign investors and host states",[18] nor "the courts of third states are… better placed to offer effective dispute settlement between investors and host states".[19] On the contrary, as we will see below, the possible recourse to national courts has been usually perceived as a barrier to the development of foreign investments. The protection of investors through BITs and investment arbitration has increased because "States realize[d] that by broadening the scope of the protection of investors and investments they increase their chances to attract FDI".[20]

Finally, and more importantly, it is worth mentioning that – while in the past, in particular in ICSID arbitration, arbitrator's independence and impartiality have been only rarely considered lacking – today the situation has totally changed.[21] Indeed, while in the past the requirement of independence set forth by Art. 14 of the ICSID Convention[22] has been interpreted as requiring an *effective manifest lack of*

[15] EFILA (2015) (n. 7), 11-12.
[16] *Id.*, 8 and ss.
[17] In this regard it should instead be considered that arbitrators have an interest in issuing a fair and neutral award considering that they have their own reputation to protect. See Meyers (2008) (n. 13), 14.
[18] Brower, Schill, Chicago Journal of International Law (2009), 479.
[19] *Ibid*.
[20] EFILA (2015), (n. 7), 8.
[21] See, inter alia, Sheppard, in *The Oxford Handbook on International Investment Law* (2008), 131 and ss., Bernasconi-Osterwalder, Johnson, Marshall (2010), 1 and ss., Giorgetti (2014), Horn, New York University Journal of Law and Business (2014), 349 and ss., Karadelis (2014).
[22] On the issue of disqualification, Article 57 of the ICSID Convention provides that "a party may propose to a commission or tribunal the disqualification of any of its members on account of any fact indicating a *manifest* lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal.' (Emphasis added).
Article 58 of ICSID Convention further provides that the decision to disqualify an arbitrator shall be taken by the other members of the tribunal, however where the disqualification proposal involves a sole arbitrator or a majority of them, or where the co-arbitrator cannot agree, the Chairman of ICSID Administrative Council should decide.

independence and impartiality,[23] now the threshold has been lowered: an *appearance of manifest lack* is considered sufficient.[24] This circumstance renders the ICSID threshold more similar to the ones set forth by the UNCITRAL Rules[25] and by the IBA Guidelines on Conflicts of Interest in International Arbitration,[26] whose threshold was lower than the one established by ICSID Tribunals.

0.1.2 *Openness*

[23] See, e.g., *Amco v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Disqualification of 24 June 1982, reported in Reisman, Craig, Park, Paulsson, International Commercial Arbitration (1997), 624-631, where it has been said that the mere feeling of "non reliability" does not suffice, *Universal Compression v. Venezuela*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators, 20 May 2011, and *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina* ICSID Case No. ARB/03/19, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, 12 May 2008.

[24] See *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuna, 13 December 2013, *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposal to Disqualify a Majority of the Tribunal, 12 November 2013, and, finally, *Caratube International Oil Company LLP & Mr Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, 20 March 2014, that has been the first ICSID case in which the disqualification of an arbitrator has been decided by the two other panellists.

[25] Under the UNCITRAL Rules, Articles 11-13 deal with the disclosure obligation and challenge of an arbitrator. Article 11 requires the arbitrator when approached for a possible appointment to disclose any circumstance likely to give rise to justifiable doubts as to his or her impartiality or independence. The obligation to disclose to the parties and the other arbitrators is a continuing one which is to last throughout the arbitration proceeding. Article 12, *inter alia*, provides that "an arbitrator may be challenged, if circumstance exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence." Further, Article 12(3) provides that an arbitrator that fails to act, or in the event of the *de jure* or *de facto* impossibility of performing his or her function, the procedure in respect to the challenge of an arbitrator contained in Article 13 shall apply. Article 13 provides for the time line within which a notice of challenge to the appointment of an arbitrator is to be made. It further provides that when this notice is made, all the parties may agree to the challenge and consequentially the arbitrator may withdraw from his or her office. It is however provided that this is not to imply acceptance of the validity of the grounds of challenge.

[26] Under the general standard regarding impartiality, independence and disclosure, the IBA General Principle stipulates that "every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until a final award has been rendered or the proceeding has otherwise finally terminated." The General Standard 2(a) provides that, "an arbitrator shall decline to accept an appointment or, if the arbitration ha[s] already commenced, refuse to continue to act as an arbitrator if he or she has any doubts as to his or her ability to be impartial or independent." General Standard 2(b) stipulates that "the same principle applies if facts or circumstance exist, or have arisen since the appointment, that from a *reasonable third person['s]* point of view having knowledge of the relevant facts, give rise to *justifiable doubts* as to the arbitrator's *impartiality or independence,* unless the parties have accepted the arbitrator in accordance with the requirement set out in General Standard (4)" (emphasis added). General Standard 2(c) explains that doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merit of the case as presented by the parties in reaching his or her decision. Further General Standard 2(d) clarifies that justifiable doubts necessarily exist as to the arbitrator's impartiality or independence if there is an identity between a party and the arbitrator; if the arbitrator is a legal representative of a legal entity that is a party in the arbitration, or if the arbitrator has a significant financial or personal interest in the matter at stake.

The second criticism that has been moved to investment arbitration is that it prohibits that the public has "access to information about adjudicative decision making" [27] and therefore it is not transparent. As a consequence investment arbitration is "immune from public scrutiny and [this causes that] matters affecting the community at large could be routinely decided in secret". [28]

This criticism does not keep into account the current strong tendency of investment arbitration towards transparency. [29] This is manifested by two main elements, namely, the publication of the awards, and the *amici curiae*'s involvement in the proceedings.

The movement towards transparency has culminated in the adoption of the 2014 UNCITRAL Rules on Transparency and the publication in 2015 of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (providing, at certain conditions, for the automatic application of the UNCITRAL Rules on Transparency).[30] According to the UNCITRAL rules the vast majority of information regarding an investment arbitration case will be publicly available and electronically stored.[31] The UNCITRAL Rules on Transparency have been already adopted, inter alia, by Art. X.33 of the negotiated text of the EU Canada Free Trade Agreement (i.e. the Comprehensive Trade and Economic Agreement (CETA)).[32]

Generally speaking, the fact that investment disputes involve States and general public interest has shifted "the emphasis from privacy and confidentiality to knowledge and accountability. Knowledge implies the use of specialist expertise in the form of amicus briefs and consequently limited confidentiality, while accountability more or less mandates the publication of awards and arbitration at even the interim stages of procedure".[33] It can be therefore shared the opinion of who has stated that, notwithstanding the fact that "the ICSID Convention and most BITs say little or nothing on whether the proceedings and awards shall be treated as confidential… in practice, today, little confidentiality is left in investment arbitration". [34] This is considered to be "the most striking difference between commercial and investment arbitration".[35]

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[27] Van Harten (2007) (n. 3), 159.

[28] *Ibid.*, 161.

[29] See EFILA (2015) (n. 7), 14 and ss. In this regard it is also worth to mention the International Law Institute, Tokyo Session, Resolution of 13 September 2013, article 6 of which recognizes the importance of transparency and *amici curiae* in investment arbitration.

[30] Opened for signature in Port Louis, Mauritius, on 17 March 2015, and thereafter at United Nations Headquarters in New York by any *(a)* State; or *(b)* regional economic integration organization that is constituted by States and is a contracting party to an investment treaty. At the present date the Convention has 16 signatory States.

[31] See Wilkie, kluwerarbitrationblog.com (2013).

[32] Available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

[33] Mistelis (2005) (n. 9), 211.

[34] Bockstiegel (2012) (n. 9), 586.

[35] *Ibid.*, 587. In this regard it should be mentioned Article 29 of the US Model BIT which impose that all memorials, minutes, orders, hearings and awards of the tribunal shall be open to the public. This practice is quite developed in NAFTA and CAFTA countries. See EFILA (2015) (n. 7), 14-15. With regard

In parallel to the fact that today the vast majority of investment awards are public,[36] it shall be mentioned that today many "voluntary third parties seek to participate in a specific investment arbitration dispute in order to provide a neutral and a well supported opinion regarding an issue of public concern".[37] Such third parties, usually NGOs, are known as *amici curiae*.[38] The involvement of *amici* in investment arbitration – and in particular in disputes regarding common goods – has "supported the development of transparency in investment arbitration, by enabling issues concerning general public interest to be considered within the arbitral process".[39]

In conclusion it can be said that the recent evolution of investment arbitration can be considered as a *de facto* reply to criticism related to the openness of such form of dispute resolution.[40]

0.1.3 *Accountability*

With regard to this requirement, it is argued that investment arbitration does not allow a party to appeal an award for matters regarding legal interpretation and it is therefore not accountable to the public.[41]

Concerning this aspect, the EFILA response limits itself to saying that "investment treaty arbitration contains a number of different control mechanisms to ensure accountability".[42] The present author shares such view; it is however worth to give a brief explanation of the reasons for which accountability shall not be considered a problem in investment arbitration.

First of all, as it has been noted, all ICSID arbitrations are subject to the self contained mechanism of review given by articles 50 and followings of the 1965 Washington Convention,[43] while *ad hoc* arbitrations are still subject to challenges at the courts of the seat and to the provision of article V of the 1958 New York Convention, concerning the refusal to enforce an international arbitration award.

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to the issue of confidentiality, see *Bywater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006.

[36] See Mistelis (2005) (n. 9), 218, EFILA (2015) (n. 7), 16.

[37] EFILA (2015) (n. 7), 15.

[38] See Mistelis (2005) (n. 9), 220 and ss., Bastin, Cambridge Journal of International and Comparative Law (2012), 208 and ss., Fach Gomez, Fordham International Law Journal (2012), 510 and ss. As arbitral awards regarding the *amicus curiae* figure, see *Bywater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5, 2 February 2007, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina* ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, 19 May 2005.

[39] EFILA (2015) (n. 7), 16.

[40] For an opinion against transparency in arbitration see Sabater, Berkeley Journal Int'l L. Publicist (2010), 47 and ss.

[41] Van Harten (2007) (n. 3), 154. Problems related to the control mechanism in the ICSID system have been analysed by Reisman, Duke Law Journal (1990), 740 and ss.

[42] EFILA (2015) (n. 7), 14.

[43] See Meyers (2008) (n. 13), 14.

Secondly, "the potential for errors of law is, to a certain degree, minimized by the special concern that arbitrators in the ITA system – as opposed to tenured judges – have their own reputation"[44] to be protected.

Finally, and most importantly, those who criticize the lack of accountability of investment arbitration seem to forget that – when the parties choose to refer to arbitration in general and to investment arbitration in particular – they are opting for a one-stop adjudication. In transnational commerce (and, therefore, also in investment disputes) parties are commercial people, wanting only one means of dispute resolution.[45] When referring to arbitration, parties are looking for a neutral, effective and extremely qualified means of dispute resolution, without having regard to the future involvement of national courts and to the possibility of rendering the public accountable of the dispute (that is anyway ensured by the growing transparency in investment arbitration analysed in paragraph 1.3.2 above). This is, in effect, what investment arbitration grants to the parties.

0.2 *Systemic features in investment arbitration: a network needing internal coherence*

The fourth criticism that is moved to investment arbitration is most strictly related to the issue of parallel proceedings. It is indeed argued that investment law and arbitration lack internal coherence and consistency, i.e. the "capability of an adjudicative system to resolve inconsistencies that arise from different decisions, and to ensure that the law is interpreted in a uniform and relatively predictable manner to allow those affected by the rules to plan their conduct".[46]

In the opinion of the present author, prior to talk about a lack of coherence and consistency, one should ascertain whether, in investment arbitration, a certain degree of orderliness is required and therefore if coherence and consistency shall be ensured. In fact, if it is ascertained that systemic features - even if at an embryonic status - are lacking, investment arbitration tribunals will appear (and, actually, shall be considered) only as unrelated entities which move in different directions without caring of each other and not needing any sort of interaction. It will be therefore useless to search for ways for ensuring consistency between arbitral awards by means of an effective management of parallel proceedings in investment arbitration.

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[44] *Ibid*.

[45] In this regard see *Sulamerica CIA Nacional de Seguros SA v. Enessa Engenharia SA*, I Lloyd's Rep 275 (2012). See also *Fiona Trust v. Privalov*, UKHL 40 (2007), where it has been said that there exist a presumption in favour of a one-stop arbitration. The House of Lords excluded the possibility that a commercial party would create a system involving various steps for the same dispute.

[46] Van Harten (2007) (n. 3), 164. The same Author, at 165, has explained that this problem is not limited to investment treaty arbitration, but regards international law in general. According to its critic "at the international level, the challenge of coherence confronts all treaty-based adjudication", because there is no hierarchical structure and therefore in international investment arbitration a point of synthesis is lacking.

As a preliminary remark, it shall be noted that there is no agreement even on the definition of a legal system.[47] It is therefore possible that investment arbitration might be considered as a system according to certain definitions but not according to other definitions. In light of this consideration (and of the circumstance that the present book is not a study on legal theory), we will not give here an answer on the question whether international investment arbitration is a system. The present paragraph will only try to ascertain the existence of systemic features in investment arbitration, in order to determine – if such features will be found – whether a certain degree of coherence and consistency between investment arbitration awards is required and therefore if a solution to the problem of parallel proceedings is necessary.

For reasons of simplicity we will adopt as a parameter only one definition for the word "system", which seems to be broad enough to constitute a point of reference for the present research. According to Yuval Shany, "a system can be defined as a purposeful arrangement or constellation of inter-related elements or components, which cannot accurately be described and understood in isolation from one another".[48] In this regard, it shall be highlighted that the word "system" is very often used improperly with regard to international investment law: rather than using it with the meaning indicated above, several Authors talk about "the investment arbitration system" or the "ISDS system" just referring to this kind of dispute resolution, regardless of an analysis of whether actually there are systemic features in international investment law and arbitration. The common referral the word "system" that many Authors make, therefore, is not an indication of the existence of a system in its proper meaning.

Several scholars have tried to understand if investment arbitration may be qualified as a system.[49] Some Authors have expressed the opinion that international investment law is a system,[50] others have declared that it is a sub-system of international law,[51] and others have stated that there is no system at all.[52]

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[47] Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003), 87 and ss., has examined the theories of several very authoritative scholars, such as Hart, Kelsen, Raz, Romano and Abi-Saab. The reference goes to Hart, *The Concept of Law* (1994), Kelsen, *Introduction to the Problem of Legal Theory* (1934), Raz, *A Concept of a Legal System*, Romano, *L'ordinamento giuridico* (1917), Abi-Saab, *Recueil des Cours* (1996).

[48] *Ibid.*, 87.

[49] The question has arisen also with regard to international law. In this regard see Shany (2003) (n. 47), 87 and ss., who has concluded for the orderliness of international law notwithstanding the fragmentation of the judiciary, and Abi Saab, New York University Journal of International Law and Politics (2009) 921 and 924. This Author argues that "we do not seem to have a 'judicial system', properly so-called in international law" but that "it is true that occasionally some vague lineaments of a structure become perceptible". See also T. Franck, The American Journal of International Law (1988), 705 and ss., Kumm, European Journal of International Law (2004), 907 and ss.

[50] Schill, Virginia Journal of International Law (2011), 94, stated that "there are several factors suggesting that international investment treaties are not bilateral treaties in the sense of quid pro quo bargains between two countries, but rather form part of a treaty-overarching system of investment protection – in other words, a framework that is multilateral in nature even though it has taken the form of bilateral treaties". The same Author, in the Inaugural Conference of the Society of International

The starting point for the discussion is the fact that arbitral tribunal are constituted on an *ad hoc* basis. If this is true, as a matter of principle, their task should be only to resolve the dispute at hand, without caring about the decisions of other Tribunals, even though on the same matter.[53] This explains why an authoritative scholar said that "in international law, every tribunal is a self-contained system (unless otherwise provided). Consequently there are no general rules by which to sort questions of coordination and conflict. Theses questions are to be solved within each 'self contained system' – in other words, within the context of the international court or tribunal in which the case has been brought".[54] The circumstance that every tribunal is constituted *ad hoc* is therefore the first argument against the existence of a system.[55]

The second argument against the possible existence of a system is the fact that international investments are today regulated by a "chaotic and unsystematic aggregate"[56] of Bilateral Investment Treaties. "Rather than constituting a consistent

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Economic Law (2008), 3, has talked about a "truly multilateral system" and, in *The Multilateralization of International Investment Law* (2009), 278, of an "autopoietic, self referential and normatively closed system of law, that overarches the myriad of bilateral investment treaty relations, unites them under common principles governing international investment relations and contributes to providing a legal framework for the functioning of the global economic system". See also Salacuse, in Making Transnational Law Work in the Global Economy (2010), 430, who has talked about a "regime". Finally, see Alvarez, Recueil des Cours (2009), 193-544 and Hansen, Modern Law Review (2010), 526-527. It is worth noting that McLachlan, *Lis Pendens in International Litigation* (2009), 75, has gone even further, stating "it is probably no longer an exaggeration to say that international *commercial* arbitration has become its own legal system" (emphasis added). This position seems to be unacceptable, due to the lack of any systemic feature in commercial arbitration.

[51] Savarese, *La nozione di giurisdizione nel sistema ICSID* (2012), 233, Di Benedetto, *International Investment Law and the Environment* (2013), 22 and ss. seems to espouse this second theory. This last author, at 43, criticizes Schill's position saying that "the thesis claiming that investment rules have already been harmonized and multilateralized would appear to be somewhat premature (…) [and] would risk fostering a view of this subsystem of law as being detached from international law as a whole, and would thus ultimately lead to characterizing international investment law and arbitration as a self-contained regime". Finally, at 42, Di Benedetto says that Schill "underlined the fact that investment tribunals have frequently referred to past decisions and awards, each of them usually applying different IIAs, but disregards their equally important tendency to refer to the case law of non-investment tribunals and courts. On this last subject see Pellet, ICSID Review FILJ (2013), 223 and ss.

[52] Vadi, Manchester Journal of International Economic Law (2011), 24.

[53] Di Benedetto (2013) (n. 51), 22-23, talks about a "patchwork" of "a multiplicity of autonomous legal instruments and, by the same token, the settlement of investment disputes by independent investment tribunals". For this reason "rules or principles belonging to different regimes may apply to the same matter in a potentially conflicting way".

[54] Treves, New York University Journal of International Law and Politics (1999), 809.

[55] Savarese (2012) (n. 51), 232. Shany (2003) (n. 47), 86, In this regard has stated that "it is possible to imagine a body of norms which constitutes a coherent legal system but is being applied by judicial bodies that do not form a meaningful judicial system. Hence, the existence of a halfway model, whereby judicial bodies are only loosely related to each other, mainly through their reference to a common normative system, must also be explored". In this regard, note that McLachlan, Lis Pendens in International Litigation (2010), 254, has stated that "in public international law it is possible to take as a point of departure the proposition that, however disparate may the jurisdictions of particular courts and tribunals, they all ultimately owe their origin to a single legal system. They are creatures of treaty. Treaties only gain their force by virtue of the existence of a general legal system".

[56] Schill, www.ssrn.com/link/SIEL-Inaugural-Conference.html (2008), 2.

and coherent system of law, one would [therefore] expect an extreme divergence and fragmentation in this area of international cooperation".[57]

However, even if the above arguments are well founded and reflect part of the reality with regard to the lack of orderliness in investment law and arbitration, it is also true that there are other characteristics of this area of international law, which can be properly seen as systemic features. The reference goes, in particular, to: (i) the strict correlation (that may be often equalized to a complete overlap) existing between the standards contained in almost all existing BITs; and (ii) the so-called "taking into account approach" with regard to the issue of precedent in investment arbitration.

With regard to the first aspect, it is worth mentioning that "these treaties [i.e. BITs] contain a wide variety of often broadly worded, cross-referencing provisions – making for a 'spaghetti bowl' of investment agreements imposing overlapping obligations from which it is difficult to distil clear-cut rules for application in individual cases".[58] In fact, "what one can observe is a convergence, not a divergence in structure, scope and content of existing investment treaties. Unlike genuinely bilateral treaties, BITs do not stand isolated in governing the relation between two States: they rather develop *multiple overlaps and structural interconnections* that create a *relatively uniform* and treaty-overarching regime for international investments" (emphasis added).[59] It is in fact true that some BIT provisions and standards of protection, such as the fair and equitable treatment, the most favoured nation, the full protection and security and the arbitration clause are present in almost all BITs and they cannot be seen in isolation from each other. Moreover, the wording of such clauses is usually very simple and broad, so that the real content of the various standards has been determined by the case law and the interpretation by arbitral tribunals. It is therefore worth sharing the opinion of who has stated that "investment treaties are a '*network*' of inter-related provisions, notwithstanding the formal autonomy of each treaty with respect to the other treaties. Such inter-relation is realized through two phenomena. On one side investment treaties are based on a structure and on clauses, which are repeated in all treaties with very similar, if not identical, modalities. On the other side, by means of the most favoured nation clause, several structural and not occasional recalls operate between the various treaties, so that investors may rely on uniform standards of protection" (emphasis added).[60]

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[57] *Ibid*.

[58] Bekker, Harvard Journal of International Law Online (2013), 5.

[59] Schill (2008) (n. 56), 3.

[60] Savarese (2012) (n. 51), 26. The concept of network has been used also by Franck, Fordham Law Review (2005), 1523 and 1546, by Salacuse, in Appeals Mechanism in International Investment Disputes (2008), 7 and – with particular emphasis – by Geiger, *Appeals Mechanism in International Investment Disputes* (2008), 18 and ss. This Author has demonstrated that there is a certain degree of convergence in investment protection provisions and that "investment treaties provide a strong signal that investors can rely on the existence of international law obligations. On the meaning of the most favoured nation clause see Faya-Rodriguez, Joubin-Bret, UNCTAD Series on Issues in International Investment Agreements II (2010), 1 and ss., Parker, The Arbitration Brief (2012), 30 and ss., Houde, OECD Papers on

Regarding the existence of a system of precedent in international investment arbitration, it is worth noting that this is one of the recently most debated issues regarding this form of dispute settlement. In order to discuss about precedent in arbitration it is worth making a preliminary reference to the recourse to precedent in national law systems. Usually the referral to "precedent" is intended as a referral to the common law doctrine of *stare decisis*, i.e. "the obligation to follow prior decisions even those the judge disagrees with".[61] Civil law countries, on the contrary, historically have not had a strong doctrine of precedent and have mainly focused on the concept of "jurisprudence constante". According to this theory, the starting point for a judge in making a decision shall be the codified law; "secondarily, but not insignificantly, tribunals would next turn to the decisions of other tribunals considering identical or similar treaty language".[62] Hence, in common law jurisdictions precedents should have binding force, while in civil law countries they should have only a persuasive authority. In this regard it should be noted that we are currently assisting to a progressive convergence of the common and civil law systems.[63] As it has been noted "common law countries renounced to a very rigid idea of precedent, while, symmetrically, civil law jurisdictions have developed a less reductive idea of it".[64] What is therefore emerging from an analysis of national law systems is a duty for judges to consider precedents, known as "taking into account approach".

Furthermore, two other clarifications are required. First of all, when we talk about precedent in investment arbitration we refer to horizontal *stare decisis*. This means that we are not considering a hierarchical relationship between international courts and tribunals and the consequent duty to follow the decisions of the hierarchically higher one, but only a horizontal relationship in which courts and tribunals follow the *ratio decidendi* of each other due to the similarity of the issues at hand.[65] Furthermore, we are not referring to a form of *de jure stare decisis* (i.e.

International Investment (2004), 1 and ss., Fietta, International Arbitration Law Review (2005), 131 and ss. MFN treatment in IIAs is meant to ensure an equality of competitive conditions between foreign investors of different nationalities seeking to set up an investment or operating that investment in a host country. The presence of such a clause in a BIT ensures that the host State will guarantee to the nationals of the other contracting State the best treatment that it assures to foreign investors according to other investment treaties.

[61] Zekos, Journal of World Investment and Trade (2009), 482; this Author carries out an historical analysis of the doctrine of precedent. In this regard see also de Prada Rodriguez, Munoz Rojo, *El proceso civil inglés* (2014), 5 and ss., Taruffo, *Precedente e giurisprudenza* (2007), 1 and ss. The definition comes from the Latin "stare decisis et non quieta movere", meaning "to stand by and adhere to decisions and not disturb what is settled". See Vadi, Transnational Dispute Management (2008), 2.

[62] Bjorklund, Transnational Dispute Management (2010), 272.

[63] Palombino, *Gli effetti della sentenza internazionale nei giudizi interni* (2008), 3-4. See also Taruffo, Revista da Faculdade de Direito da UFPR (2001), 27 and ss.

[64] Palombino, *Il trattamento giusto ed equo degli investmenti stranieri* (2012), 175 and ss. The Author makes reference to a Practice Statement issued by the House of Lords in 1966, (1966) 1 W.L.R. 1234 (Eng), according to which a rigid adherence to precedents may lead to injustice. Therefore precedents shall be always considered but may be disregarded when concrete needs so require. With regard to civil law countries, a reference shall be made to art. 477, par. 3, of the Spanish Ley de Enjuiciamento Civil (2000) and to art. 65 of the Italian Law on judicial organization (Regio Decreto n. 12 of 1941).

[65] See Haynes, Journal of International Dispute Settlement (2014), 501.

mandated by law) but to a *de facto* form of it. This means that courts and tribunals take into account each other's decision due to "a complex mix of quasi-legal factors – that include the habit - or customary practice - of the adjudicator, the expectations of the parties involved in the dispute, the need for efficiency in dispute resolution – i.e. avoidance of 'reinventing the wheel' – an overall sense of fairness embodied in the principle that like cases should be treated alike, and the widespread opinion of legal and non-legal scholars and practitioners".[66]

Several international courts and tribunals have followed a horizontal, *de facto*, taking into account approach.[67] In this regard it is worth mentioning the ICJ's decision in the *Cameroon v. Nigeria* case,[68] where it has been said that – even if according to article 59 of the ICJ Statute the effects of an award should regard only the parties in the dispute – any change of approach of the Court with regard to similar questions shall be adequately motivated.[69]

Given the above, it is now time to understand what has been the approach of international investment tribunals and scholars with regard to the issue of precedent. In this regard it is worth noting that – as a preliminary (and general) remark – two common statements are commonly made by scholars with regard to arbitral precedent:[70] (i) in investment arbitration, arbitrators are (at least in principle) not bound by any system of precedent; but (ii) a *de facto*, horizontal and very powerful system of precedent "constrains arbitrators to account for prior published awards and to stabilize international investment law".[71] This phenomenon is particularly related to the very strong doctrinal tendency to call for the application of precedents in international investment law.[72]

From the perspective of arbitral tribunals, the main reason for applying precedents has been described as the "natural desire of any court to maintain consistency in the application of law".[73] Precedent has therefore been considered as

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[66] Bhala, American University International Law Review (1998), 938-939. See also Haynes (2014) (n. 65), 502.

[67] The problem of precedent in international law has been dealt with by Miller, Leiden Journal of International Law (2002), 489 and ss. The Author, at 498, has concluded that "it should be clear… that international tribunals do interact with one another, if not at the robust level found in domestic legal systems. Each of the tribunals under consideration has referred to the jurisprudence of another". In this regard Cassese, Diritto Internazionale (2006), 277, has noted that "due to the rudimental character of international law, to the lack of a central normative authority and of a judicial institution having final and binding jurisdiction, awards issued by the most authoritative international tribunals (in particular the ICJ) will have a crucial importance in the evaluation of the existence of customary rules, in the limitation of their scope of application or applicability and in the development of new doctrines".

[68] See Preliminary Decision of 11 June 1998, par. 28.

[69] Palombino (2012) (n. 64), 184-187, has demonstrated that such an approach has been taken also by the European Court of Human Rights and by the Court of Justice of the European Union.

[70] For a contrary opinion see Brower, Ottolenghi, in International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer (2009), 851 and ss.

[71] Cheng, Transnational Dispute Management (2008), 1016.

[72] See, in particular, Kaufmann-Kohler, Arbitration International (2007), 357 and ss.

[73] Brierly, in *The Basis of Obligation in International Law* (1958) 29.

the "essence of the orderly administration of justice".[74] Andres Rigo Sureda has identified other four reasons for applying precedents: (i) the parties' expectations to be treated in accordance with the principle of equality before the law; (ii) precedents are repository of legal experience; (iii) to follow precedent is a way to avoid the appearance of any excess of judicial discretion; and (iv) judges are reluctant to admit that they were wrong.[75] Many other Authors have described the recourse to precedent as a social practice, due to the fact that in the very small community of investment arbitrators it is common to keep into consideration the other arbitrators' decisions.[76]

Hence, from a practical perspective, arbitrators have usually: (1) identified prior relevant decisions; (2) compared the aggregate costs of departure from prior decisions with the aggregate consequences of following prior decisions, taking into account whether the policies underlying those prior decisions remain relevant under contemporary conditions; (3) decided which prior decisions to follow or depart from; and (4) articulated reasons for their decision.[77]

Given the above, on the basis of their approach to precedent, arbitral awards have been classified[78] in four categories: (a) arbitral awards which have considered precedents as persuasive authority;[79] (b) arbitral awards which have operated a distinguishing from precedents;[80] (c) arbitral awards which have considered precedents as a supplementary means of interpretation according to article 32 of the 1969 Vienna Convention on the Law of Treaties;[81] and (d) arbitral awards which have considered that to follow precedents is a duty due to the necessity to ensure the harmonious development of international investment law.[82]

In light of what has been said, in the opinion of the present author, the heterogeneity of arbitral decisions shows that the most correct analysis with regard to the existence of a doctrine of precedent in investment arbitration is the one that summarizes all the above approaches on the basis of the abovementioned "taking

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[74] Lauterpacht, *The Development of International Law by the International Court* (1958, reprinted 2010), 14.

[75] Rigo Sureda, in International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer (2009), 832-833. Purcell, California Law Review (1997), 869 has talked about a public function of precedents: "a correct judgment should logically influence the behaviour of future litigants and guide the decisions of future courts".

[76] See Hirsch, The Hebrew University of Jerusalem Research Paper No. 13-13 (2013), 20 and ss., Weidemaier, William and Mary Law Review (2010), 1900.

[77] Cheng (2008) (n 71), 1031.

[78] Rigo Sureda (2009) (n. 75), 836.

[79] *Liberian Eastern Timber Corporation (LETCO) v. The Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986.

[80] *RosInvest Co UK Ltd v. The Russian Federation*, SCC Case No. Arb. V079/2005, Award on Jurisdiction, October 2007, para. 37.

[81] *Canadian Cattlemen for Fair Trade v. United States*, NAFTA, Award on Jurisdiction, 28 January 2008, para. 50.

[82] See *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction, 21 March 2007, para. 57, and *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012.

into account approach".[83] This means that arbitrators cannot decide a case just ignoring the previous awards that have analysed similar or connected issues.[84] This has been perfectly demonstrated by the empirical analysis carried out by Commission, according to whom the vast majority of arbitral awards take into account previous decisions.[85]

Given the above, it is possible to conclude that, *as a matter of fact,* when analysing the current framework of international investment law and arbitration, we are in front of: (1) a network of interrelated BITs; and (2) a network of tribunals, "which act *as if they are part of a single system of dispute resolution*" (emphasis added).[86] In this regard, Joost Pauwelyn has talked about investment law and arbitration as a "complex adaptive system", i.e. "a system in which large networks of components with no central control and simple rules of operation give rise to complex collective behaviour, sophisticated information processing, and adaptation via learning or evolution".[87] As a consequence, according to Pauwelyn, foreign investment law has a "minimum structure of continuity (free enough to change, but stable enough to stay recognizable), [and] it distinguishes itself from purely chaotic systems… which are too

[83] Palombino (2012) (n. 64), 187 and ss. The Author refers, in particular, to the cases *El Paso Energy International Co. V. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, *BP American Production Co. et al. V. Argentina*, ICSID Case No. ARB/04/8, Decision on Jurisdiction, 27 July 2006, *Pan America Energy LLC and BP Argentina Exploration Co. v. Argentina*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006. Similarly, Brown, Transnational Dispute Management (2008), 3, has talked about a "cross fertilization" between investment arbitral tribunal.

[84] Schill (2008) (n. 56), 21, stated that "precedent has become both quantitatively as well as qualitatively the premier determinant for the outcome of investor-State disputes. Even though arbitral precedent is considered to be non-binding, it has a considerable *de facto* force to the extent that divergences in investment jurisprudence become rather rare. Notably, even in cases of conflicting decisions, tribunals employ various strategies to uphold consistency in investment treaty arbitration".

[85] Commission, Journal of International Arbitration (2007), 129 and ss. As a confirmation of the above, we will see that only in the (see Chapter 1 footnote 198) *National Gas* award, the tribunal has taken into account other 17 arbitral awards. See also Castro de Figuereido, www.kluwerarbitrationblog.com (2014). With a more general perspective, Conforti, Rivista giuridica degli studenti dell'Università di Macerata (2010), 24, stated that, with the sake of understand the content and meaning of international rules, it is essential to start from the activity done (and interpretation given) by international courts and tribunals (and in particular of the ICJ).

[86] Palombino (2012) (n. 64), 195. See also Kurtz (2013), 1, who has talked about a "diffuse and heterogeneous network". In this regard, note that – talking about general international law – Bjorklund, Nappert (2011), 7, have exposed their idea of a "inter nuclei communication", "whereby international tribunals look to each other's decisions, in appropriate cases, for influence and guidance in areas of international law involving similar concepts". This is a "wilful awareness by tribunals in one sphere of international law of what goes on in other related spheres, and an exercise of canvassing the views expressed by other tribunals in these related spheres for guidance to inform, or test, one's own analysis. This is especially important for those areas of international law which, like investment law, have not fully matured". This is also confirmed by Di Benedetto (2013) (n. 51), 127, who stated that "proof of the significant coherence of IIL [i.e. international investment law], despite the fact that its multiple sources are independent of each other, is given by the circular process existing between the interpretations of authors or tribunals and the drafting techniques set out by investment treaties". Dupuy, New York University Journal of International Law and Politics (1999), 796, has strongly criticized the existence of sub-systems in international law.

[87] Pauwelyn, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2271869 (2014), 20.

volatile and random to survive".[88] In the opinion of the present author, however, such systemic features cannot exist autonomously but have always to be collocated within the bigger framework of international law. This is testified both by the fact that certain substantive rules of international investment law originated in public international law and by the fact that international investment tribunals usually make reference to public international law rules (e.g. the Vienna Convention on the Law of Treaties) and to the case law of public international law courts and tribunals.[89]

If the above is true, coherence, consistency and finality are values that cannot be ignored in a framework such as the one that has been just described.[90] It is an oxymoron, in fact, to talk about a *network* of treaties and tribunals, which, respectively, are interpreted and operate *disregarding* each other. This circumstance, therefore, imposes to find a solution to the problem of parallel proceedings.

In this regard it is worth noting that, as of today, the issues of coherence, consistency, and finality of awards have been often dealt with in an unsatisfactory and superficial way. Authors have acknowledged the problem but have rarely given answers to it. As an example, it is worth noting that the EFILA, in its 2015 "Response to critics against ISDS", has stated that inconsistency is a "natural consequence of the system".[91] It is therefore true that "the lack of coherence within the ITA system likely has become the ground upon which the system is most frequently criticized by scholars and commentators".[92]

This book will therefore try to give an answer to this problem, focusing in particular on the existing structure of BITs and *ad hoc* investment tribunals, which – in the opinion of the present author – still offer some tools to be used in order to face the issue of parallel proceedings and the consequent lack of coherence and consistency within investment law and arbitration.

Chapter 1 will be aimed at providing the readers with the taxonomy of parallel proceedings in investment arbitration and at analysing the policy considerations at

[88] Id., 10 (footnotes omitted).

[89] Our opinion, in this regard, is similar to the one expressed by Di Benedetto (2013) (n. 51), 42-43. It is therefore possible to refer to a legal definition of "self-contained regime" within the framework of public international law given by the International Law Commission (Fifty-eight session), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006, according to which "this legal notion may concern entire fields of international law (such as human rights law, trade law, etc.) and implies that "rules of general international law are assumed to be modified or even excluded in the administration (interpretation and application of rules) of these fields". However, as noted by Di Benedetto, the fact that international investment law may be considered as a sub-system of general international law does not mean that international investment law cannot derogate to public international law, due to the fact that international investment law is to be considered as a *lex specialis* within the general framework of public international law. With regard to the possible orderliness of public international law see Shany (2003) (n. 47), 77 and ss.

[90] In this regard see also Alvarez, *Appeals Mechanism in International Investment Disputes* (2008), 32, who has based the legitimacy of international investment law on the coherency of its rules.

[91] EFILA (2015) (n. 7), 12 and ss.

[92] Meyers (2008) (n. 13), 15.

the basis of the need of consistency, coherence and finality in the in the network of international investment law and arbitration.

Chapter 1

International investment arbitration and the need for coherence

This Chapter will introduce the topic of parallel proceedings in investment arbitration. First of all it will give a definition of the problem and it will provide the reader with an analysis of the taxonomy of multiple proceedings (Paragraph 1.1) and a search for the historical reasons behind the emergence of the problem (Paragraph 1.2). It will be demonstrated that – as investment arbitration is today configured – it is quite inevitable to have (at least the risk of) parallel/multiple proceedings related to the same claim. Secondly, and mainly, the Chapter is aimed at demonstrating why parallel proceedings shall be avoided. Policy considerations and issues related to the emergence of parallel proceedings will be therefore deeply analysed.

In this Chapter the author will try to demonstrate that the issue of parallel proceedings has not only procedural implications. Indeed this problem involves, on the one hand, systemic issues and, on the other hand, substantive implications on the rights of the parties involved in the dispute from which parallel proceedings arise. Therefore, there are several policy considerations (which will be analysed in Paragraph 1.3) that lead us to search for a solution to the issue at stake: such considerations pertain to procedural and substantive aspects.

Procedural aspects mainly regard efficiency in arbitration and the need to save costs and time in order to let investment arbitration maintain its key advantages.

Concerning the substantive implications of parallel proceedings, it will be demonstrated that the existence of several claims in relation to the same dispute (with the related risk of conflicting outcomes) will undermine the essential elements of a legal relationship between two parties and destroy the principle of legal certainty.

Finally, after having explained (in Paragraph 1.4) the main objective of this book (i.e. to provide a general remedy to the problem of parallel proceedings in investment arbitration) it will be explained what are the proposed tools to move forward from the impasse generated by parallel proceedings. We will finally provide the plan of the rest of the work.

1.1 The taxonomy of multiple claims and their inevitability of parallel proceedings

Parallel proceedings in international arbitration have been defined as "proceedings pending before [a domestic court or] another arbitral tribunal in which the parties and one or more of the issues are the same or *substantially* the same as the ones before the arbitral tribunal in the current arbitration" (emphasis added).[1]

This definition, which looks at parallel proceedings from a substantive perspective, considers as *parallel* the proceedings in which:

[1] Erk-Kubat, *Parallel Proceedings in International Arbitration: A Comparative European Perspective* (2014), 15.

1) the *purpose* of the claims is the same;
2) the *facts* on which the claims are based are the same;
3) the parties in the two proceedings represent the same *interest*, even if they are not formally identical.

In the present study, we will refer to *parallel* proceedings also in case of proceedings that are not concurrently pending, even though they substantially involve the same purpose, facts and interests between the same parties. In regard to this last category of proceedings, it is worth mentioning that it would be maybe more appropriate to speak about *multiple* proceedings. However, for the sake of clarity, we will discuss about parallel proceedings as a general category, involving both concurrent and subsequent proceedings (based, as already said, on the same purpose, facts and interests).

It is self-evident that, in the framework of today's very complex investment operations, involving several (and complex) legal instruments (i.e. treaties, contracts and laws) and various related entities (usually from the investor's side), it is quite easy that two proceedings could fall into the aforementioned definition.

As it has been stated by several authors, parallel proceedings are "fundamentally undesirable"[2] in light of the fact that they incur very high costs, generate the risk of conflicting outcomes and also undermine the credibility of the adjudicatory system. As the former President of the International Court of Justice ("ICJ"), Gilbert Guillaume, stated in 1995, "it would be most regrettable if, on specific problems, different courts were to take divergent positions".[3] In the years following Guillaume's statement a further dramatic expansion of the number of international proceedings started by individuals against States occurred (in particular in the field of international investment law), with the consequent growth of the risk of parallel proceedings and conflicting awards.[4]

The proliferation of international courts and tribunals (and the related risks, such as conflicting outcomes, rise of costs and legitimacy crisis) is indeed a general phenomenon of international law,[5] which has one of its greatest manifestations in international investment law. This is due to the particular features of investment operations and to the characteristics of legal instruments governing international investments, as well as (as we will see below) to a rigid application of the principle of party autonomy by investment tribunals, regardless of the policy considerations that go against parallel proceedings and conflicting awards.

[2] Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration* (2013), 2.
[3] Guillaume, ICLQ (1995) 862.
[4] Oellers-Frahm, Max Planck UNYB (2001), 67, Romano, Int'l Law and Politics (1999) 709, Buergenthal, Leiden Journal of International Law (2001), 267. The problem of the multiplication of tribunals was already mentioned by Quadri, *Diritto Internazionale Pubblico* (1968), 262 and ss.
[5] It is not possible here to give a general overview of the phenomenon. In this regard, please refer to Shany, The Competing Jurisdictions of International Courts and Tribunals (2003), 1 and ss., Giorgetti, ICSID Review (2015), 98 and ss., and van Aaken, Finnish Yearbook of International Law (2006), 91 and ss.

The following sub-paragraphs will examine the features of investment operations that mainly affect (and fragment) the jurisdiction of investment arbitration tribunals, and in particular: (i) the difference between contract and treaty claims; (ii) the entitlement of company's shareholders to bring an investment claim; (iii) the entitlement of each entity of a group to bring its autonomous claim; and (iv) the availability of several means of dispute resolution within the same legal instrument.

1.1.1 *Contract and treaty claims*

Historically, foreign investments involved the signing of a contract between the investor and the host State.[6] These contracts set forth the standard of treatment of investors and, in the past, generally provided for the resolution of disputes in the national courts of the host state according to the law of the host State.[7]

With the evolution of the standing of individuals before international tribunals, investment contracts have evolved, also providing for the possibility to settle disputes before *ad hoc* tribunals or internationally administered arbitrations.[8]

In parallel, in particular in the second half of the 20th century,[9] a system of bilateral treaties for the promotion and protection of investments (BITs), regulating the treatment of investors of one of the signatory States in the other signatory State, has emerged.[10] Usually, according to such BITs, the relationship between investors and host States shall be governed by international law.[11]

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[6] Sacerdoti, *I contratti tra stati e stranieri nel diritto internazionale* (1972), 1 and ss.

[7] Tonini, *La tutela internazionale dei diritti contrattuali degli investitori stranieri* (2011), 4 and ss., Savarese, *La nozione di giurisdizione nel sistema ICSID*, http://paduaresearch.cab.unipd.it/3532/ (2012), 12, Amerasinghe, *International Arbitral Jurisdiction* (2011), 3-13. During the 20th century foreign investments have not always been accepted by developing countries, which claimed their sovereignty on natural resources. For this reason the so-called Calvo Doctrine, requiring that all disputes between investors and the host state should have been resolved in national courts of the host state, emerged. In this regard see also Conforti, *Diritto Internazionale* (2013), 248 and ss. Disputes between investors and states have been traditionally considered as part of the discipline of state responsibility for injury to aliens. See also Lillich, International law of State responsibility for injury to aliens (1983), Amerasinghe, State Responsibility for Injury to Aliens (1967). For a general approach to the law applied to investor – States contracts see Bernardini in *Law of International Business and Disputes Settlement in the 21st century – Liber Amicorum Karl-Heinz Bockstiegel* (2004), 51 and ss.

[8] Radicati di Brozolo, Rivista di Diritto Internazionale (1982), 299 and ss.

[9] Alexandrov, Journal of World Investment and Trade (2006), 387, has talked about the occurrence of a "baby boom" of investor-State arbitrations in the '90s.

[10] Vandevelde, *Bilateral Investment Treaties* (2010), 1 and ss., Mauro, *Gli accordi bilaterali per la promozione e protezione degli investimenti* (2003) 1 and ss. The first BIT, between Germany and Pakistan has been entered into in 1959. Today, according to Savarese (2012) (n. 7), 15, there are about 3000 BITs in force. See also Bockstiegel, Paper given at the Conference 50 Years of Bilateral Investment Treaties – Taking Stock and Look to the Future Frankfurt (2009), 2 and ss. With regard to the general content of BITs see Valenti, *Gli standard di trattamento nell'interpretazione dei trattati in materia di investimenti stranieri* (2009), 26 and ss., and Valenti, Diritto del Commercio Internazionale (2004), 973 and ss.

[11] See Schreuer, McGill Journal of Dispute Resolution (2014), 1 and ss.

The standards of treatment involved in such treaties are usually very broad.[12] As an example, it could be mentioned that under the label of "fair and equitable treatment" arbitrators have involved standards of due process, legitimate expectations and proportionality.[13] It often happens, therefore, that the violation of a standard included in a contract can be considered also as a violation of a treaty standard.[14] Often – in fact – the existence of a contractual breach is seen as an indicator of the fact that there has also been a breach of a broader treaty standard. This may happen, in particular, when BITs contain a so-called "umbrella clause", which – according to the majority of scholars – equalizes all the violations of contractual duties to violations of treaty duties.[15]

Hence, regarding the claims arising from an investment contract, "the question emerges as to which dispute resolution procedure must be applied – the one contained in the applicable BIT or the one indicated by the investment contract which the investor itself stipulates with the host State".[16] As a matter of principle, considering that "there is no *a priori* limitation on the scope or content of treaty obligations… There is no a priori definition of what is or is not international, nor is there any presumption of the restrictive interpretation of treaties",[17] it is logical to deduce that "where there is a BIT between the investor's Home State and the Host State, then the investor might pursue its treaty rights" notwithstanding the existence of a contract protecting similar – if not the same – rights.[18]

This view has developed since the very well-known decision in the *Vivendi* annulment proceedings. According to the *ad hoc* committee "as to the relation between breach of contract and breach of treaty… a state may breach a treaty without breaching a contract and vice versa… In accordance with this general principle

[12] BITs are aimed at the promotion and protection of foreign investments. With this scope such treaties provide for very broad standard of treatment such as "full protection and security", "fair and equitable treatment and "most favoured nation". All these standards are protected through the right of the investor to initiate an arbitration directly against the host state before an international arbitration panel.

[13] Palombino, *Il trattamento giusto ed equo degli investimenti stranieri* (2012), 61 and ss.

[14] Hariharan, Journal of World Investment and Trade (2013), 1019 and ss., Shany, American Journal of International Law (2005), 835 and ss., Alexandrov, Journal of World Investment and Trade (2004), 555 and ss., Yannaca Small, OECD Working Papers on International Investments (2006), 26 and ss.

[15] According to part of the case law, umbrella clauses have the scope of converting all contract claims in treaty claims. However, there is no agreement on the interpretation of umbrella clauses. See the different approaches in *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, where the tribunal denied the possibility to interpret extensively an umbrella clause, and *Société Générale de Surveillance S.A. v. Republic of the Philippines*, where the tribunal consented to such an interpretation. See Zivkovic (2011), 10 and ss., Bergamini, Rivista dell'arbitrato (2005), 118 and ss, Carlevaris, Rivista dell'arbitrato (2004), 431 and ss., Wendlandt, Texas International Law Journal (2008), 523 and ss, Weissenfels (2007), 1 and ss, Yannaca Small, OECD Working Papers on International Investment (2006), 1 and ss., Schill, Minnesota Law Journal (2009, 1 and ss., Wong, Geo. Mason Law Journal (2006), 135 and ss. This subject will be further examined in paragraph 1.6 below.

[16] Savarese, Journal of World Investment and Trade (2007), 409.

[17] Crawford, Arbitration International (2008), 353. As stated by this author, the authority for the above statement is "The Wimbledon" (1923) PCIJ Ser. A No. 1.

[18] Cremades, Cairns, in *Arbitrating Foreign Investment Disputes. Procedural and Substantive Legal Aspects* (2004), 325.

(which is undoubtedly declaratory of general international law) whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law – in the case of the BIT, by international law; in the case of the contract, by the proper law of the contract, in other words, the municipal law".[19] "In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract".[20] "On the other hand, where the 'fundamental basis of the claim' is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard. At most, it might be relevant – as municipal law will often be relevant – in assessing whether there has been a breach of the treaty".[21]

The immediate consequence of what stated above is that the investor has the choice to pursue: (i) the contract claim; (ii) the treaty claim; or, in theory, (iii) both the contract and the treaty claim.[22] It is therefore obvious that the dualism between contract and treaty claims creates and/or increases the risk of parallel proceedings.

This is what has happened in the *RSM Production Corporation v Grenada*[23] and in the *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v Grenada*[24] cases. Such cases arose from the same facts, concerning the circumstance that Grenada dismissed a petroleum license that it granted to RSM, due to an untimely application by the latter. RSM started an ICSID arbitration (on the basis of the investment agreement) whereupon the Tribunal found that Grenada did not violate any BIT obligation. RSM than filed a petition for annulment (which was later dismissed due to RSM's failure to pay annulment costs).[25] In the meanwhile, RSM's shareholders (jointly with the same RSM) started another

[19] *Compania de Aguas del Aconquija SA and Compagnie Générale des Eaux/Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB 97/3, Decision on Annulment, 3 July 2002, paras. 95-96. In this regard see Gaillard, Transnational Dispute Management (2004), 6 and ss. Similarly, note Lanco Int'l Inc. v. Argentina Republic, ICSID Case No. ARB/97/6, decision on jurisdiction, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* ICSID Case No. ARB/00/4, final award, *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005. With regard to the distinction drawn up by the *ad hoc* committee it should be noted that it is not always easy to distinct between contract and treaty claims. On this point see Wehland (2013) (n. 2), 21. This statement has also been confirmed by investment tribunals such as *Impregilo v. Argentina*, ICSID Case No. ARB/07/17, Award of 21 June 2011, para. 175.

[20] *Ibid.* para. 98.

[21] *Ibid*. para. 101. With regard to the substantive law applicable to contract and treaty claims see Wehland (2013) (n. 2), 22.

[22] Cremades, Cairns (2004) (n.18), 326.

[23] *RSM Production Corporation v Grenada*, ICSID Case No ARB/05/14, Award, 13 March 2009.

[24] *Rachel S Grynberg, Stephen M Grynberg, Miriam Z Grynberg, and RSM Production Corporation v Grenada*, ICSID Case No ARB/10/6, 10 December 2010.

[25] *RSM Production Corporation v Grenada*, ICSID Case No ARB/05/14, Annulment Proceedings, 28 April 2011.

claim pursuant to the U.S. – Grenada BIT on the basis of the same facts. As we will see in Chapter 3, the second claim was dismissed by the Tribunal.

In this regard, it is worth noting that in order to avoid a conflict of jurisdiction between arbitral tribunals and national courts, some treaties contain a so-called "waiver clause".[26] As an example it is possible to cite art. 1116 (b) NAFTA, according to which "the investor... waives its right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure... that is alleged to be a breach... except for proceedings for injunctive, declaratory or other extraordinary relief".[27] In the same vein, other treaties contain the so-called "fork-in-the-road" provisions, which apply the Latin maxim *electa una via altera non datur*. An example of this provisions is article 10(2) of the Greece-Albania BIT which provides that if disputes cannot be settled amicably, "the investor or the Contracting Party concerned may submit the dispute either to the competent court of the Contracting Party or to an international arbitration tribunal...".[28]

However, in reference to such clauses it should be noted that "it is impossible to generalize on whether a 'fork-in-the-road' clause or waiver forces an investor to elect between treaty and contract claims, because it would seem to depend on the exact wording of the treaty".[29] These clauses therefore may not be considered as a general remedy against parallel national and arbitration proceedings.

Furthermore, and more importantly for the aim of the present book, such clauses are not applicable in the cases of conflicts of jurisdiction between two arbitral tribunals, i.e. in cases the contract provides for a form of arbitration and the treaty for another form of arbitration. In these cases, according to the wording of the two legal instruments, it is possible and perfectly legitimate for the investor to start both the contract and the treaty claims. Waiver clauses will be further examined in Chapter 2.

In conclusion, from the perspective of the present book the difference between contract and treaty claims is very relevant, being one of the most relevant sources of parallel arbitration proceedings.[30] It is finally worth considering that, in light of the fact that contract claims and treaty claims are not necessarily governed by the same

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[26] See Romanetti, Stockholm International Arbitration Review (2009), 75 and ss.

[27] This provision has been applied in *Waste Management Inc v. United Mexican States*, ICSID case No. ARB (AF)/98/02, Arbitral Award of 2 June 2000, 15 ICSID Rev FILJ 235-236, where the tribunal stated that "when both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously in light of the imminent risk that the claimant may obtain the double benefit in its claim for damages. This is precisely what NAFTA art. 1121 seeks to avoid".

[28] Dahlberg (2009). For a general analysis of the relevance of local remedies in investment arbitration and for the interaction of some remedies with investment arbitrations see Foster, Columbia Journal of Transnational Law (2011), 204 and ss. Such author, at 265, proposes a narrow interpretation of fork-in-the-road provisions.

[29] Cremades, Cairns (2004) (n. 18), 333.

[30] See Savarese, Diritto del commercio internazionale (2004), 955 and ss. The case of multiple claims started under contract and treaties is conceptually identical to the one of several claims started according to various treaties (e.g. the Energy Charter Treaty and a BIT) or according to a BIT and a national law. For this reason we will refer only to contract and treaty claims in the rest of the book.

substantive law, it is possible that two arbitrations related to the same facts will be concluded with different outcomes.

1.1.2 *Majority and minority shareholders (or company and its shareholders)*

The wording of the vast majority of the existing BITs usually has a very broad definition of investment.[31] Therefore, BITs' definitions are not anymore "enterprise based definitions"[32] – involving the direct realization of an enterprise in the host state or, at least, an amount of shares in a company equal to the *effective* control of such company – but have evolved as "asset based definitions" – involving portfolio investments and the mere ownership of shares, without specifying the necessary amount of shares.[33] As stated by Schreuer, "the participation in the locally incorporated company becomes the investment".[34] As a consequence, it is now very common to talk about an "every kind of asset approach", in light of the fact that the mere ownership of an asset in a foreign company might be considered as an investment.[35]

First of all, Tribunals have often accepted the possibility of autonomous claims by majority shareholders, both on the basis of the wording of BITs and on the basis of the circumstance that the concept of "control" referred to in the ICSID Convention (if applicable) should be logically associated to the idea of a majoritarian position in the company's shares stock.[36]

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[31] Schreuer, Transnational Dispute Management (2005), 6 and ss.

[32] See the BIT between Denmark and Poland of 1 May 1990 stating that "(a) The term "investment" shall mean any kind of assets invested in accordance with the laws of the Contracting Party receiving the investment in its territory in particular: (i) movable and immovable property and any other property rights such as mortgages, liens or pledges, (ii) shares in and stock and debentures of a company and any other form of participation in a company, (iii) claims to money or other rights relating to services having a financial value, (iv) industrial and intellectual property rights, technology, trademarks, goodwill, know-how and any other similar rights, (v) business concessions having financial value, that are required to conduct economic activity in accordance with the law of the Contracting Party concerned and are conferred by law, administrative decision or contract, including concessions to search for, cultivate, extract or exploit natural resources. (b) *The said term shall refer: to all investments in companies made for the purpose of establishing lasting economic relations between the investor and the company and giving the investor the possibility of exerci*sing significant influence on the management of the company concerned" (emphasis added).

[33] See the 2008 UK Model BIT, stating that: ""investment" means *every kind of asset*, owned or controlled directly or indirectly, and in particular, though not exclusively, includes: (i) movable and immovable property and any other property rights such as mortgages, liens or pledges; (ii) shares in and stock and debentures of a company and any other form of participation in a company; (iii) claims to money or to any performance under contract having a financial value; (iv) intellectual property rights, goodwill, technical processes and know-how; (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources" (emphasis added).

[34] Schreuer (2005) (n. 31), 6.

[35] See Tonini (2011) (n. 7), 38 and ss.

[36] See Dumberry, Valasek, ICSID Rev. FILJ (2011), 45 and ss. The authors refer to the cases *Gas Natural SDG S.A. v. Argentina*, ICSID Case No. ARB/03/10, Decision on Jurisdiction, 17 June 2005, *Antoine Goetz and others v. Republic of Burundi*, ICSID Case No. ARB 95/3, Award, para. 89, 10 February 1999, and *Suez*

Concerning the position of minority shareholders, while in the *Vacuum Salt* award the tribunal held that the ownership of a minority percentage of shares in a company could not be considered as a source of foreign control in light of the fact that a minority position is merely technical and not managerial,[37] the following authorities show that claims by minority shareholders are today common practice in international investment arbitration, both administered by ICSID tribunals and in other forms.

With particular regard to the ICSID Convention, art. 25(2)(b) allows claims from companies incorporated in the host State by attributing this right to "any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, *because of foreign control*, the parties have agreed should be treated as a national of another Contracting State" (emphasis added).[38] In this regard it should be highlighted that the Convention does not define the concept of *foreign control* and, therefore, arbitral tribunals have usually[39] interpreted such concept on the basis of the wording of the relevant BIT, thus allowing claims brought by a company incorporated in the host State, of which only a minority shareholder had the nationality of the other contracting party in the BIT.[40]

Furthermore, on the basis of the wording of BITs, tribunals have admitted that minority shareholders have their autonomous claim, independently from that of the main company. In *CMS*, where the claimant owned 29,42% of the shares of the company, the Tribunal stated that it "finds no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders".[41] Tribunals have therefore assumed jurisdiction on claims brought by shareholders representing even 14,18% of the company's shares.[42] In *Lanco*, the Tribunal stated that "as regards shareholder equity, the Argentina-U.S. Treaty says nothing indicating that the investor in the capital stock has to have control over the

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Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentina, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006.

[37] *Vacuum Salt v. Ghana*, ICSID Case No. ARB/92/1, Award of 16 February 1994, where the Tribunal stated "it stands to reason, of course, that 100 per cent foreign ownership almost certainly would result in foreign control, by whatever standard, and that a total absence of foreign shareholding would virtually preclude the existence of such control. How much is enough, however, cannot be determined abstractly (…). Interests sufficiently important to be able to block major changes in the company could amount to controlling interests (…) Control could in fact be acquired by persons holding only 25% of the company's capital (…) 51% of the shares may not be controlling while for some purposes 15% may be sufficient (…). The concept of control is broad and flexible (…). The question is (…) whether the nationality chosen represents an exercise of a reasonable criterion (…). A tribunal may regard only criterion based on management, voting rights, shareholding or any other reasonable theory as being reasonable for the purpose". See Moreland Currents Int'l Trade Law J. (2000), 20.

[38] On this point see Moreland, (2000) (n. 37), 19.

[39] See paragraph 1.6 below, mentioning the *Vacuum Salt* case, where an opposite conclusion has been reached by the Tribunal.

[40] As it will be seen below, Art. 25(2)(b) of the ICSID Convention has been usually interpreted in the sense that it is aimed at expanding jurisdiction and not at restricting it.

[41] *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, para. 34, 17 July 2003.

[42] *GAMI Investments Inc. v. Mexico*, NAFTA (UNCITRAL), Award, para. 37, 15 November 2004.

administration of the company, or a majority share; thus the fact that Lanco holds an equity share of 18,3% in the capital stock of the Grantee allows one to conclude that it is an investor in the meaning of Article I of the Argentina-U.S. Treaty".[43]

The practice of assuming jurisdiction on claims brought by minority shareholders is today so diffused that some Authors have argued that a customary rule of international law has developed in this regard.[44]

It should be also noted that the possibility of direct claims by minority shareholders is not limited to the case of damages directly suffered by them and expressly protected by an international law rule.[45] The reference goes also to damages suffered by the main company and only indirectly affecting shareholders' right, generally due to a loss of value of their shares.

In international law it is clear that "claims based on a reflective injury to shareholders are generally barred".[46] In this regard it is worth citing what the ICJ stated in the *Diallo* case: "The Court, in the Barcelona Traction case, recognized that "a wrong done to the company frequently causes prejudice to its shareholders". But, it added, damage affecting both company and shareholder will not mean that both are entitled to claim compensation… It is only one entity whose rights have been infringed"[47] and such entity is the company.

A recent study has also shown that the practice of claims for indirect damages suffered by shareholders has a very limited application in national law systems.[48] As it has been stated by the English Court of Appeal in *Gardner v. Parker*, "The shareholder's loss will be made good if the wronged company, which has the primary claims, enforces in full its claims against the wrongdoer".[49]

International arbitral awards show that in international investment law the practice is opposed to the one followed in national law systems and in general international law.[50] Arbitral tribunals have in fact "found that shareholders can bring

[43] *Lanco Int'l, Inc. v. Argentina*, ICSID Case No. ARB/97/6, Decision on Jurisdiction, para. 10, 8 December 1998.

[44] See, e.g., McLachlan, Shore, Weininger, *International Investment Arbitration: Substantive Principles* (2007), 186. For a contrary opinion see Dumberry, Michigan State Journal of International Law (2010), 365 and ss.

[45] In this regard it should be noted that since the ICJ *Barcelona Traction* case (*Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain*), Judgement, 5 February 1970 ICJ Rep. 4, 35) it has been admitted that shareholders (or, in cases regarding diplomatic protection, their State of nationality) may autonomously bring a claim arising from a rule that *directly* protects a shareholder's right. This has further been confirmed in the *ELSI* case (*Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy*), Judgement, 20 July 1989, ICJ Rep. 15, 42.

[46] Gaukrodger, OECD Working Paper on International Investment (2013), 22.

[47] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo*), Decision, 30 November 2010, I.C.J. Rep., 639.

[48] Gaukrodger (2013) (n. 46), 15 and ss.

[49] *Gardner v. Parker*, [2004] 1 BCLC 417, 430 (Eng. Ct. App. 2004).

[50] Gaukrodger (2013) (n. 46), 25 and ss. Bottini, U. Pa. J. Int'l. Law (2010) 563 and ss.

autonomous claims even when the company has effective recourse".[51] The decisions in *Azurix*,[52] *LG&E*,[53] *Enron*[54] and *Siemens*[55] may be cited as examples of this practice.[56]

In light of the above it is easy to understand that, if any shareholder has his autonomous claim, "nothing would prevent all these different shareholders from *filing their own separate claims* against the host State for the same treaty breach".[57] This is what has happened in the cases regarding *Sempra v. Argentina*[58] and *Camuzzi v. Argentina*,[59] where the majority shareholder (Camuzzi) and the minority shareholder (Sempra) of the companies Sodigas Sur S.A. and Sodigas Pampeana S.A. filed two separate requests for arbitration on the basis of the same facts (in this case, as it will be seen below, the same Tribunal heard both the claims). Similarly, in *CMS v. Argentina* [60] and *Total v. Argentina* [61] the two claimants were both minority shareholders of the company TGN and filed two separate claims arguing that the different dates of the purchase of the TGN shares was an element for distinguishing the two claims which arose from the same facts. As it will be shown below, in this case the two proceedings were not coordinated and the two tribunals in *CMS* and *Total* reached different conclusions on the same issues.

A very complex scenario also appeared in the disputes arising from the very well known *Yukos* saga, where several shareholders of the Russian company Yukos started different claims on the basis of the same facts.[62] Various arbitration cases

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[51] Gaukrodger (2013) (n. 46), 29.

[52] *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, para. 1, 8 December 2003.

[53] *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Objections to Jurisdiction, para. 1, 30 April 2004.

[54] *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, para. 1, 14 January 2004.

[55] *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, para. 23, 3 August 2004.

[56] For more cases see Bottini (2010) (n. 50), 584 and ss. For a contrary case see *Consorzio Groupement L.E.S.I. Dipenta v. Algeria*, ICSID Case No. ARB/03/8, Award, para. 1, 10 January 2005. In this regard it should be noted that – in principle – also the company's creditors who have suffered an indirect loss might be entitled to file a claim.

[57] Dumberry, Valasek (2010) (n. 36), 71.

[58] *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005.

[59] *Camuzzi Int'l S.A. v. Argentina*, ICSID Case No. ARB/03/2, Decision on Jurisdiction, 11 May 2005. The two investors further agreed that a single tribunal would have heard both claims.

[60] *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005.

[61] *Total S.A. v. Argentina*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010.

[62] The facts are perfectly described in para. 62 of the PCA Final Award of 18 July 2014, mentioned in footnote 63 below. In particular, quoting the PCA Tribunal, "The disputes between the Parties to the present proceedings involve various measures taken by Respondent [Russia] against Yukos and associated companies primarily in the period between July 2003 and November 2007, when Yukos had emerged after the dissolution of the Soviet Union to become the largest oil company in the Russian Federation. The measures complained of include criminal prosecutions, harassment of Yukos, its employees and related persons and entities; massive tax reassessments, VAT charges, fines, asset freezes and other measures against Yukos to enforce the tax reassessments; the forced sale of Yukos' core oil production asset; and other measures culminating in the bankruptcy of Yukos in August 2006, the subsequent sale of its remaining assets, and Yukos being struck off the register of companies in November 2007. Claimants contend, and Respondent denies, that Respondent failed to treat

emerged[63] and, as will be seen below, the same Tribunal has heard three of such claims.

It could also well happen that two claims are started by the company who materially made the investment and one or more of its shareholders. Any of the tribunals involved in the disputes arising in this scenario could well consider itself as having jurisdiction on the single claim that the same tribunal is going to face.

As a consequence, the entitlement of the company and of each shareholder to bring his autonomous claim – for direct and indirect losses – shall be considered as the second main source of parallel proceedings and conflicting outcomes in international investment arbitration. In this regard, it is worth mentioning what has been stated by Zachary Douglas, according to whom "it is difficult to imagine why a shareholder would elect to bring a claim for the account of its company if it had the option of bypassing the company altogether. The company might be able to pay creditors, local taxes and discharge other obligations before distributing the residual amount of any damages recovered to the shareholders".[64] It is therefore obvious that, from the perspective of a shareholder, starting an autonomous claim against the host State is the preferable option.

1.1.3 *Chain of entities of the same group*

"In the vast majority of cases investors are companies… Corporations are owned by shareholders who may themselves be companies".[65] Investments very often present a complex structure consisting of companies incorporated in different

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Claimants' investments in Yukos in a fair and equitable manner and on a non-discriminatory basis, in breach of Article 10(1) of the ECT, and that Respondent expropriated Claimants' investments in breach of Article 13(1) of the ECT. Claimants seek full reparation in excess of USD 114 billion".

[63] Arbitrations started by minority shareholders: *Quasar de Valores SICAV S.A. v. Russian Federation*, Stockholm Chamber of Commerce (SCC) Award, 20 July 2012, *RosInvest Co UK Ltd v. The Russian Federation*, SCC Case No. Arb. V079/2005, Final Award, 12 September 2010. Arbitrations started by majority shareholders: *Hulley Enterprises Ltd v. Russia, Yukos Universal Limited v. Russia* and *Veteran Petroleum Limited v. Russia*, UNCITRAL, Permanent Court of Arbitration, Interim Award on Jurisdiction and Admissibility, 30 November 2009, and Final Award, 18 July 2014. In order to understand the percentages of majority shareholding in Yukos, it is worth quoting paras 65-69 of the Final Award of 18 July 2014: "65. The three Claimants in these related cases are all part of the Yukos group of companies, which had at its center Yukos, headed by Chief Executive Officer Mr. Mikhail Khodorkovsky. 66. Claimant in PCA Case No. AA 226, Hulley, was incorporated in the Republic of Cyprus on 17 September 1997 and was a 100 percent owned subsidiary of YUL [Yukos Universal Limited]. 67. Claimant in PCA Case No. AA 227, YUL, was incorporated on 24 September 1997 in the Isle of Man (a Dependency of the United Kingdom). 68. Claimant in PCA Case No. AA 228, VPL [Veteran Petroleum Limited], was incorporated in the Republic of Cyprus on 7 February 2001. 69. Hulley held approximately 56.3 percent, YUL held approximately 2.6 percent and VPL held approximately 11.6percent of the outstanding shares in Yukos. Collectively therefore, Claimants approximately had a 70.5 percent shareholding in Yukos". See also footnotes 137 and 138 below (referring also to the claim before the ECtHR and the ICC arbitration Tribunal). With regard to the aspect that the final owner of the whole group was the Russian citizen Mr. Khodorkovsky, please refer to paragraph 1.1.3 below.

[64] Douglas, *The international Law of Investment Claims* (2009), 452.

[65] Schreuer (2005) (n. 31), 1.

jurisdictions and owned by nationals of different countries.[66] It is possible, in this regard, to talk about "strategic structuring";[67] companies are therefore "readily established in order to allow their owners to benefit from certain advantages related to their place of incorporation".[68]

This practice is commonly accepted by international investment tribunals. It is worth mentioning that the *Aguas del Tunari* Tribunal stated that "it is not uncommon in practice, and – absent a particular limitation – not illegal to locate one's operations in a jurisdictions perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT".[69] Similarly, the *HICEE* tribunal stated that structured investments "are not unusual, nor is there anything in the least reprehensible about it; structured investments are commonplace. The purpose is to secure advantages from incorporation or operation in a particular jurisdiction; … The advantages anticipated often include the protection of particular bilateral (or other) treaties covering foreign investment".[70] This shall be added to the fact that "some States actively promote themselves as favourable venues for corporate presence and access to a favourable network of investment treaties… Such an approach may also boost investment inflows".[71]

On the basis of the wording of the BITs, usually considering as foreign investors companies which have the nationality of the other contracting state (regardless of the effective control of the company), tribunals have therefore assumed jurisdiction in the following cases:[72]

1) claimant which have an indirect interest in a locally incorporated company through their participation in another corporation, which may have the nationality of the claimant investor,[73] the host State[74] and of a third State;[75]

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[66] Wisner, Gallus, Journal of World Investment and Trade (2004), 927.
[67] Sinclair, ICSID Rev. FILJ (2005), 357. See also Schreuer, The Fordham Papers (2012), 17 and ss.
[68] *Ibid.*, 363.
[69] *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, para. 330 21 October 2005.
[70] *HICEE v. Slovakia*, UNCITRAL, PCA Case No. 2009-11, Partial Award. 23 May 2011.
[71] Sinclair (2005) (n. 67), 363.
[72] See Dumberry, Valasek (2010) (n. 36), 51 and ss. The following examples are taken by Dumberry and Valasek's article.
[73] *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, where the German claimant (Siemens) owned 100% of another German corporation (Siemens Nixdorf Informationssysteme), which – in turn – created and controlled an Argentinian company (Siemens IT Services S.A.).
[74] *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, where the U.S. corporation Enron owned a participation in an Argentinian company (Transportadora de Gas del Sur), which had several participations in other Argentinian companies.
[75] *Waste Management Inc v. United Mexican States* (II), ICSID case no. ARB (AF)/00/3, Award of 30 April 2004. Here, the U.S. claimant owned two holding corporations incorporated in Grand Cayman (UK) (AcaVerde Holdings Ltd. and Sun Investment Co.), which – in turn – owned the company incorporated in the host State (Acaverde).

2) claimant which are intermediate ("holding", "shell" or "mailbox") corporations. Such companies "are typically incorporated in favourable tax jurisdictions. They usually have no significant assets or operations and are established for the sole purpose of owning shares of other corporations".[76]

With particular reference to the cases mentioned under 2), arbitral tribunals and scholars have sometimes expressed their perplexities concerning the risk of abuses of investment arbitration, due to the fact that such "shell" companies have been incorporated in countries of convenience for the mere purpose of gaining jurisdiction in international investment arbitrations. It is interesting to note that the problem has also arisen even in cases where the ultimate owner had the same nationality of the host State. This happened, *inter alia*, in *Tokios Tokeles*,[77] *Rompetrol*[78] and *Yukos*.[79] With particular reference to the last mentioned case, the tribunal has clearly stated that the definition of "investor" in the Energy Charter Treaty (ECT) (Article 1(7)) does not function to deny standing to shell companies incorporated under the laws of a signatory State, even if, as in the present case, the claimant was owned by the Russian citizen Mr. Khodorkovsky. The ECT, in fact, refers to "a company or other organization organized in accordance with the law applicable in that Contracting Party", thus precluding an analysis of the effective control on the real management of the company. The tribunal accepted jurisdiction and stated that, on the basis of the ECT, it was "not entitled to find otherwise". The Tribunal applied the "plain meaning doctrine" and interpreted the ECT in its literary sense. Quoting the *Saluka*[80] Tribunal, it stated that it had "some sympathy for the argument that a company which has no real connection with a State party to a BIT, and which is in reality a mere shell company controlled by another company which is not constituted under the laws of that State, should not be entitled to invoke the provisions of that treaty"; however the Tribunal declared not to have alternatives to give weight to what the parties have expressed in the arbitration clause and assumed jurisdiction.[81]

The above approach of arbitral tribunals – which, to the knowledge of the present author, has been (partially and in different circumstances, that will be

[76] Dumberry, Valasek (2010) (n. 36), 55.

[77] *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004. This award has been strongly criticized by Alexeyev, Voitovich, Journal of World Investment and Trade (2008). The Authors in particular criticized the very formalistic approach of the Tribunal disregarding commercial reality.

[78] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Jurisdiction, 18 April 2008.

[79] *Yukos Universal v. Russian Federation*, (UNCITRAL) Permanent Court of Arbitration, Interim Award on Jurisdiction and Admissibility. 30 November 2009.

[80] *Saluka Investments BV v. Czech Republic*, (UNCITRAL) Permanent Court of Arbitration, Partial Award, 17 March 2006.

[81] For a general analysis of the award see Blyschak, Richmond Journal of Global Law & Business (2011), 179.

examined in paragraph 1.2 and 1.4) put in discussion only in the *TSA*[82] and *National Gas*[83] awards – has generated a practice known as "treaty shopping".[84] Such concept has been defined as a "commonly used scheme for multinational corporations to '*steal*' not only higher levels of protection, advantage or benefit, but also the jurisdiction of arbitral tribunals. With a significantly growing number of international investment treaties, the practice of treaty shopping has become increasingly rampant" (emphasis added).[85] Bernardo Cremades has talked, in this regard, about "gambling methods".[86] Blyschak has referred to an investor which "freeloads" onto a treaty that was not properly intended to apply to the investor.[87]

The direct consequence of the above is that several entities belonging to the same group of companies (and protecting the same interests) may start different claims according to the terms of different BITs (the BITs that the various States of nationality of such entities concluded with the host State) in order to seek relief for the alleged damage that the group (*rectius* the final owners) suffered.

This is what has happened in the *CME*[88] and *Lauder*[89] cases. Ronald Lauder, a U.S. national, was the ultimate beneficiary of an investment in a Czech operating company (CNTS) providing television services. The investment was performed through an intermediate corporation (CME). After the host State took certain measures concerning TV licenses, Lauder started an *ad hoc* arbitration in London under the U.S.A. – Czech Republic BIT and CME started a SCC arbitration under the Netherlands – Czech Republic BIT. The two tribunals reached completely opposite conclusions with regard to the evaluation of the same facts.

As it will be better seen in paragraph 1.4 below, it could be said that the practice of treaty shopping is fully justifiable on the basis of the wording of the majority of BITs and on the basis of the literal interpretation that arbitral tribunals have given of arbitration clauses contained in these treaties on the basis of the necessity of respecting the principle of party autonomy as expressed in the relevant arbitration clause.[90]

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[82] *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, 19 December 2008. For a comment on this case in comparison to the approach taken in *Tokios Tokeles* see Martin, Transnational Dispute Management (2011).

[83] *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award, 3 April 2014. As it will be seen below (paragraph 1.6) these awards cannot be considered as a deviation from the main approach described in the text.

[84] See Kirtley, Journal of World Investment and Trade (2009), 427 and ss., Burgstaller, Journal of World Investment and Trade (2006), 857 and ss.

[85] Zhang, Contemp. Asia Arb. J. (2013), 50.

[86] Cremades, Journal of World Investment and Trade (2004), 89.

[87] Blyschak (2011) (n. 81), 195.

[88] *CME v. Czech Republic*, UNCITRAL, SCC Partial Award, 13 September 2001.

[89] *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001.

[90] Zhang (2013) (n. 85), 51. A possible stop to this phenomenon could be realized through the so-called "denial of benefits clauses", aimed at limiting the protection afforded by investment treaties only to foreign companies which have an actual connection with the State in which they are incorporated. Examples of such clauses are article 17 of the Energy Charter Treaty and article II.14 of the Trans-Pacific Partnership Treaty, which denies the protection of the treaty to shell companies. In this regard it should

As any form of forum shopping,[91] this practice has very controversial effects,[92] but it is not forbidden on the basis of a plain reading of the relevant sources.[93] Tribunals have therefore allowed treaty shopping and corporate manoeuvring,[94] unless the cases of abuses that they have deemed manifest on the basis of the very short time passed between a change of the corporate structure (aimed at gaining the protection of a certain BIT) and the beginning of the arbitration.[95]

1.1.4 *Different adjudication systems provided in the same legal instrument*

The last and residual source of parallel proceedings (the interest for which is more theoretical than practical) is given by the circumstance that arbitration clauses in several BITs or in investment agreements often provide for various means of dispute resolution (e.g. ICSID arbitration, *ad hoc*/UNCITRAL arbitration, institutional commercial arbitration, national courts).

As an example, it can be mentioned Article 8 of UK Model BIT, stating that:

(1) (…)

(2) Where the dispute is referred to international arbitration, the national or company and the Contracting Party concerned in the dispute may agree to refer the dispute either to:

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be noted that such clauses are not unanimously perceived as an effective mechanism to limit treaty shopping. See Blyschak (2011) (n. 81), 191 and ss. The Author refers to the *Yukos* case in order to demonstrate the limited applicability of these clauses in order to limit treaty shopping. For a general overview of the subject see Mistelis, Baltag, Penn State Law Review (2009), 1301 and ss. For a major focus on procedural requirements see Gastrell, Le Cannu, ICSID Review FILJ (2015), 78 and ss. In this regard, it should be noted that, as it will better explained in paragraph 1.6 below, article X.3 of the investment provisions of the EU-Canada Free Trade Agreement (Comprehensive Economic and Trade Agreement – CETA) defines as investors only entities and natural persons which have a real and substantial business in the territory of one of the signatory States. Such provision therefore excludes claims by shell companies.

[91] Bassett, North Carolina Law Review (2005-2006), 333 and ss., Koch, The Geneva Papers (2006), 293 and ss., Maloy, QLR (2005-2006), 25 and ss. The Authors argue that forum shopping – notwithstanding the very negative opinions related to this practice – is a perfectly legitimate option for lawyers, which have the duty to find the best forum for their clients. In particular Bassett, 335, explains her opinion that forum shopping and strategic choices are not a form of "cheating", but a "legitimate, expressly authorized action when more than one forum satisfies the requisite legal criteria". The same Author, at 336, states that "to the extent that strategy and choice play a role in litigation, forum shopping encompasses both". According to the Author the result of forum shopping is not necessarily unfair. For a general analysis of the problem of forum shopping, see Ferrari (2013), 1 and ss., Brower, North Carolina Law Review (1993), 649 and ss.

[92] See Schreuer (2012) (n. 67), 26-27.

[93] See Sacerdoti, Journal of World Investment and Trade (2004), 97.

[94] See *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, para. 330 21 October 2005, *Mobil Corporation, Venezuela Holding BV, Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petroleos Holdings, Inc., Mobil Cerro Negro Ltd., and Mobil Venezolana de Petroleos, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010. See also Blyschak, Journal of World Energy Law and Business (2011), 32 and ss.

[95] See *Phoenix Action Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, *Banro American Resources, Inc. and Société Aurifére du Kivu et du Maniema S.A.R.L. v. Democratic Republic of Congo*, ICSID Case No. ARB/98/7, Award, 1 September 2000. For further explanation on the concepts of abuse of rights and abuse of process please see Chapter 3.

(a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965 and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or

(b) the Court of Arbitration of the International Chamber of Commerce; or

(c) an international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

Similar provisions are contained in many other BITs.[96]

In the absence of fork-in-the-road provisions, this situation might give rise to parallel and un-coordinated proceedings. A party in bad faith could, indeed, start more than one proceeding related to the same facts in the various *fora* set forth in the arbitration clause and – in theory – each of the arbitral tribunals could assume jurisdiction on the dispute (this issue will be better examined at paragraph 2.1.1 below). In this regard, anyway, it shall be considered that some Authors have expressed the view that once a choice under a treaty has been made, the others are precluded. Such a view is certainly correct in principle, but could be more easily accepted in presence of a clarifying provision to that effect.[97]

1.2 *The reason behind parallel proceedings: the historical necessity to incentivize investments*

It is now worth considering the reasons behind the proliferation of *fora* for the settlement of investment disputes.

In this regard it is helpful to start from the words of Eloise Obadia, who in 2002 – referring to the activities of ICSID, today the most applied form of resolution of investment disputes – stated that "during the first 30 years of its existence, ICSID was somewhat of a 'Sleeping Beauty', with an average of one or two cases being registered each year. It is with the widespread development of bilateral and multilateral investment treaties that the activities of ICSID have awakened… In a way, these bilateral and multilateral investment treaties are to ICSID what Prince Charming was to Sleeping Beauty, having stirred the activities of the Centre".[98]

[96] See, *e.g.*, article 24(3) of the U.S. Model BIT.

[97] See Wehland (2013) (n. 2), 100.

[98] Obadia, Investment Treaties and Arbitration (2002), 67-68.

This statement is strictly related to the following considerations: (i) prior to the "baby boom" of bilateral investment treaties (and of the related investor – State arbitrations)[99] the number of foreign investments was very limited due to the mistrust of investors in the developing States' systems of justice (and to the international form of relief given by diplomatic protection); (ii) until the end of the 20th century the activity of ICSID (and the existence of investment arbitration in general) was very limited;[100] and, as a consequence, (iii) States and arbitral tribunals have assumed an approach aimed at incentivizing the recourse to international investment arbitration. In light of the three above considerations, we will now try to analyse the historical process at the basis of the jurisdictional fragmentation occurred within international investment law, prior from the perspective of States that negotiated BITs and further looking at the approach assumed by arbitral tribunals in assuming jurisdiction.

From the first point of view, the resolution of disputes between States and foreign investors was, in fact, until the second half of the 20th century, reserved to the jurisdiction of national courts. Only when the investor, having before exhausted all the available local remedies, did not receive any sort of satisfaction, the State of nationality of the investor had the right to seek international relief through diplomatic protection.[101] Such form of international protection is a right of the State of nationality of the investor who enjoys maximum discretion in making recourse to or waiving it, even on the basis of political considerations. Furthermore, the rule of the prior exhaustion of local remedies rendered the process very slow. It is, in this regard, sufficient to think that the whole proceedings (i.e. national and international) related to the well-known *Barcelona Traction*[102] case has taken 22 years.[103]What stated above shall be summed to the circumstance that, after World War II, developing States claimed their full sovereignty on natural resources and therefore considered themselves entitled to expropriate investments without any sort of protection for investors (i.e. without paying a prompt, adequate and effective compensation according to the so-called *Hull Formula*). Moreover, such States – applying the so-called Calvo Doctrine[104] – requested to insert in investment contracts a so-called Calvo Clause, pursuant to which they renounced to any form of diplomatic protection.[105]

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[99] See Alexandrov (2006) (n. 9), 387.

[100] See Bernardini, Journal of World Investment (2001), where it is said that: "The experience, particularly in the 1960s and 1970s, of one of the sectors of economic activity which has most significantly mobilized the industrialized world's resources towards developing areas – the exploitation of mining resources and, more specifically, petroleum – shows how difficult it was during this period to reconcile the parties' different objectives".

[101] On the concept of diplomatic protection see Conforti (2013) (n. 7), 248 and ss.

[102] The reference goes to the *Barcelona Traction, Light and Power Co., Ltd.* (*Belgium v. Spain*), Judgement, 5 February 1970 ICJ Rep. 4, 35 case and to the related national proceedings.

[103] See Tonini (2011) (n. 7), 9-10.

[104] Such a doctrine was ideated by the Argentinian diplomatic Carlos Calvo in the second half of the 19th century.

[105] On the Calvo Doctrine, see Conforti (2013) (n. 7), 250, stating that the effect of the Calvo Clause in an investment contract shall be minimized, in light of the fact that such contracts were signed by investors and host States and investors could not bind their State of nationality, that were the only entities

From the above it is evident that foreign investors carrying out businesses in developing States enjoyed very little protection and, therefore, they where not incentivized in investing abroad. For this reason, in order to attract investments, States have started to enter into BITs with very broad standards of protection, definitions of investments and providing for a neutral arbitration to be started directly by investors in one of the different *fora* provided therein. This has been described by Prof. Sacerdoti as a "reaction" to the ICJ *Barcelona Traction* decision, according to which the State of nationality of shareholders was not entitled to seek diplomatic protection for damages suffered directly by the company (that actually performed the investment) and indirectly (i.e. loss of value of the shares) by shareholders.[106] It is therefore clear, if it is true that – as we have seen above – the main sources of parallel proceedings are related to the definitions of "investors" and "investments" contained in BITs, that the first reason leading to parallel proceedings is the same States' willingness to attract foreign investments through BITs very favourable to foreign investors (and setting forth various *fora* for the settlement of investment disputes). In this regard it is worth quoting Anthony Sinclair's words, stating, with concern to overlapping jurisdiction in international investment law, that "the inherent flexibility – or patent undesirability – of this potential overlap (depending on which side you sit) is the product of a modern treaty regime that typically couples a very broad definition of investments directly or indirectly held with frequently no more than a formalistic test of nationality to establish standing".[107]

In regard to the practice of arbitral tribunals, it is worth beginning the analysis by looking at the very limited number of investment cases until the end of the last century. It is here sufficient to mention that "the first ICSID case was registered in 1972. The first ICSID case under an investment treaty was registered in 1987… at the end of 1994, ICSID had before it only three cases between foreign investors and host governments under investment treaties. The first year in which more than five ICSID cases were registered was 1997".[108] How can this date be joined with the circumstance that 57 cases in 2013[109] and 42 in 2014[110] arising from arbitration clauses contained in international investment treaties have been initiated?

First of all, the data regarding the very high number of BIT arbitrations are clear evidence that, as of today, investment arbitration is considered (and, in the opinion of the present author, as it will be seen below, still is) the most reliable means for the resolution of disputes between States and foreign investors.

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entitled to make recourse to diplomatic protection. See also de Gramont, Transnational Dispute Management (2006), 18.

[106] Sacerdoti, Appeals Mechanism in International Investment Disputes (2008), 133.

[107] Sinclair (2005) (n. 67), 361.

[108] Alexandrov (2006) (n. 9), 387.

[109] See UNCTAD, Recent Developments in Investor- State Dispute Settlement, published on 1 April 2014.

[110] See UNCTAD, Recent Trends in IIAS and ISDS, published on 19 February 2015.

Trying to analyse the reasons for the significant growth of the recourse to investment arbitration (and in particular to ICSID), one of the main of them seems to be (on the basis of an analysis of the approaches taken by tribunals at the jurisdictional stage of proceedings),[111] the very flexible approach taken by tribunals in assuming jurisdiction.[112] The reference goes in particular to the recourse by tribunals to the doctrine of "piercing the corporate veil", i.e. the determination of the nationality of a company through the ascertainment of the nationality of a corporation's predominant shareholders.[113]

In particular, as demonstrated by the cases that will be reported below, from an analysis of the jurisdictional awards it emerges that: (i) tribunals have used to pierce the corporate veil when necessary in order to assume jurisdiction; and (ii) when the claim has been brought by a shell company, tribunals do not have pierced the corporate veil, even if the actual beneficiary of the investment had the same nationality of the host; and (iii) in case of claims started by the company incorporated in the host State, only in two cases Tribunals have accepted to pierce the corporate veil, while in all the others they stopped at the first level of control. Such a flexible (and often incoherent) approach has been justified on the basis of a literal interpretation of the relevant BITs.

As an example of the approach described under (i) it is worth mentioning one of the oldest ICSID cases, *SOABI v. Senegal*,[114] where a Panamanian company owned the locally incorporated company's shares; such Panamanian company was, in turn, owned by Belgians. Panama was not a signatory of the ICSID Convention and therefore the respondent State argued that the Panamanian company was not entitled to the protection of the ICSID Convention. The Tribunal, on the contrary, held that ultimate control was sufficient to establish its jurisdiction. The Tribunal stated "it is obvious that, just as a host state may prefer that investments be channelled through a company incorporated under domestic law, investors may be led for reasons of their own to invest their funds through intermediary entities while retaining the same degree of control over the national company as they would have exercised as direct

[111] See Dolzer, Schreuer, *Principles of International Investment Law* (2012), 50 and ss., Nadakavukaren Schefer, *International Investment Law* (2013), 113 and ss., Sornarajah, *The international Law on Foreign Investment* (2010), 323 and ss., McLachlan, Shore, Weiniger (2007) (n. 44), 131 and ss. See also Bernardini, in *Global reflections on international law, commerce and dispute resolution – Liber amicorum in honour of Robert Briner* (2005), 103 and ss.

[112] This could be sociologically explained, using the words of Hale, *Between Interests and Law* (2015), 11, by saying that "[d]ispute settlement institutions (be they domestic, intergovernmental, or transnational) have almost never run against the interests of dominant economic groups".

[113] See Kryvoi, Global Business Law Review (2011), 173, who has defined the "piercing the corporate veil" as "disregarding the separation between entities organized in corporate form with limited liability of shareholders". See also Lyons, Syracuse J. Int'l & Comp. Law (2005-2006), 525. For a general approach to the "piercing the corporate veil" doctrine see Beyer, Maryland Journal of International Law (1990), 233 and ss.

[114] *Société Ouest Africaine des Bétons Industriels v. Senegal*, ICSID Case No. ARB/82/1, Award, 25 February 1988.

shareholders of the latter".[115] As a consequence, the Tribunal pierced the corporate veil and asserted its jurisdiction. Such an approach has been applied by other Tribunals whenever it has been necessary to pierce the corporate veil in order to assume jurisdiction.[116]

Moving to the approach mentioned under (ii) it shall be noted that several times, when assuming jurisdiction in cases brought by holding companies (mentioned in paragraph 1.1.3), Tribunals should have had to decline jurisdiction if they had applied the piercing the corporate veil doctrine. In this regard it is worth mentioning, *inter alia*, the *Tokios Tokeles*[117] and *Rompetrol*[118] decisions, where the ultimate controller of the investment was a national of the respondent State and several authors have considered the assumption of jurisdiction as an allowance of an abuse of the investment arbitration system. In this regard the strong dissenting opinion issued by Prof. Prosper Weil in the *Tokios Tokeles* decision is a significant example of such criticisms.[119]

Notwithstanding such criticisms, in the majority of cases Tribunals have refused to pierce the corporate veil in order to avoid declining their jurisdiction under a certain BIT.[120] This could lead to a situation (already analysed in paragraph 1.1.3) in which various companies of the same group (that represent the same interests) bring two separate, but substantially identical, claims arising from the same facts.

As to the situation mentioned under (iii), the only two cases in which a Tribunal has pierced the corporate veil in order to decline jurisdiction have been *TSA v. Argentina*[121] and *National Gas v. Egypt*.[122] In the first of these cases, the claimant TSA was an Argentinean company. TSA's controlling company TSI was incorporated in The Netherlands with the sole purpose to make the disputed investment and take benefit of the Netherland – Argentina BIT. The majority of TSI's controllers were French and Argentinian nationals. In order to decline jurisdiction pursuant to the lack of the nationality requirement set forth in the Dutch – Argentinian BIT, the Tribunal had to pierce the corporate veil. In this case the Tribunal did so, stating that "only a genuinely

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[115] *Ibid.*, para. 37.

[116] See, e.g., *Mr. Franz Sedelmayer v. The Russian Federation* (through the Procurement Department of the President of the Russian Federation), Arbitration Award of 7 July 1998 rendered at the Place of Arbitration Stockholm, available at www.investmentclaims.com/decisions/Sedelmayer-Russia-JurisdictionandFinalAward-7Jul1998.pdf.

[117] *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004.

[118] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Jurisdiction, 18 April 2008.

[119] *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Dissenting Opinion of Prosper Weil. According to Prof. Weil the origin of capitals shall be highly relevant in the assessment of jurisdiction pursuant to the ICSID Convention. If the capitals come from the respondent State, the claimant is not entitled to make recourse to ICSID. See McLachlan, Shore, Weiniger (2007) (n. 44), 149 and ss.

[120] See, *e.g.*, *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, para. 330 21 October 2005.

[121] *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. Arb/05/5, Award, 19 December 2008.

[122] *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award, 3 April 2014. See Blanke, www.kluwerarbitrationblog.com (2014).

foreign investment should be protected by the ICSID mechanism".[123] In the second case, in which the tribunal has applied a very similar reasoning and reached the same conclusion of the *TSA* Tribunal, the claimant National Gas was an Egyptian national and the final controller of the investment was also Egyptian. With regard to these two cases, it should be highlighted that a piercing of the corporate veil has been possible only because the claimant was a company incorporated in the host State. This has consented to the Tribunals to search for the foreign control requested by art. 25(2)(b) of the ICSID Convention. The research for the foreign control is actually not allowed by the same ICSID Convention when, under a certain BIT, the claimant is a national of the other contracting State and not a company incorporated in the host State.[124] However, it should be noted that in many other cases (the circumstances of which were similar to *TSA* and *National Gas*), such as *AUCOVEN v. Venezuela*,[125] Tribunals have stopped to the first level of control and refused to pierce the corporate veil even in cases of claims started by companies incorporated in the host State.

Given the whole discussion above, it is evident that in order to improve the number of foreign investments, the possibility of recourse to investment arbitration has been broadened, first of all, by States, which have negotiated BITs with very broad "investors" and "investments" definitions. Tribunals, in turn, have assumed a very incoherent approach concerning their jurisdiction and have, on the basis of BITs' broad wording, very rarely declined jurisdiction due to a lack of the nationality requirement. Indeed, as it has been noted in a very meaningful comment to the *Tokios Tokeles* decision, the search for the effective control has been used only in order to expand jurisdiction, but not to restrict it.[126] If, as it will be seen in paragraph 1.4 below, tribunals' approach is fully justifiable in light of the relevant international law rules, it is also true that it has lead to the proliferation of *fora* for the settlement of investment

[123] *Ibid*., para. 118-120. For a general comparison of the *Tokios* and *TSA* decisions see Martin (2011), (n. 82), 1 and ss.

[124] This is perfectly confirmed by the award rendered in *Burimi SRL and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Award, 29 May 2013. As it will be seen in paragraph 1.6 below, the Tribunal has looked at the foreign control with regard to the claim presented by the locally incorporated company Eagle Games, while it did not do so with regard to the claim filed by the shell company Burimi SRL. This on the basis of a literal interpretation of the relevant BITs and of the ICSID Convention.

[125] *Autopista Concesionada de Venezuela, C.A. (AUCOVEN) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 September 2001, para. 116. In this case, *AUCOVEN* was originally owned by a Mexican company and – therefore – the Convention was not applicable because Mexico is not part of ICSID. Anyway, the investment was based on an agreement, a clause of which provided that in case *AUCOVEN* ownership should pass to a national of a contracting state, ICSID jurisdiction was available and the consent was given. Once *AUCOVEN* shareholding became American (even if the indirect ownership was Mexican), the ICSID tribunal declared to have jurisdiction on the basis of the principle of party autonomy: the party expressly identified the principle of majority shareholding as the criterion to be applied to identify ratione personae jurisdiction. They have chosen to subordinate their consent to ICSID arbitration to no other criteria. The tribunal was not empowered – according to the Convention – to change the agreement of the parties. The tribunal furthermore refused to consider Icatech (*AUCOVEN* American shareholder) as a convenience corporation, considering that it has become shareholder of *AUCOVEN* various years prior to the arising of the dispute.

[126] See Savarese, Rivista dell'arbitrato (2005), 387 and 389.

disputes and to the risk of parallel proceedings and conflicting awards. In this regard it is worth citing what has been stated by Gaillard and Pinsolle: "With the proliferation of complex deals and the corresponding proliferation of a related contracts and agreements drafted in a different manner, there is room for playing with parallel proceedings that can really make the difference on the outcome of the case".[127]

In conclusion, if tribunals' approach has probably given a contribution in reaching the objective of improving the number of foreign investments,[128] it is evident that, as we have seen in the introduction to Section 1, it has generated some mistrust in the investment arbitration system. Indeed, such an approach seems to struggle against several policy considerations that are essential for the survival of any method of dispute settlement. Such policy considerations will be analysed in the following Paragraphs.

1.3 *Policy considerations against parallel proceedings*

In the 1599 case *Ferrer v. Arden*,[129] Lord Coke made a clear statement in favour of finality and consistency and against the multiplication of proceedings (involving same facts, purposes and interests). He stated that "[f]or it hath been well said, *interest reipublicae, ut sit finis litium*; otherwise great oppression may be done under

[127] Gaillard, Pinsolle, in *The Art of Advocacy in International Arbitration – Second Edition*, 174 and ss.

[128] See Bernardini, (2001) (n. 100), 236, who – referring to the "denationalization" or "internationalization" of investment contracts has stated that "It is a matter of common experience that such techniques have shown their efficacy thanks to the particular dispute settlement method chosen by the parties" (i.e. investor – State arbitration). This has been because "the international arbitrator has given full effect to the above-described clauses in accordance with the parties' (or, at least, the private investor's) intent. The same Author, at 245, stated that "BIT's provisions in the field of dispute settlement through international arbitration represent an effective protection of the investment". It is therefore likely that the possibility to make recourse to this means of dispute settlement has incentivized the number of foreign investments. This idea is fully accepted by the European Federation for Investment Law and Arbitration. See EFILA (2015) (n. 7), 3. See also Meyers, works.bepress.com/Daniel_meyers/2 (2008), 5-6, stating that "In the absence of a reliable and efficient mechanism for the resolution of foreign investment disputes, the international community feared that prospective investors would be discouraged from investing abroad… The absence of a reliable legal structure to protect foreign investments was viewed not only as an impediment to foreign investment itself, but also to economic development and the multitude of benefits associated therewith. To overcome this impediment, the international community established what has today become the ITA (i.e. investment treaty arbitration) system. Accordingly, it is fair to say that the very purpose of the ITA system is to encourage foreign investment and thereby to further economic development in host States. Indeed, this purpose is recited in the preambulary provisions of nearly every bilateral investment treaty… In this way, the creation of the ITA system was based on two fundamental premises. First, that increasing the legal protections for foreign investments would increase the volume of foreign investments. And second, that increasing the volume of foreign investments would increase economic development". The same Author has noted that there is no certain evidence of the fact that the growing number of investments has been due to the development of the investment arbitration system. For a positive opinion on the influence of BITs on the number of foreign investments see also Geiger, Appeals Mechanism in International Investment Disputes (2008), 25. For sure, according to Meyers, there is no evidence of the fact that with the development of investment arbitration foreign investments have decreased. For a contrary opinion see Hallward-Driemeier (2003), 1 and ss.

[129] VI Coke 7a. On this point see Harnon, Israel Law Review (1966), 542-543.

colour and pretence of law; for if there shall not be an end of suits, then a rich and malicious man would infinitely vex him who hath right by suits and actions; and in the end (because he cannot come to any end) compel him to yield to his charge and vexation and to leave and relinquish his right; all which was remedied by the rule and reason of the Common law, the neglect of which rule... hath with it brought in four great inconveniences: 1. Infiniteness of Verdicts, Recoveries, and Judgments in one and the same case. 2. Sometimes contrarieties of Verdicts and Judgments one against the other. 3. The continuance of suits for twenty, thirty, and forty years, to the utter impoverishing of the parties. 4. All the same tendeth to the dishonour of the Common Law, which utterly abhorreth infiniteness, and delaying of suites, wherein is to be observed the excellency of the Common Law; for the rejection the true institution of it doth introduce many inconveniences, and the observation thereof is alwaies accompanied with rest and quietness, which is the end of all humane Laws."

This statement, archaic in its wording but still very actual in its meaning, in fact reflects the status of all legal systems, where consistency and finality are considered to be fundamental and irrevocable values.[130] It is not a case, therefore, that the majority of investment law scholars call for the application of such principles.[131]

In particular, three main policy considerations appear to be at the basis of the need for consistency and/or finality:[132] (i) ensuring the reliability and the legitimacy of the adjudication process and the principle of legal certainty; (ii) protecting judicial economy and efficiency in the decision making process, thus avoiding vexations and harassment for the defendant State; and (iii) the necessity to ensure that disputes come to an end, notwithstanding the desire to ascertain the truth with regard the case at hand.

We will deal with all these policy considerations separately.

1.3.1 *Reliability and legitimacy of the adjudication process and the principle of legal certainty*

Investment arbitration is by definition a public form of dispute resolution.[133] Indeed, vital areas of the life and economy of a State are often conditioned by the settlement of international investment disputes and this puts investment arbitration

[130] In 1966 Prof. Harnon already stated "the need for finality of judgement is recognized by many, if not all, systems of law". See Harnon (1966) (n. 129), 539. Similarly, Pinos, Osgoode Hall Law Journal (1988), 718, stated that "the final resolution of disputes therefore can be considered to be central to the effective functioning of the system of justice".

[131] V. Kaufmann-Kohler, in *Precedent in Investment Arbitration* (2008), 136 and ss. For a contrary opinion, see Schultz (2013), 19, who has stated that "an ossified, consistent, predictable, bad regime is worse than a loose, inconsistent, bad regime, because the former creates greater constraints for decision-makers in individual cases".

[132] As noted by Gaukrodger (2013) (n. 46), 29 and ss., such policy considerations have often been underestimated. Douglas (2009) (n. 64), 455 and ss., has underlined that investment tribunals have acted as if the policy considerations against the risk of conflicting outcomes are not their problem.

[133] See Van Harten, *Investment Treaty Arbitration and Public Law* (2007), 1 and ss., De Brabandere, *Investment Treaty Arbitration as Public International Law* (2014), 1 and ss.

in a position of very high visibility. Therefore it is worth analysing the influence of parallel proceedings on the perception that States and public opinion may have of investment arbitration.

This task may be analysed through the analysis of the possible dramatic outcomes of parallel proceedings on the reliability of the adjudication process and on the principle of legal certainty. In this regard, it is worth recalling the *CME*[134] and *Lauder*[135] cases, briefly mentioned above. As already stated, notwithstanding that the facts at the basis of the two claims were perfectly the same,[136] the two tribunals reached completely opposite solutions on the issues of expropriation, fair and equitable treatment and full protection and security. In the *CME* case, indeed, the SCC Tribunal (the conclusions of which were upheld by the Sweden's SVEA Court of Appeal) found a violation of all the mentioned standards, while the *ad hoc* London Tribunal in the *Lauder* case stated that no violation occurred in the present case.

It shall be mentioned that the outcome of parallel proceedings is not necessarily so dramatic. In the disputes started by *Yukos*'s majority shareholders,[137] the same Tribunal heard the three cases and issued – on the same day – three almost identical awards. In this case, as well as in the other disputes related to the *Yukos* saga (i.e. the cases started by minority shareholders),[138] it is possible to say that - in concrete - Tribunals have tried to give a reasonable practical solution to the issue of parallel proceedings, at least taking into account the facts and the outcomes of the related disputes.

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[134] *CME v. Czech Republic*, UNCITRAL, SCC Partial Award, 13 September 2001

[135] *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001

[136] The *CME* and *Lauder* litigations regarded the granting of a TV license to Central European Development Corporation (CEDC), a vehicle company of the Dutch company CME and the American citizen Mr. Lauder, for establishing a new private television (TV Nova) in Czech Republic. After several bureaucratic problems, TV Nova received its licence, but in 1995 a change in Czech Media Law strongly affected CME and Lauder's investment (giving advantage to the business of the Czech citizen Dr. Zelezny, a former partner of Mr. Lauder). As already stated, two claims were started (one by CME according to the Dutch-Czech BIT before the SCC and one *ad hoc* in London by Lauder according to the US-Czech BIT) and the Tribunals reached completely opposite conclusions. For a more detailed description of the facts see Franck, Fordham Law Review (2005), 1559-1668.

[137] *Yukos Universal Ltd. (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Award of 18 July 2014, *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 226, Award of 18 July 2014, and *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 228, Award of 18 July 2014.

[138] *Quasar de Valores and others v. The Russian Federation*, SCC Case No. 24/2007, Award of 20 July 2012, *RosInvest UK Ltd v. The Russian Federation*, SCC Case No. V079/2005, Award of 2 September 2010. It should be noted that the Yukos saga involved also a case before the European Court of Human Rights, *OAO Neftyanaya Kompaniya Yukos v. Russia*, App. No. 14902/04, ECtHR, Judgement (Merits) of 20 September 2011, and a ICC commercial arbitration, *Yukos S.a.r.l. v. Rosneft*, which involved also proceedings before Dutch, English and US Courts. As explained by Giorgetti (2015 (n. 5), 112, in *Quasar*, "when reaching its conclusions, the SCC Tribunal reviewed both Yukos [i.e. the proceedings before the ECtHR] and RosInvest. It explained why it disagreed with the Yukos decision. It also briefly referred to the similarities with the RosInvest. The Yukos litigation is particularly interesting because the different tribunals took cognizance of other international courts and tribunals seized of similar and related matters. They often, but not always agreed with each other's conclusions". For an analysis of the *Yukos* decision issued by the ECtHr see McCarthy, Journal of World Investment & Trade (2016), 140 and ss.

A similar coordination may be found in the abovementioned *Sempra* and *Camuzzi* decisions, where – even if the two minority shareholders brought two separate claims – the claimants, in accordance with Argentina, decided that the same Tribunal would have heard both disputes. On the contrary, in the similar circumstances (i.e. two autonomous claims started by minority shareholders) regarding the already mentioned *CMS* and *Total* claims, such coordination was not present. The *Total* Tribunal – notwithstanding the fact that the claim before it arose from a participation of the claimant in the Argentinian company TGN (i.e. the same circumstance that give rise to the *CMS* claim) – made reference to the *CMS* decision but reached opposite conclusions on the alleged violation of fair and equitable treatment.[139]

In light of the above, due to the lack of a general rule for the solution of the problem, the potential for conflicting outcomes, as well as the rise of costs, the lack of efficiency and, last but not least, the lack of legal certainty makes the existence of parallel proceedings a very high barrier to the survival of international investment law and arbitration.[140]

It is not casual, indeed, that the risk of conflicting outcomes has led commentators to strongly criticize investment arbitration and to talk about its legitimacy crisis.[141] Carver has stated that conflicting outcomes are a "totally unacceptable result (…) You cannot have any working system of arbitration which produces two diametrically opposite results at any time on exactly the same subject matter (…) It may undermine the whole future of bilateral investment dispute settlement. It may undermine the whole future of investment arbitration unless we can find a solution to this".[142] Similarly, Susan Franck stated that "prominent practitioners have noted that 'any system where diametrically opposed decisions can legally coexist cannot last long. It shocks the sense of rule of law or fairness'. Given that issues of legitimacy cut to the heart of utility of using arbitration, the literature must address the concerns underlying the legitimacy crisis in a meaningful way. Otherwise, conflicting awards based upon identical facts and/or *identically worded investment treaty provisions* will be a threat to the international legal order and the continued existence of investment treaties" (footnotes and citation omitted, emphasis added).[143] Finally, and more generally, Charney has stated that "not only

[139] See Gaukrodger (2013) (n. 46), 43.

[140] The dramatic effects of parallel proceedings are in fact even more visible in cases involving several systems of adjudication, such as the *Chevron* disputes, involving disputes in US national Courts, Ecuador national Courts, Permanent Court of Arbitration in the Hague, the District Court in the Hague (as setting aside authority) and the International Criminal Court. Cases such as this are out of the scope of the present book and will only be briefly analysed in Chapter 3. See Giorgetti, Journal of International Law (2013), 787 and ss., Donziger, Garr, Page, Human Rights Brief (2010), 8 and ss.

[141] Sornarajah, (2008) (n. 111), 41 and ss. For a contrary opinion and direct answer to Sornarajah, see Juillard Appeals Mechanism in International Investment Disputes (2008), 81 and ss.

[142] Carver, Journal of World Investment and Trade (2004), 23. For an analysis of the possible reasons behind conflicting outcomes see Schneiderman (2010), 1 and ss.

[143] Franck (2005) (n. 136), 1583.

may a cacophony of views on the norms of international law undermine the perception that an international legal system exists, but if like cases are not treated alike, the very essence of a normative system of law will be lost".[144]

Given the above, one shall consider that, due to the its public nature, in order to be considered reliable (and therefore to increase its legitimacy) investment arbitration shall meet and reflect the wishes and needs of the community on which it has influence[145]. Hence, it is worth considering what States (and investors) expect from investment arbitration.[146] It is our contention that, when giving their consent to investment arbitration, the normal expectation of the parties – and in particular States (and the national public opinion) – is, *inter alia*, that "an issue will be tried only once".[147] This is in particular true if one considers that the costs of investment arbitration sustained by States are finally paid by citizens and, therefore, the fact that a dispute is heard twice may be considered as a waste of public money. As stated by Susan Franck, indeed, "legitimacy depends in large part upon factors such as determinacy and coherence, which can in turn beget predictability and reliability (…) Coherence is a key element of legitimacy; it requires consistency of interpretation and application of rules in order to promote perceptions of fairness and justice".[148]

In conclusion, in a network such as investment law and arbitration, where very broad standards are contextualized and given concrete significance by the work of arbitrators,[149] the issue of legitimacy, which involves the validity of the power exercised by arbitrators,[150] is crucial, due to the facts that public interest is at stake and, now more than ever, public opinion is vigilant. Indeed, such reasoning has been fostered also with regard to the ICJ framework, by saying that "it is imperative for the Court to maintain judicial consistency (…) because intellectual coherence and consistency is the cornerstone of continuing respect for the jurisprudence of the Court. Furthermore, the success of the Court is dependent to a large degree upon its

[144] Charney, New York University Journal of International Law and Politics (1999), 699.
[145] Gribnau, Electronic Journal of Comparative Law (2002), 28 and ss.
[146] Bekker, Harvard International Law Journal Online (2013), 8, and Salacuse, *Making Transnational Law Work in the Global Economy – Essays in Honour of Detlev Vagts* (2010), 428, give a central role to "parties' expectations" in the context of the challenges facing the international investment regime.
[147] Vestal, Saint Louis University Law Journal (1964-1965), 31. Generally speaking, every time one refers to finality of disputes, the public interest is at stake. In this regard see Harnon (1966) (n. 129), 546.
[148] Franck (2005) (n. 136), 1584-1585.
[149] Bekker (2013) (n. 146), 13-14, has indeed talked about investment arbitration as a form of "judge-made law" and about arbitrators as "agents of diffusion" of such law. Similarly Schill, www.ssrn.com/link/SIEL-Inaugural-Conference.html (2008), 18 and ss., has talked about the "norm generative function" of international investment tribunals. In light of these considerations one could assert that arbitrators in the investment network do not only resolve disputes, but respond to the so-called "law expounding model", where "the role of judges in the system is to derive the appropriate legal rule from the values articulated in the constitutions and statutes" (i.e. in, our case, Bilateral Investment Treaties). For a description of such model see Purcell, California Law Review (1997), 898 and ss.
[150] Gribnau (2002) (n. 145), 29.

reputation for impartial adjudication and judicial consistency is the most obvious means of avoiding accusation of bias".[151]

In the opinion of the present author the only way to ensure the legitimacy and reliability of investment arbitration is to apply the legal principles that are felt as necessary by the operators, such as consistency, coherence, predictability, equality, justice and objectivity; in other words, ensuring legal certainty.[152] In investment law and arbitration this means that parallel proceedings shall be avoided and – if they are not avoidable – there shall be a general rule aimed at managing the problem that may arise from the existence of two proceedings between the same substantial parties, arising from the same facts and the claimants of which have the same interests and purposes.

Only when operators will found a way to manage this problem, investment arbitration tribunals will get their full legitimacy as adjudicators.[153]

1.3.2 *Judicial economy and the need for efficiency in the decision making process*

Judicial economy is one of the most mentioned standards regarding the management of processes by judges, as well as a canon that should inspire the drafting of procedural laws.[154] Generally speaking, it can be said that judicial economy is seen in national systems as implying two main aspects: saving time and saving money.

From an international perspective, judicial economy is very often mentioned in WTO litigation, where panels exercise such a "practice by which they rule not to rule on certain of the litigants' legal arguments, deeming these unnecessary to solving the dispute at hand".[155] In the *US – Wool Shirts and Blouses* case, the Appellate Body stated that "panels may not address any issues that need not to be addressed in order to resolve the dispute between the parties".[156] In this regard it should be noted that

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[151] Ovchar, Bond Law Review (2009), 25. The Author has in particular referred to what has been written by Higgins in *Problems and Process: International Law and How We Use It* (1994), 202.

[152] *Ibid*., 42 and ss. The prominent role of consistency in investment arbitration is also recognized by Article 2 of the International Law Institute Resolution of 13 September 2013 (Tokyo Session) on Legal Aspects of Recourse to Arbitration by an Investor Against the Authorities of the Host State under Inter-State Treaties, stating that "Consistency of solutions in investment arbitration contributes to legal certainty for all actors involved. The quest for consistency does not require the mechanical application of prior practice without regard to the particular circumstances of the case or the need for the interpretation and development of the law". The last sentence gives a central role to arbitrators in ensuring consistency in investment arbitration. Such role will be deeper analysed below.

[153] See Vestal (1964-1965) (n. 147), 33-34, and Pinos (1988) (n. 130), 718.

[154] With regard to the duty of legislators to ensure a fair process see Nigro, Prosperi, *L'irragionevole durata dei processi* (2009), 35-37.

[155] Busch, Pelc, International Organization (2010), 257. The Authors further state that "this practice is important not only for the litigants, who frequently appeal its use, but for the membership as a whole, since judicial economy limits the scope of the case law that results".

[156] WTO Document WT/DS138/AB/R, 25-26. Concerning judicial economy at the Appellate Body stage, see Alvarez-Jimenez, Journal of International Economic Law (2009) 393 and ss.

WTO rules (as interpreted by the Appellate Body) give a very broad discretion to panels in applying judicial economy; therefore, as stated by Busch and Pelc, panels "need to strike a balance between greater legalism (that is, 'rigidity'), which aims at furthering compliance, and more flexibility (that is, 'stability'), which helps attract and retain members".[157]

Prof. Palombino has stated that "the principle of judicial economy from guiding and affecting the international judge's activity (…) belongs, in fact, to the general canons of adjudication – that is, those canons which are inherent in the judicial function and that the judge takes into account in the exercise of his duties, regardless of what the written procedural law establishes. Accordingly the judge is in any case expected to operate in conformity with the principle of judicial economy and to use it in a proper way, namely one that does not compromise the dispute's resolution and/or the establishment of the true state of the world. Such a circumstance is particularly evident where, for reasons of judicial economy, the judge limits the scope of the decision, and this even though no provision requires it".[158]

Notwithstanding the above, it is worth noting that in international arbitration law there is no reference to the principle of judicial economy. This does not mean that this principle shall not influence the arbitrators' work and that the parties do not expect that arbitration is conducted efficiently. Indeed, time and costs are key issues in order to evaluate the efficiency of the arbitration process and efficiency is, in turn, one of the most debated issues by international arbitration scholars.[159] Indeed, as confirmed by the 2015 Queen Mary Arbitration Survey, expenses and longevity of arbitration are the less attractive characteristics of this method of dispute settlement.[160]

However, it is worth noting that "there is no a priori answer to the question of how to make arbitration fair and efficient. Each case depends on its facts".[161] This consideration shifts the analysis on the role of arbitrators in ensuring – on the basis of the concrete needs of each case – efficiency and respect of the principle of judicial economy. This is particularly true in case of investment arbitration, where – as it has been already said – the very high costs are sustained by public money.

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[157] Busch, Pelc (2010) (n.155), 259. Bhala, Journal of Transnational Law and Politics (1999), 48, stated that the recourse to judicial economy is a proof of the existence of a system of *de facto stare decisis* in WTO. He stated that judicial economy is a principle of "self restraint" by panels.

[158] Palombino, Leiden Journal of International Law (2010), 910. The Author, at 912, underlines that "the presence of the principle among the fundamental canons of litigation has always been highlighted by scholars of domestic procedural law". In this regard, in particular concerning the jurisdiction of the US Supreme Court, see Hill, Vanderbilt Journal of Transnational Law (2008), 1195 and ss.

[159] See Welser, Austrian Yearbook of International Arbitration (2014), 149, Kirby, Journal of International Arbitration (2015), 689 and ss.

[160] The 2015 School of International Arbitration Survey, entitled *Improvements and Innovations in International Arbitration* is available at http://www.arbitration.qmul.ac.uk/research/2015/.

[161] See Fellas, PLI's Course Handbook (2007), 16.

The task of arbitrators is therefore to make a balance between due process and efficiency;[162] they have to ensure that, in concrete, each party has *once* the right to present its case but – at the same time – they have a duty to avoid wastes of money and time.[163] As a confirmation of such a general duty it is worth mentioning the provision of Section 33 of the English Arbitration Act 1996, stating that the tribunal shall, on one side, give each party a reasonable opportunity to putting his case and dealing with that of his opponent, and, on the other side, adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay of expense.[164] UNCITRAL Rules, at Article 17, similarly provide that "[t]he arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that an appropriate stage of the proceedings each party is given a reasonable opportunity to present its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute".

In the context of parallel proceedings this means that arbitrators have a duty to ensure that a dispute is tried only once, therefore avoiding conflicting outcomes, useless duplication of proceedings and exaggerated costs, and ensuring good administration of justice in the arbitral proceedings. Hence, it is a duty of arbitrators to make efforts in order to grant finality of awards and to avoid re-judging a dispute that has been already judged or that is being judged.

This would also ensure that the defendant State is not vexed and harassed by the multiplication of proceedings. In the lack of the application of the finality rule, a company would be able to structure its business so as to be able to sue a State a number of different claims on exactly (or at least *substantially*) the *same* claim.[165] It is in fact arguable that, when accepting to submit jurisdiction of arbitrators for investment disputes, States did not expect to have to participate to more than one proceeding concerning the same dispute. Therefore, if it is true that arbitrators shall keep the legitimate expectations and the rights of *both* parties into account,[166] it is also true that they cannot allow a claimant to multiply a dispute in order to get more chances of success. As stated by Zachary Douglas "an appeal to basic notions of justice would surely suffice to refute any suggestion that such a state of affairs is acceptable as a matter of principle. A host state cannot be expected to defend a barrage of concurrent or consecutive claims relating to precisely the same prejudice to a single investment. Nor can it be right for a host state to defend consecutive claims in

[162] With regard to the duty of arbitrators in the case management see Waincymer, *Procedure and Evidence in International Arbitration* (2012), 78 and ss.
[163] Fortier, ICCA Congress Series no. 9 (1999), 395-399.
[164] Similarly, article 19 of the UNCITRAL Model Law gives to the Tribunal the possibility to conduct the arbitration in such manner as it considers appropriate.
[165] See Vestal (1964-1965) (n. 147), 34.
[166] See Bekker (2013) (n. 146), 8. For a general analysis of the concept of legitimate expectations see Merusi, *Buona fede ed affidamento nel diritto pubblico* (2001), 21 and ss. and Carbone, *Promessa e affidamento nel diritto internazionale* (1967).

relation to the same investment by different members of the group of claimant companies until an award favourable to that group is procured".[167]

1.3.3 *Fairness and finality*

A possible defence of the existence of parallel proceedings could be that the celebration of more than one process related to the same facts is functional to the achievement of truth and justice with regard to the dispute at hand.[168]

This consideration calls into play general considerations regarding the scope and the aim of a process (and of an arbitration). An adjudication proceeding is not aimed, in fact, at achieving the objective truth, but only to ascertain a probable truth. Such a probable truth is related to the knowledge and information available to the judges/arbitrators and has – by definition – a dialectical and uncertain character, involving, for its same nature of *ex post* ascertainment of facts a certain degree of subjectivity by the adjudicative body.[169] Any litigation process is therefore fallible and the goal of complete certainty in a process is not reachable.[170]

It is not a case that systems of civil procedure are "not designed to produce absolute certainty of the truth in any given litigation or in a series of litigations. The usual burden of proof standard in civil cases is the preponderance of the evidence test".[171] The kind of analysis that judges and arbitrators carry out is a form of historical investigation aimed at ascertaining with the highest degree of probability the facts that happened and to integrate them into legal categories; this process involves a certain degree of subjectivity and is not free from being conditioned by the arbitrators' personal and juridical backgrounds. Hence, the question is, once an arbitration panel has conducted a proceedings respecting all the mandatory procedural rules (ensuring fairness and equality of the parties), why should the proceedings be repeated "when no subsequent litigation either will *or is intended to* determine the absolute truth?" (emphasis in original).[172]

In light of the above, we can therefore assume that, if the scope of an adjudication process is to achieve the highest possible degree of certainty, the duty of arbitrators is to ensure, before deciding a dispute, that each party has the full possibility to present its case (and to give evidence of its assertions). This means that arbitrators have to ensure that during the proceedings due process is respected.[173] In this regard it should be noted that due process and the right to be heard are ensured

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[167] Douglas (2009) (n. 64), 309.
[168] See Harnon (1966) (n. 129), 542 (who – anyway – criticizes such a conclusion).
[169] Pastore, http://m.docente.unife.it/orsetta.giolo/Percorsi%20di%20Genere%20-%20Testi%20seminario%201%20dicembre.doc (2012-2013), 4.
[170] Callen, Kadue, Hastings Law Journal (1979-1980), 765; Greenebaum, Indiana Law Journal (1969), 2.
[171] Callen Kadue (1979-1980) (n. 170), 766.
[172] *Id.*, 767.
[173] See Fortier (1999) (n. 163), 398.

if, in relation to a dispute, a party has the right to present its case *one time* and not several times.

If due process and fairness are respected during a proceeding between two parties, a duplication of such proceeding is not required and may well be precluded due to the existence of a final award/judgement on the dispute.[174]

On the contrary a problem of fairness may exist when two conflicting awards relating to the same dispute coexist, due to the fact that it goes against both legal certainty and the same concept of rule of law if something is deemed lawful and unlawful at the same time.[175] This circumstance renders necessary a rule of coordination in order to ensure that no more than one award regulates a certain controversy between two parties.

In conclusion, using the words of Professor Scott, the Reporter of the First Restatement of Judgments, we could ask ourselves "[w]hy should not [the search for] the truth prevail? The answer is based upon public policy. The interests of [justice] and of the parties require the putting of an end to controversies".[176]

1.4 *Necessity of a general remedy for ensuring consistency and finality. The impossibility to find a solution at the jurisdictional stage: the central role of arbitrators and the necessity to go beyond party autonomy. Plan of the next chapters*

Several national law systems have given different answers to the issue of conflicting judgments. If there are two parallel national proceedings and none of them is concluded, while civil law systems mechanically apply the *lis pendens* rule, according to which the judge second seized shall stay his proceedings until the first seized judge rules on his jurisdiction,[177] common law systems use to make reference to the more discretional remedies of *forum non conveniens* and anti-suit injunctions. This means that if an English judge finds that there is a clearly more appropriate forum that may serve better than him the interest of justice, he will stay its proceedings and ask the plaintiff to refer to that judge. On the contrary, if the English judge finds to be the most appropriate forum, he will issue an anti-suit injunction, an order aimed at restraining a party from commencing or continuing a judgement.

In case one of the two parallel proceedings is concluded, almost all the national law systems apply the rule of *res judicata*, according to which, once a dispute between two parties is decided by a determination that is considered final as to the rights,

[174] It is not a case that the very authoritative Italian scholar Piero Calamadrei (*Istituzioni di diritto processuale civile secondo il nuovo codice* (1941), 125) has stated that any decision/award may not be re-judged once it has become *res judicata*, due to the fact that it, by definition, *facit ius* (made law). Once the award is issued, it is valid notwithstanding it could be considered as not reflecting the truth. In this regard see Palombino, *Gli effetti della sentenza internazionale nei giudizi interni* (2008), 89 and ss.

[175] Palombino (2008) (n. 174), 90 and ss.

[176] Scott, Harvard Law Review (1942), 1.

[177] See, e.g., art. 29 of the EU Regulation 1215/2012.

question and facts involved in the dispute, a re-litigation of the same matter is barred.[178]

In the very unlikely hypothesis that two judgements concerning the same dispute and between the same parties are issued, *all* national law systems have found solutions aimed at avoiding the coexistence of conflicting outcomes. Anyway, the different systems have applied different solutions. As it has been demonstrated,[179] often these solutions disregard any evaluation on the substance of a decision and give precedence to the first or second issued decision as a matter of fact. In Italy, for example, the second decision always prevails, while in common law countries, on the contrary, the valid decision is the first one.[180] In other systems, like France, the *Cour de Cassation* will decide which decision to render invalid.[181] Furthermore, it should be added that in some particular cases, such as (in Italy) the fragmentation of a dispute concerning damages arising from a car accident,[182] national judges have applied the doctrine of abuse of process in order to bar the second claim from going ahead at the admissibility stage, even if – in principle – jurisdiction was present. All the above legal instruments will be deeply examined in Chapters 2 and 3 below.

With regard to international arbitration, as a matter of principle one should note that there are no explicit rules aimed at solving the problem of parallel proceedings. For logical reasons, the first phase of the proceedings where it is possible to try to find a solution to the problem of parallel proceedings is the jurisdictional stage. Indeed, it is reasonable that, if a case has been already judged or is being judged, other arbitral tribunals refuse to hear the same claim as a matter of jurisdiction.

Nevertheless, as it will be explained in this paragraph, a closer look to the rules regulating jurisdiction in international arbitration reveals that at the jurisdictional stage arbitrators have nothing (or, at least, less) to do in order to avoid the occurrence of two parallel proceedings.

First of all it should be reminded that arbitrator's jurisdiction is determined, according to the principle of kompetenz-kompetenz, by the same arbitrators.[183] This is clearly stated, for instance, by art. 41, paragraph 1, of the ICSID Convention, stating that "[t]he Tribunal shall be the judge of its own competence". Similarly art. 23, paragraph 1, of the 2010 UNCITRAL Arbitration Rules states that "[t]he arbitral

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[178] Gallagher, in *Pervasive Problems in International Arbitration* (2006), 335.

[179] Palombino (2008) (n. 174), 90.

[180] Ibid., 90-91. The Author mentions some contrary opinion with regard to the approach taken by Italian courts that let prevail the second issued decision.

[181] In criminal justice systems, on the contrary, often the most favourable decision for the guilty person prevails, on the basis of the principle *in dubio pro reo*. See, e.g., art. 669 of the Italian criminal procedural code.

[182] See Castaldo, http://www.consiglionazionaleforense.it/site/home/agenda/documento5237.html (2011), 1 and ss., Scarselli, Rivista di diritto processuale (2012), 1450 and ss.

[183] On the determination of arbitral jurisdiction see Gotanda, Columbia Journal of Transnational Law (2001) 11 and ss. On the principle of kompetenz-kompetenz see Bachand, Arbitration International (2009), 431 and ss., Chillakaru, Contemporary Asian Arbitration Journal (2013), 133 and ss.

tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement". The rationale behind the principle of kompetenz-kompetenz is that arbitrators are appointed by the parties and their task is to interpret the arbitration agreement paying only consideration to party autonomy as expressed in the arbitration clause in light of the relevant applicable law.

Considering that BITs are international treaties, arbitrators shall interpret their jurisdictional clauses according to the provisions of art. 31-32-33 of the 1969 Vienna Convention of the Law of Treaties ("VCLT") (which fully reflect customary law with regard to treaty interpretation).[184] Due to the fact that article 32 and 33 VCLT only come into play, as supplementary means of interpretation, in cases of particularly obscure treaty provisions, we will primarily deal with the provision of art. 31 VCLT. According to such rule:

1. 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*.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

   (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

   (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

   (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

   (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

   (c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

[184] Weininger, *Pervasive Problems in International Arbitration* (2006), 235 and ss., and Kaufmann- Kohler, *Pervasive Problems in International Arbitration* (2006) 257 and ss. See also Conforti (2013), (n. 7), 112 and ss., and Gardiner, *Treaty Interpretation* (2008), 142.

From the above provision three main elements emerge: (i) interpretation shall be carried out in good faith according to the ordinary meaning to be given to treaty provisions; (ii) interpretation shall be performed according to the object and purpose of the treaty; and (iii) interpretation shall keep into account the context in which the treaty has been signed.[185]

We will now try to understand how the requirements for the interpretation of treaties set forth in the VCLT have to be applied in order to interpret jurisdictional clauses contained in BITs. As a preliminary remark it is worth noting that the VCLT does not privilege any of the above three criteria. They are all equal for the sake of interpreting an international treaty.[186] Furthermore any of such elements shall be kept into considerations jointly with the others.[187] Concerning the ordinary meaning to be given to treaty provisions, it should refer to the "regular, normal or customary"[188] meaning that is attributed to a term or to a sequence of terms. However, as it has been stated by the ICJ, the ordinary meaning "is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it".[189]

This lets the context (i.e. the relevant constraints of the communicative situation that influence the language use, language variation and discourse summary) come into play. In fact "context is as an immediate qualifier of the ordinary meaning of terms used in the treaty and hence context is an aid to selection of the ordinary meaning and a modifier of any over-literal approach to interpretation".[190]

Finally, in regard to the object and purpose of the treaty, it should be said that even if it is not easy to understand if such terms have a different meaning, a study has clarified that "the term 'object' indicates thus the substantial content of the norm, the provisions, rights and obligations created by the norm. The object of a treaty is the instrument for the achievement of the treaty's purpose, and this purpose is, in turn, the general result which the parties want to achieve by the treaty".[191]

Given the above, it is worth understanding what are the context, the object and the purpose of a BIT. In regard to the context, as stated in paragraph 1.2 above, it is arguable that BITs (particularly the ones concluded in the late 20th century) should

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[185] A partially different approach to interpretation of BITs is proposed by Ciurtin, Revista Română de Arbitraj (2015), 65 and ss.

[186] See Gardiner, (2008) (n. 184), 142.

[187] *Ibid*., 161.

[188] Gardiner, (2008) (n. 184), 164.

[189] *South West Africa* (*Liberia v. South Africa*, jointly with *Ethiopia v. West Africa*), Preliminary Objections, Judgement, 20 May 1961, ICJ Reports 1962, 336. In this regard Gardiner, at 161-162, says "Grotius had stated: 'If there is no implication which suggests a different conclusion, words are to be understood in their natural sense, not according to the grammatical sense which comes from derivation but according to current usage'. Thus Grotius' opening words effectively support the approach taken in the Vienna rules in that they start with the ordinary meaning but allow for different implications". Gardiner's quote refers to Grotius, *De Jure Belli ac Pacis*, Oceana (1964), Book II, 409.

[190] Gardiner (2008) (n. 184), 177.

[191] Buffard, Zemanek, Austrian Review of International & European Law (1998), 326.

be contextualized in an economy that is trying to become even more global and where a movement of capital from the north to the south of the world is essential. Therefore States are willing to incentivize investments (i.e. the purpose of the treaty) trough norms which create very favourable conditions for investors in the host States (i.e. the object of the treaty).[192]

Hence, it is not surprising that, for example, the *Tokios Tokeles* Tribunal, facing a BIT provision (i.e. art. 1(2)(b) of the Ukraine-Lithuania BIT) stating that investor is "any entity established in the territory of Lithuania in conformity with its laws and regulations", has stated that "[t]he object and purpose of the Treaty likewise confirm that the control-test should not be used to restrict the scope of 'investors' in Article 1(2)(b). The preamble expresses the Contracting Parties' intent to 'intensify economic cooperation to the mutual benefit of both States' and 'create and maintain favourable conditions for investment of investors of one State in the territory of the other State'. The Tribunal in *SGS v. Philippines* interpreted nearly identical preambulary language in the Philippines-Switzerland BIT as indicative of the treaty's broad scope of investment protection. We concur in that interpretation and find that the object and purpose of the Ukraine-Lithuania BIT is to provide broad protection of investors and their investments".[193]

In light of the above it is not possible to criticize the Tribunals' approach in cases where Tribunals have refused to read the BIT jurisdictional provisions in a way that is different from the one resulting from the ordinary meaning, the context, the object and the purpose of the treaty, i.e. the promotion of investments. The raise of parallel proceedings seems justified by the rules on interpretation of treaty provisions conferring jurisdiction.

Indeed, if BITs provide that the mere ownership of shares is an investment, it is not surprising that we can have several autonomous claims from the various shareholders of a same company. In this regard, it is worth highlighting what stated by the *CMS* Tribunal: "The Tribunal notes in respect that the Centre [ICSID] has made every effort possible to avoid a multiplicity of tribunals and jurisdictions, but that it is not possible to foreclose rights that different investors might have under different arrangements".[194]

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[192] See Di Benedetto, *International Investment Law and the Environment* (2013), 150, according to whom "[t]he fundamental objectives of investment treaties are the protection and promotion of foreign investments. These are embedded into their overall structure and are confirmed in their preambles (and often by their titles)".

[193] *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Award on Jurisdiction, 29 April 2004, para. 31. Similarly, in *SGS v. Philippines*, ICSID Case No. ARB/03/11, Decision on Jurisdiction, 29 January 2004, para. 116, the Tribunal stated "the object and purpose of the BIT supports an effective interpretation of art. X(2). The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended 'to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other". It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments" Many other decisions have taken similar approaches.

[194] *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 July 2003, para. 86.

It is also fully justifiable that, even in cases of claims brought by shell companies, tribunals have consented to disputes to go ahead, because the relevant BITs allowed to structure investments in a manner aimed at taking advantage of more than one investment treaty. With this regard it is worth reminding the decisions of the *Saluka* and *Yukos* Tribunals mentioned in paragraph 1.1.3 above, where – even if showing some sympathy for the possibility of precluding jurisdiction to claims brought by shell companies –Tribunals stated that the relevant BIT wording precluded them to do so.

However, it is worth noting that Tribunals could have also given a different reading of the relevant BITs' provisions and give prevalence to "policy considerations rather than to canons of interpretation".[195] For example, in *Vacuum Salt v. Ghana* the Tribunal refused to hear a claim by a minority shareholder,[196] and, in his dissenting opinion in the *Tokios Tokeles* decision, Prof. Weil explained why the abovementioned interpretation of the majority of the Tribunal should be considered wrong.[197] It is, anyway, arguable that these opinions do not represent the majoritarian position and that Tribunals still prefer to rigidly apply VCLT provision and assume jurisdiction every time the interpretation of the relevant BIT provision so dictates, without caring of the risk of multiple and conflicting proceedings (and awards).[198] Tribunals have therefore

[195] Weiniger (2006) (n. 184), 235 and ss. and in particular 247.

[196] In *Vacuum Salt v. Ghana*, ICSID Case No. ARB/92/1, Award, 16 February 1994, the Tribunal refused to hear a claim by a company incorporated in Ghana, a minority shareholder (Mr. Panagiotopulos) of which, owning 20% of the company's shares, was Greek. Provided that the words "foreign control" contained in article 25(2)(b) of the ICSID Convention are not defined, and that the concept of control is not intended by ICSID Tribunals (and by several scholars) as necessarily corresponding to the majority of the shares, the Tribunal could have concluded that it had jurisdiction (due, inter alia, to the very important technical contribution that Mr. Panagiotopulos gave in the management of the company). On the contrary it reached an opposite conclusion and did not assume jurisdiction on Vacuum Salt's claim stating that there was not foreign control over the company. Probably, if a BIT between Greece and Ghana would have existed and if Mr Panagiotopulos had brought his claim under this BIT, in light of the approaches mentioned in the text on the direct claims by shareholders, the result could have been different.

[197] In his dissenting opinion Prof. Weil explained that ICSID has been created for the settlement of investment disputes and it would be a misuse of the system to allow a claim by a shell company owned by nationals of the host State. With the same aim, in the abovementioned *Aguas del Tunari* case, Alberro-Semerena issued a dissenting declaration where he stated that it should not be allowed to an investor to change the nationality of a shell company in order to take advantage of a BIT. This form of treaty shopping is, in the opinion of the dissenting arbitrator, an abuse of the system.

[198] This does not mean that Tribunals are pro-investors biased. In case of ICSID claims brought by a company incorporated in the host State, Tribunals have indeed sometimes pierced the corporate veil and refused to assume jurisdiction on the basis of the fact that the final beneficiary of the investment was a national of the host State. This happened in the abovementioned cases *TSA v. Argentina* and in *National Gas v. Egypt*. A closer look to the awards reveals that tribunals have accepted to pierce the corporate veil on the basis of the fact that the claim was brought by the company incorporated in the host State: in this case the provision of Article 25(2)(b) of the ICSID Convention applies. According to the *TSA* (not unanimous) and *National Gas* Tribunals, such provision expressly requires the existence of a foreign control and therefore authorizes the Tribunal to pierce the corporate veil and look at the effective foreign control and therefore at the effective beneficiary of the investment. It is anyway worth noting that this approach has not been always followed. In the already mentioned cases *Amco and others v. Indonesia*, *Autopista Concesionada de Venezuela C.A. v. the Bolivarian Republic of Venezuela* and *Aguas del Tunari v. Republic of Bolivia* the Tribunals refused to lift the veil beyond the first level of

preferred to respect the principle of party autonomy as expressed in BITs rather than ensuring the reliability and legitimacy of investment law and arbitration.

It is therefore clear that, unless the wording of BITs is amended[199] (and this seems not very likely to happen)[200], a solution to the problem of parallel proceedings at the stage of jurisdiction is not likely, due to the fact that the VCLT and the necessary respect the principle of party autonomy do not allow arbitrators to go against what has been expressed by the parties when giving their consent to arbitration.[201]

Does this mean that we are at a deadlock and there is no solution to the problem of parallel proceedings? It is the opinion of the present author that there are still tools to be used in order to avoid parallel proceedings. Such tools may be: (i) an exercise of party autonomy aimed at avoiding parallel proceedings; (ii) an exercise of discretion by arbitrators at the jurisdictional stage; and (iii) a requirement of the applicable substantive law aimed at avoiding the result of conflicting outcomes, regardless of party autonomy.

In the next Chapter the solutions under (i) and (ii) and will be examined. It will be demonstrated that such remedies (i.e. consolidation, joinder, intervention, waiver clauses, forum non conveniens, anti-suit injunctions and comity), based on an exercise of discretion either by the parties or by the arbitrators, may not be assumed as a general remedy to the issues of parallel proceedings and conflicting awards. Indeed, it is not possible to base the solution to the problem of parallel proceedings only on a possible and discretionary remedy. What investment arbitration needs, in order to pass the critics and increase its legitimacy, is a general remedy that is applicable regardless of an exercise of discretion by the parties (or by the arbitrators). We shall therefore try to go beyond party autonomy and see whether – at a certain stage of the arbitral procedure – a solution of this kind is available.

Chapter 3 will be aimed at examining the remedies offered at the admissibility phase of international investment disputes. The objective of the Chapter will be to understand if such remedies (i.e. abuse of process, *res judicata* and collateral estoppel) can be considered as generally and autonomously applicable solutions aimed at precluding the prosecution of parallel proceedings (being such proceedings concurring or subsequent). As we will see, a central role in the application of these remedies shall be assumed by arbitrators, who are the final managers of the dispute and have the inherent powers to ensure that their process is respectful of the canons of a good administration of justice. Indeed, it is arguable that only if arbitrators are aware of

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control over the claimant company. They argued that: (i) the Convention talks about "foreign control" and not about "effective control" and therefore a research beyond the first level of control is not justified; (ii) the scope of art. 25(2)(b) of the ICSID Convention, as explained by Mr. Broches in the Report of the Executive Directors, is to expand (and not reduce) the jurisdiction of the Centre. With this regard see also the abovementioned *Tokios Tokeles* Decision on Jurisdiction, at para. 46.

[199] As it has happened for the CETA. Please refer to footnote 90 above.

[200] Boddiker, American University International Law Review (2010), 1070.

[201] Zoppo (2013), 239 and ss. has talked about a "legalization" of forum shopping.

their duty to ensure the consistency of international investment law (and arbitration awards) the issue of inconsistency and incoherence will be resolved.

Chapter 2

The inappropriateness of traditional remedies based on party autonomy or on the discretion of arbitrators and the Inadequacy of the solutions set forth in institutional commercial arbitration rules

Chapter 1 has been aimed at demonstrating why parallel proceedings shall be avoided and the reasons behind the necessity of a general remedy to this problem.

Chapter 2 will demonstrate that the legal instruments aimed at avoiding parallel proceedings that are applicable at the jurisdictional phase of investment arbitration proceedings are not well fitted to offer such a remedy in international arbitration. As it will be seen below, the main reason for which such tools are unsuitable for the aim of our research is that they are always based on consent,[1] i.e. on an expression of autonomy of the same parties that commenced the parallel proceedings.

It will be demonstrated that there exist a strong contrast between the consensual paradigm of international arbitration, which is sometimes also called the "*grundnorm*" of international arbitration,[2] and the necessity that arbitration – having *de facto* become the natural judge for disputes related to international commerce and in particular to international investments[3] – adapts to the substantial needs of modern transactions.[4] The formalism related to consent, indeed, often does not allow arbitration to adapt to the substantive reality of complex disputes, thus generating an "artificial discrepancy between the substantive and the procedural aspect of the same multiparty relationship".[5] This situation generates a paradox, perfectly described by Prof. Stipanowich in a 1987 paper: "[e]conomy and efficiency may be frustrated by a number of dilatory factors before, during and after the arbitration. Ironically, many of these potential causes of delay are rooted in those characteristics of arbitration that distinguish it from traditional adjudication processes. Nowhere is this paradox more evident that in disputes involving multiple parties".[6] In light of the above, as perfectly expressed by Leboulanger, "strangely enough, in some aspects, domestic litigation seems better adapted to certain situations than international commercial arbitration,

[1] Even in the cases where Authors try to avoid an analysis of consent, focusing on different elements of the proceedings, such as the meaning and extent of the concept of "dispute". Reference goes in particular to Brekoulakis, *Third Parties in International Commercial Arbitration* (2010), 210 and ss.

[2] Hosking, Pepperdine Dispute Resolution Law Journal (2004), 565. Craig, *Multiple Party in International Arbitration* (2009), lvii, has talked about the "pierre anguilaire of arbitration". See also Park, *Multiple Party in International Arbitration* (2009), 4. For a broad analysis of the issue of consent see Rau, *Multiple Party in International Arbitration* (2009), 69 and ss.

[3] Youssef, *Multiparty Arbitration* (2010), 99, stating that "The decline of the requirement of consent as may be rationalized by reference to the emergence of arbitration as the judge naturel of disputes arising under international contracts".

[4] Strong, Vanderbilt Journal of Transnational Law (1998), 917. Similarly, see Bamforth, Maidment (2009), 3.

[5] Brekoulakis, Penn State Law Review (2009), 1182.

[6] Stipanowich, Iowa Law Review (1987), 475.

namely those involving related proceedings".[7] It is therefore questionable whether it would be worth to develop a more flexible approach to jurisdiction in arbitration, keeping into consideration concerns of equity and substantial justice.[8] At the same time, however, it will be demonstrated that an analysis of consent is unavoidable when assessing arbitrators' jurisdiction and that a solution to parallel proceedings cannot be found at this stage of arbitral proceedings.[9]

The analysis made in the present Chapter will start with forum selection, fork-in-the-road and waiver clauses (Paragraph 2.1.1) and then will focus on the various doctrines developed in international commercial arbitration, i.e. joinder (Paragraph 2.1.2.1), consolidation (Paragraph 2.1.2.2) and quasi consolidation (Paragraph 2.1.2.3). Such remedies, based on party autonomy, are not able to provide a general solution to the problem of parallel proceedings, because they necessarily involve a choice by the parties, which – for several reasons – could be not interested in avoiding parallel proceedings. With particular reference to joinder and consolidation, paradoxically, such remedies are not set forth in ICSID Convention and Rules and therefore in ICSID arbitration (*i.e.* the most common form of investment arbitration) it is not possible to have any form of coordination between two ICSID proceedings, or any form of joinder of third parties without an express manifestation of consent by *all* the parties involved in the claim(s). Hence, at present, without consent by all the parties, we are – with particular regard to ICSID arbitration – stuck in a situation in which there cannot be any form of real coordination between parallel proceedings or any kind of involvement of third parties other than the already analysed *amicus curiae*, which cannot be considered even similar to joinder or intervention. A brief reference will also be made to collective proceedings started by investors.

Similar conclusions will be reached with regard to other remedies which involve a discretionary choice by arbitrators, such as *forum non conveniens* and comity (Paragraph 2.2.1): the applicability of the *kompetenz-kompetenz* principle at the jurisdictional stage of proceedings necessarily involve choices to be taken by arbitrators, that not necessarily are sensitive to the policy considerations against parallel proceedings outlined in the first Chapter.

Finally it will be demonstrated (Paragraph 2.2.2) that arbitral anti-suit injunctions are not a useful tool to solve the problem of parallel proceedings, because the issuance of such orders – other than being based on an exercise of discretion by arbitrators – is not advisable (due to the undue interference that anti-suit injunctions have on the principle of *kompetenz-kompetenz*) and has a very limited efficacy to limit jurisdiction of other arbitrators.

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[7] Leboulanger, Journal of International Arbitration (1996), 43.

[8] Youssef, ICCA Congress Series (2012), 107 and ss.

[9] Park (2009) (n. 2), 5, stated that "for arbitrators, motions to join non-signatories create a tension between two principles: maintaining arbitration's consensual nature, and maximizing an award's practical effectiveness by binding related persons". The issue of the diminution of the importance of the role of consent in general international law is deeply examined by Romano, International Law and Politics (2007), 791 and ss.

2.1 *Remedies based on party autonomy (and secondarily on arbitrators' discretion)*

2.1.1 *Forum selection options, fork-in-the-road and waiver clauses*

This paragraph is aimed at demonstrating that the remedies to the issue of parallel proceedings based on an agreement (express or implied) between the parties prior to the commencement of a dispute may be easily circumvented and, therefore, are not an effective tool to deal with the issue at stake. We will first of all analyse the case of many jurisdictional options contained in the same legal instruments, and then move to some more complex and debated provisions, i.e. fork-in-the-road and waiver clauses.

Forum selection clauses

With regard to forum selection clauses, as already showed in paragraph 1.1.4 above, several BITs, multilateral treaties and national laws (as well as contracts entered into by States and foreign investors) contain various jurisdictional options in their dispute settlement clauses, giving a choice to the investor, that can therefore decide before which (court or) tribunal to bring a dispute. In this regard, it has been already stated that – in principle – nothing could prevent an investor in bad faith from pursuing all the remedies contained in a legal instrument. Moreover, nothing might impede that, on the basis of the *kompetenz-kompetenz* principle, all tribunals before which the same dispute has been brought assume jurisdiction on the matter. In light of the current wording of dispute settlement provisions in contracts, treaties and laws, there is no remedy to this phenomenon. Prof. Pierre Mayer has therefore proposed to insert in investment treaties a clarifying provision to this effect (i.e. a provision saying that once a dispute settlement mechanism under a forum selection clause is chosen, the others shall be expressly waived).[10]

Wehland, on the contrary, stated that "forum selection options must, *in principle*, be [considered impliedly] limited to claims that have not yet been asserted elsewhere" and seems to consider useless Mayer's proposed provision.[11] He motivates such an assertion on the basis of the fact that "it seems *inconceivable* that the signatories to an IIA (or a domestic legislator for the matter) could have intended such a deeply flowed outcome" and on the basis of "a good faith interpretation aimed at avoiding situations in which the exercise of a forum selection option would have to be considered as an abuse of process".[12] These Wehland's statement seems flawed. First of all, the intentions of who wrote a legal text are not necessarily prevailing in the

[10] Mayer, Le contentieux arbitral transnational (2006), 200.
[11] Wehland, *The coordination of multiple proceedings in Investment Treaty Arbitration* (2013), 101. This Author, at 103, further states that "these limitation must be seen as inherent to the mechanism of forum selection options.
[12] Wehland (2013) (n. 11), 103.

interpretation of such legal text.[13] Secondly, in absence of a provision that clearly limits the power of an investor to start several claims in different *fora* in relation to the same dispute, we could assume that what is not forbidden is to be considered allowed. Finally, and more importantly, it is today extremely easy for an investor to use (or to modify *ad hoc*) its corporate structure in order to start a claim with another company of the group under a different BIT, thus avoiding the alleged (implied) limit that, in Wehland's opinion, is contained in the forum selection clause. Similarly, forum selection clauses are completely useless in case of several claims initiated by majority and minority shareholders, due to the fact that the various claims are started under different investment treaties.

Indeed, the same use of the word "inconceivable" by Wehland demonstrates that he did not found a legal basis for his opinion and that forum selection options are not, contrary to what Wehland said, a useful device in order to coordinate multiple proceedings in investment arbitration.

Fork-in-the-road clauses

Fork-in-the-road clauses "offer the investor a choice between the host State's domestic courts and international arbitration. The choice, once made, is final. If the investor resorts to the host State's domestic courts to have the dispute settled, it loses the right to international arbitration".[14] Such clauses are today not only limited to give an alternative among investment arbitration and national courts litigation, but are aimed at excluding any previously agreed form of litigation when the parties choose to refer to investment arbitration.[15] In this regard it is often said that *electa una via non datur recursus ad alteram*. An example of fork-in-the-road clause is Article 8(2) of Argentina-France BIT, providing that "[u]ne fois qu'un investisseur a soumis le différend soit aux juridictions de la Partie contractante concernée, soit à l'arbitrage international, le choix de l'une ou de l'autre de ces procédures reste définitif".

The usefulness of fork-in-the-road provisions is, however, very limited. Their main limit is that "they only apply where the dispute in the previous and the later proceedings is the same".[16] For the sake of the applicability of fork-in-the road clauses, two disputes are "same" if the so-called triple identity test is met.[17] Accordingly, the parties, the *petitum* (i.e. the request to the Tribunal) and the *causa petendi* (i.e. the legal basis for the request to the tribunal) must be identical. In particular, on the basis of the wording of the relevant treaty provisions, the

[13] In this regard, please refer to the rules on treaty interpretation examined in the first Chapter.
[14] Schreuer, The ICSID Convention: A Commentary (2009), 365.
[15] See Wehland (2013) (n. 11), 86. See also Article VI of the Estonia-US BIT.
[16] See Wehland (2013) (n. 11), 88.
[17] See Schreuer, The Journal of World Investment and Trade (2004), 245 and ss. See also *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001. This opinion has been strongly criticized by Lowenfeld, www.transnationaldisputemanagement.com (2006), in particular with regard to the necessity of strict identity between the parties. According to Wehland (2013) (n. 11), 91, footnote 296, an opinion similar to Lowenfeld's has been sustained by the *ad hoc* committee in the Vivendi case.

requirements of the same parties and the same *causa petendi* have been applied very strictly. Hence, even in presence of parties which substantially represented the same interests but that were formally different, Tribunals did not find that the triple identity test was met and did not apply fork-in-the-road provisions. Similarly, tribunals have said that that "the dispute in two sets of proceedings is identical only where the claims asserted in both of them have the same legal basis".[18] This position is perfectly showed by the approach of the Tribunal in *Lauder v. Czech Republic*,[19] where the Respondent State tried to argue that the fork-in-the-road provision contained in the US-Czech Republic BIT [20] precluded a claim which, as already explained, was substantially identical to the claim in another dispute arisen from the same State's measures (*CME v. Czech Republic*).[21] The tribunal, at para. 162 stated that "the resolution of the investment dispute under the Treaty between Mr. Lauder and the Czech Republic was not brought before any other arbitral tribunal or Czech court before – or after – the present proceedings were initiated. *All other arbitration or court proceedings referred to by the Respondent involve different parties, and deal with different disputes*". The dramatic outcomes of the Tribunal's decision, which reached opposite conclusions to the *CME* Tribunal, are well-known and have been already described in Chapter 1.

Moreover, fork-in-the-road provisions do not preclude separate claims by majority and minority shareholders, thus allowing several arbitration proceedings under different BITs and in relation to the same State measure.

As an example of fork-in-the-road provisions in investment arbitration it is often cited Article 26 of the ICSID Convention, stating that "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention". With concern to this clause it should be noted, anyway, that the words "unless otherwise stated" seem to envisage the possibility that the parties may give their consent to more than one dispute resolution mechanism. Furthermore the mechanism provided for in this Article operates at the moment of consent[22] and not at the moment of the commencement of the dispute. For this reason it is arguable that Article 26 of the ICSID Convention is not a proper fork-in-the-road mechanism but a device aimed at avoiding that – unless otherwise stated –consent is given to several forms of dispute resolution. This means that, in principle, it can happen that several proceedings are initiated in different *fora*. This is exactly what happened in the *SPP v. Egypt*[23] case, where the Tribunal had to admit

[18] Wehland (2013) (n. 11), 93.
[19] *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001. Several other authorities which reached the same conclusions are mentioned in Schreuer (2004) (n. 17), 246 and ss.
[20] See article VI(3) of US-Czech Republic BIT and Schreuer (2004) (n. 17), 245.
[21] *CME Czech Republic B.V. v. The Czech Republic,* UNCITRAL, Award, 14 March 2003.
[22] Schreuer *et al.* (2009) (n. 14), 352.
[23] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3,

that "when the jurisdictions of two unrelated and independent tribunals extend to the same dispute, there is no rule of international law which prevents either tribunal from exercising its jurisdiction".[24] This statement goes against who said that "Article 26 seems to achieve consolidation at least temporarily as it provides that only one procedure may be pending in relation to a certain dispute".[25]

Another limit of Article 26 of the ICSID Convention is that it operates only in case the requirements of the triple identity test are met. This means that all the limits that we have already examined for fork-in-the-road clauses in BITs (i.e. the possibility of several claims under different BITs by various shareholders or by various companies of the same group) are present also under the ICSID Convention.

For all the above reasons, even if "it makes more sense to have the entire dispute heard by one tribunal, preferably the one with the most comprehensive jurisdiction",[26] it is strongly arguable that fork-in-the-road provisions are not helpful in reaching this objective, due to the several drawbacks that the current application of such clauses involves. While, as it will be argued in Chapter 3 below, the strict application of the triple identity test is not sustainable in presence of non-written general principles of law (such as *res judicata*, collateral estoppel and abuse of process), it is very difficult to demonstrate that, in presence of a very strict treaty provision, as in the case of fork-in-the-road clauses, it is possible to waive the requirements of the triple identity test. "Even where a treaty contains a fork in the road provision, the latter simply will not cover all the situations in which an investor might try to relitigate a dispute".[27]

Waiver clauses

The last mechanism of prevention of parallel proceedings possibly contained in arbitration clauses are the so-called waiver clauses. Such clauses set forth that once a dispute under a certain treaty, contract or law is commenced, the claimant waives all other possible proceedings that he may commence.

As a preliminary remark, it should be noted that, in practice, the effects of waiver clauses are different depending on the kind of legal instruments in which they

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Decision on Jurisdiction.

[24] *SPP v. Egypt*, Decision on Jurisdiction, 14 April 1988, para. 53-56. A similar statement can be found in *Champion Trading Company and Others v. Egypt*, ICSID Case n. ARB/02/09, Decision on Jurisdiction, 21 October 2003, para. 19, where it is stated that "the Convention does not contain any rules regarding possible parallel proceedings". Anyway, in the *SPP* decision, the Tribunal further stated that "however, in the interest of international judicial order, either of the tribunals may, in its discretion and as a matter of comity, decide to stay the exercise of its jurisdiction pending a decision by the other tribunal" (we will come back on the topic of comity later in this Chapter). In this case a ICC and a ICSID arbitration proceedings were concurrently pending.

[25] This possibility is envisaged by Crivellaro, The Law and Practice of International Courts and Tribunals (2005), 385, who – anyway – denies its applicability at 388. This opinion is proved wrong also by what has been stated in *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case n. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, para. 144-148.

[26] Crivellaro (2005) (n. 25), 389.

[27] Wehland (2013) (n. 11), 98.

are contained. If waiver clauses are contained in an investment contract or in a national law, usually they consist in an advanced waiver of all the mechanisms of dispute settlement not contained in the contract or law which sets forth the waiver clause (i.e. such clauses usually consist in an advanced waiver to investment arbitration). On the contrary, when waiver clauses are contained in a treaty, they "prevent an investor from submitting the dispute to any other forum *once he has opted for arbitration under the treaty*".[28]

With regard to waiver clauses contained in contracts and/or national laws, it should be noted that there is still much debate regarding their validity, due to the fact that several authorities do not consider possible for an investor to waive in a contract the right to commence investment provided in a BIT.[29] Furthermore, considering that such clauses are usually aimed at focalizing the investment dispute before national courts, they do not usually involve parallel proceedings between investment arbitration tribunals and are therefore out of the scope of the present book.[30] For the sake of completeness, anyway, it is worth noting that such clauses – if they are considered valid – set forth a hierarchy between contract claims (or claims arising from the provisions of a national law) and treaty claims and operate only if the requirements of the triple identity test are met. This means that also these clauses have a very limited applicability in order to prevent parallel proceedings. It will be sufficient for an investor to modify its corporate structure in order to formally claim damages through another entity of its corporate chain, taking benefit of the provisions of another BIT and therefore bypassing the limits of the waiver clause. Furthermore, these clauses cannot in any way preclude multiple claims by majority and minority shareholders.

Concerning the waiver clauses contained in investment treaties,[31] which are more interesting for the sake of the present work, it is worth mentioning the provisions of Article 1121 of the NAFTA, Article II.20(2) of the TPP, Article 26(2) of 2012 US Model BIT and Article 26(1)(e) of 2004 Canada Model BIT, all providing that a claim under the dispute settlement mechanisms provided in such treaties may be commenced only if the investor expressly "waives any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other

[28] *Id.*, 98-99.

[29] See *SGS v. Philippines*, Decision on Jurisdiction, para. 154, where it is stated that "it is, to say the least, doubtful that a private party can by contract waive rights or dispense with the performance of obligations imposed on the States parties to those treaties under international law. (…) Thus the question is not whether the Tribunal has jurisdiction: unless otherwise provided, treaty jurisdiction is not abrogated by contract". An opposite approach has been taken by the Tribunal in *Aguas del Tunari SA v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on the Respondent's Objection to Jurisdiction, 21 October 2005. In this regard see Blyschak, works.bepress.com (2008), 49 and ss.

[30] We shall therefore refer to the work of other Authors. See Romanetti, Stockholm International Arbitration Review (2009), 75 and ss., Spiermann, Arbitration International (2004), 179 and ss., Hoffmann, ICSID Review FILJ (2007) 69 and ss. See also Strong, ICSID Review FILJ (2014), 1 and ss., who analyses the proposed provision of a waiver clause in a Colombian national law which generated several disappointments in the international community and was therefore deleted.

[31] See McLachlan, Shore, Weininger, International Investment Arbitration (2007), 107 and ss.

dispute settlement procedures, any proceedings with respect to the *measure* of the disputing Party".[32] Wehland argues that, in light of the reference to the same State's "measure" (and not to the same dispute, as in the case of fork-in-the-road provisions), waiver clauses have "the advantage of obviating the need to determine whether the dispute in a subsequent action is the same as the one brought before the treaty forum".[33] Furthermore, he argues that waiver clauses have the advantage to refer to any future request for relief and to "go beyond the 'same parties' criterion in that they typically also require the waiver of claims by enterprises owned or controlled by the investor relying on the treaty mechanism".[34]

With regard to the alleged lack of the requirement of the same dispute, it should be noted that there is no agreement on the fact that it shall not be met in presence of waiver clauses. Indeed, Cremades and Madalena state that "application of the waiver usually requires identity between the different claims".[35] In this regard it should be noted that, in lack of previous case law on the matter, it is not possible to say that the mere reference to the same State's measures (which is, anyway, a good point in favour of a broad reading of waiver clauses) will be considered as a sufficient argument by future Tribunals. If Wehland's opinion should be considered correct, waiver clauses contained in a treaty could be considered a useful tool to prevent multiple contract and treaty claims by the same investor.

The lack of the same parties requirement is argued on the basis of the provisions of Article 1121 Nafta and 26(2)(b)(ii) of the 2012 US Model BIT which refer to "the investor, and where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly". In this regard it should be considered that a similar provision is not contained in other treaties (and in particular in the new TPP, which has *de facto* replaced the NAFTA) and this undermine the applicability of the rule on a large scale. Moreover it is arguable that it could be easy for an investor in bad faith to bypass the obstacle generated by the waiver clause: again, by simply amending its corporate structure he will gain the benefits of one or more others BITs in order to start more claims in relation to the same dispute or measure (a simple reference *Aguas del Tunari* case mentioned in Chapter 1 is sufficient to describe this scenario). Furthermore, investor's shareholders (majority or minority) are completely entitled to commence separate arbitration proceedings in relation to the same measure. As a consequence, unless a waiver clause such as the one set forth in Article 1121 NAFTA is provided in almost all BITs, such clauses cannot be considered as a general remedy to the problem of parallel proceedings (in particular in cases of claims by companies of the same

[32] For an application of such clauses see *Waste Management Inc. v. United Mexican States (Waste Management I)*, ICSID Case No. ARB(AF)/98/2, Award, 2 June 2000.
[33] Wehland (2013) (n. 11), 99.
[34] Ibid.
[35] Cremades, Madalena, Arbitration International (2004), 531.

group and in cases of multiple claims by majority and minority shareholders) and are not helpful for the sake of the present book.[36]

2.1.2 Introduction to multiparty and multicontract situations in international commercial arbitration and possible applications in investment arbitration

International commercial arbitration scholars usually distinguish between multiparty and multicontract arbitration.[37] We refer to multiparty arbitration when there are more than two parties involved in the proceedings, opposite to the traditional bi-party arbitration where there are only two parties. The phrase multicontract arbitration, on the other hand, is referred to those situations in which the sources of obligations are more than one, irrespective of the number of parties (and substantial interests) involved in the proceedings; hence, multicontract arbitrations may be both bi-party and multiparty.

Furthermore, in case of multiparty arbitrations we can distinguish between cases in which there are more than two substantive interests represented within the proceedings, that we will call multi-polar arbitrations, opposite to the cases in which – even in presence of more than two parties – there are only two substantive interests involved in the proceedings, which can be classified as bi-polar arbitrations.[38]

In light of the above we can distinguish the following three situations:

a) a multiparty arbitration in which only two substantive interests are represented (bi-polar, multiparty arbitration);

b) a multiparty arbitration in which more than two substantive interests are represented (multi-polar, multiparty arbitration);

c) a bi-party arbitration in which there are more than one source of obligations between the same parties (bi-polar, multicontract arbitration).

The three situations described above may be related to the sources of parallel proceedings pinpointed in Chapter 1:

1) the case of a chain of companies of the same group (paragraph 1.1.3) starting several proceedings against the same State (under different BITs) may be equalized to a bi-polar, multiparty arbitration. Indeed, the various companies of the same group represent the same interest against the host State;

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[36] Even Wehland (2013) (n. 11), 99 at footnote 356 admit what has been stated in the text, saying that "it should be noted that this inclusion of certain related parties represents only a partial solution to the problems associated with multiple potential claimants. (..) In particular, a waiver provision would not appear to prevent an investor's controlling shareholder from subsequently initiating another set of proceedings".

[37] See Mantilla Serrano, Multiparty Arbitration (2010), 11 and ss., Hanotiau, *Multiple Party in International Arbitration* (2009), 35 and ss., Polinari, Rivista dell'arbitrato (2006), 537 and ss. For a complete analysis of these issues see Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions* (2006), 1 and ss.

[38] For an embryonic analysis of such situations see Laitinen (2013), 10 and ss.

2) the case of majority and minority shareholders (paragraph 1.1.2) of the same investor starting several claims against the host state may be equalized to a multi-polar, multiparty arbitration. In fact, even if in principle majority and minority shareholders claim damages arising from the same State measure, they still could represent different substantial interests;

3) the case of contract and treaty claims between the same parties (paragraph 1.1.1) may be equalized to a bi-polar, multicontract arbitration, in which there are two parties starting more claims (arising from the same State measure) under different legal sources.

Given the above classification, we will now try to analyse the mechanisms of joinder, consolidation and quasi consolidation, mainly developed in the field of international commercial arbitration, and their suitability, in investment arbitration, to limit the effects of parallel proceedings in the various scenarios described above.

The main issues that we will face in the discussion are related, in particular: (i) to the consensual nature of these remedies; (ii) to the regulation (if any) of the above mechanisms in arbitration rules and laws; and (iii) to the fact that – in many cases – these mechanisms are scarcely compatible with the strict requirements of nationality involved in investment arbitration (i.e. an arbitration against a State under a BIT can be start only by a national of the other contracting State of the same BIT), which preclude in principle the recourse to arbitration by persons which do not have the required nationality.

The discussion will always be conducted keeping into consideration the (already analysed) several policy considerations against parallel proceedings in investment arbitration[39] which run against the formalities related to consent in multiparty/multicontract mechanisms in international commercial arbitration and call for a more flexible (and justice oriented) approach, based on the necessity to adapt procedural aspects to substantial reality.[40]

2.1.2.1 Joinder (and intervention): Looking for an implied consent? The methodologies applied in international commercial arbitration and their fallacy if applied in investment arbitration

According to Natalie Voser "a request for joinder exists when the respondent wants to file a counterclaim either against the claimant and a third party, or solely

[39] Namely good administration of justice, procedural efficiency (save time and costs) and, mainly, avoiding duplication of proceedings and contradictory awards. See also Leboulanger (1996) (n. 7), 53-54.

[40] See Platte, Arbitration International (2002), 69, stating that an 'economic reality' analysis should be applied. On the contrary, Hanotiau, International Arbitration 2006: Back to Basics (2007), 357, has stated that "the issue of 'extension' of the arbitration clause to non-signatories would be easier to decide if it were approached by courts and commentators in a more rigorous way".

against the third party".[41] The third party, which can be or not a signatory to the arbitration agreement,[42] is therefore dragged into an arbitration which initially involved two other parties.

In case of intervention, on the contrary, it is the third party – whether signatory or not[43] – that asks to be involved in the proceedings in order to bring its own claim or to support the claim of one of the parties.[44] In this regard it shall be pointed out that, in cases of parallel proceedings in international arbitration arising from the situations outlined in Chapter 1 above, it is very unlikely that one of the several claimants will ask to the tribunal to intervene in the proceedings due to the fact that such claimants are usually willing to keep the advantages of several separate proceedings which increase their possibility to be successful in the dispute.

As the same Voser points out, "sometimes the wording used in the context of joinder is not 'third party' but third person. On the one hand, in a technical sense, this wording is more correct, since the third person to be joined is not yet a party to the arbitral proceedings. On the other hand, if a third person has implicitly consented to the arbitration agreement, it should automatically be a party to the arbitration proceedings".[45] Accordingly, we will therefore refer to *third persons* to be joined in arbitration proceedings in order to become a party of the same proceedings.[46]

When evaluating if a joinder is appropriate in a certain case, we shall always keep into consideration the due process (and, more generally, policy) concerns related to such mechanism. In particular, first of all, when operating a joinder, arbitrators shall ensure that every party is granted the full opportunity to present its case.[47] This analysis can only be carried out on a case by case basis. Furthermore, it is usually emphasized that – in international commercial arbitration – in case of joinder after the proceedings have been commenced, the joined party loses its right to appoint its arbitrator.[48] Moreover, it could be argued that the confidentiality of proceedings (at

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[41] Voser, *50 Years of the New York Convention* (2009), 346.

[42] It is obviously easier, for the reasons that will be set out below, to operate a joinder in case the persons are all signatories of the arbitration agreement. With this regard see art. 816 *quater* of Italian Code of Civil Procedure. See Gradi, Commentario al Codice di procedura civile (2014), 366 and ss.

[43] Also in this case there should not be problems for intervention of signatory parties. For a comment to a contrary arbitral decision see Gradi, Giustizia Civile (2012), 2863 and ss., in which it is described a case where arbitrators required a second consent by the parties of an already initiated arbitration in order to allow the intervention of a third party signatory.

[44] The possibility of intervention in commercial arbitration has been strongly criticized by Bove, Rivista dell'arbitrato (1995), 791.

[45] *Ibid*.

[46] Park (2009) (n. 2) has talked about "less than obvious parties". Problems related to third parties can arise also in case of assignment (out of the scope of the present book); for these cases refer to Jagush, Sinclair, *Pervasive Problems in International Arbitration* (2006), 291 and ss.

[47] See Strong (1998) (n. 4), 982- 984.

[48] See Ten Cate, The American Review of International Arbitration (2004), 143 and ss., stating that this situation should not be dramatized. See also Platte, (2002), (n. 40), 80, Leboulanger, (1996) (n. 7), 66, McIlwrath, Moolan, Joinder – Current Practice in International Arbitration, www.transnationaldisputemanagement.com (2005), 5, Nicklisch, Journal of International Arbitration (1994), 61 and ss., Schwartz, Journal of International Arbitration (1993), 5 and ss., Voser (2009) (n. 41), 350, Devolvé, Arbitration International (1993) 197 and ss. In this regard, Authors usually refer to the

least partially) will be lost.[49] In this regard it should be first of all noted that, in investment arbitration, confidentiality concerns have a limited role to play due to the public nature of this kind of disputes.[50] Concerning the right of every involved party to nominate its arbitrators, it has been argued that "the significance of party appointment may be psychological",[51] and that, in any case, arbitrators have a duty of impartiality which should not prejudice the joined party. However, as investment arbitration is today conceived, it might be difficult to deprive a party of its right to appoint its arbitrator (or at least participate in the appointment of the sole arbitrator).

Keeping into consideration the scenarios 1), 2) and 3) outlined in paragraph 2.1.2 above, it is worth noting that joinder could be useful in scenario 1), due to the fact that only in case of a bi-polar and multiparty situation (i.e. in which there are more than two parties but the represented interests are only two), such as the one of several claims started by various entities of the same group, it will be possible to join the multiple claimants in the same proceedings. In this case, indeed, due to the fact that the several joined claimants represent the same centre of interest, it is not arguable that such "centre of interest" did not have the possibility to appoint its arbitrator. All the companies of the same group will have the right to appoint one arbitrator and their right of appointment will not be violated due to the fact that these companies are substantially representing only one party. Indeed, as stated by Leboulanger, "there is no major incompatibility between the rule of joinder and multi-contract situations between two parties";[52] the same conclusion could be drawn in several claims arising not only by contracts but also by international treaties.

On the contrary, if one argues that each of the parties should always have the right to appoint its arbitrator, the possibility of joinder does not seem possible in scenario 2).

In scenario 3), in consideration of the fact that the parties are only two, it is useless to speak about joinder, because in order to avoid parallel proceedings it will be necessary to consolidate the two separate claims.

Given the above, it is first of all worth analysing the various institutional rules and national laws regarding joinder in international commercial arbitration and their suitability to regulate the matter also in investment arbitration. As a preliminary remark, it is worth noting that the ICSID Convention does not provide any form of joinder/intervention of third parties and ICSID Rules are limited to accepting *amici curiae*'s submissions (which cannot be compared either to joinder or to intervention of third parties).

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decision of the French Cour de Cassation 1e Civ. In *BKMI v. Dutco*, 7 January 1992, 1992 Bull. Civ., No. 2., where the Cour de Cassation stated that the right of every party to appoint its arbitrator is a matter of public policy and can only be waived by any party after the dispute has arisen. In this regard it should be noted that the various parties in the *Dutco* case represented more centres of interests and so the dispute could be classified as multi-polar, multiparty.

[49] Voser (2009) (n. 41), 350-351, NIcklisch (1994) (n. 48), 68, Platte (2002) (n. 40), 75.

[50] For a different conclusion, see the *Cord Syrup* cases mentioned in Paragraph 2.1.2.2 below.

[51] Chiu, Journal of International Arbitration (1990), 58.

[52] Leboulanger (1996) (n. 7), 68.

Moving to a reading of commercial arbitration rules it emerges immediately that either such rules are still strongly anchored to the requirement of consent or, as demonstrated by the case law, tribunals have anyway avoided to join third persons in cases where one of the parties did not agree with the joinder.[53] In this regard it should be highlighted that only recently the majority of institutional rules have started to provide a specific rule on joinder. Some of these rules provide for joinder only if also the party to be joined has signed the arbitration agreement, giving the discretion to arbitrators to join such signatory party.[54] In other cases it is only requested a consent to joinder by the requesting party and the third person, but not by the non requesting party.[55] In these last cases, even if the rules are silent on the necessity of original consent to the arbitration agreement of all the parties, it is reasonable to think that the tribunal will never operate a joinder without the consent of all the involved parties, due to the fact that it will otherwise incur in the risk of refusal of enforcement of the award.[56] Finally, there is the broadest provision: Article 4(2) of the 2004 Swiss Rules. Such rule states that: "Where *one or more third persons* request to participate in arbitral proceedings already pending under these Rules or where a party to arbitral proceedings under these Rules intends to cause one or more third persons to participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all parties, including the person or persons to be joined, taking into account all relevant circumstances" (emphasis added). In this case, the reference to third persons (instead of third parties) has been interpreted by some Authors as giving freedom to the tribunal to join third persons that have never signed the arbitration agreement.[57] Also in this last case, however, there is the risk that an arbitration award arising from proceedings in which one or more persons have been joined without consent of all parties involved is not enforced and therefore arbitrators could anyway keep into account the position of all the parties involved in the proceedings.

In light of the above it can be said that it is a fact that consent is today still essential to join third parties in international commercial arbitration. Several Authors, who understandably assert that consent is still the cornerstone and the *grundnorm* of

[53] For a general analysis of such rules, see Gomez Carriòn, Arbitration International (2015) 479 and ss., Pitkowitz, Austrian Yearbook on International Arbitration (2015), 301 and ss.

[54] See Article 17.5 of UNCITRAL Rules and Article 7(1) of 2012 ICC Rules, Art. 14 of 2013 Vienna Rules, Art. 27 of 2013 HKIAC Rules. S. 35 of the English Arbitration Act 1996 (regarding consolidation) seems to have adopted a similar approach.

[55] See Article 22.1(viii) of the 2014 LCIA Rules, which anyway still request arbitrators to give to all the parties the reasonable opportunity to state their view, Art. 24(b) SIAC Rules, Art. 19.2 of the Spanish Rules. The provision of Article 22.1(viii) of the LCIA Rules has generated a lot of debate. See, *inter alia*, Voser (2009) (n. 41), 398, Brekoulakis (2010) (n. 1), 104 and ss., Gomez Carriòn (2015) (n. 53), 486-488. On LCIA Rules see Winstanley, Multiple Party Action in International Arbitration (2009), 213 and ss.

[56] See Mayer, Multiparty Arbitration (2010), 223 and ss.

[57] See Brekoulakis (2010) (n. 1), Conejero Roos, 50 Years of the New York Convention (2009), 423, Gomez Carriòn (2015) (n. 53), 497. For a contrary opinion see Voser (2009) (n. 41), 394-396. Some National Laws seem to take an approach similar to the one of the Swiss Rules, such as Art. 24 of the Australian Arbitration Act, Art. 1045 of the Netherlands Code of Civil Proceedings and Art, 1696 bis of Belgian Judicial Code.

international arbitration, have shared this view.[58] In light of the above, it is self-evident that, with regard to investment arbitration, where in the vast majority of cases (*i.e.*, in all BIT claims) there is no consent at all until the proceedings are commenced, there is no possibility to consider joinder as a valuable tool to solve the issues generated by parallel proceedings. This should be added to the circumstances that, as already stated: (i) parallel proceedings in investment arbitration are generated by a choice of the claimant(s) to multiply the fora before which a same dispute is presented; and (ii) BITs contain very strict nationality requirements, which preclude to parties of all nationalities to be joined to an already pending BIT arbitration in lack of an explicit agreement of all the parties involved (in this last case, after the consent is given, the basis for jurisdiction of the arbitral tribunal is not BIT but the new parties' agreement).

Anyway, it should be taken into account also that, in order to extend[59] arbitral jurisdiction to third persons in lack of an express consent, Authors have tried to look at certain situations which could be considered as subrogates of consent, i.e. to: (i) forms of implicit consent, (ii) factual situations in which consent cannot be considered as not existent, and (iii) behaviours that can be interpreted as substitutes for consent.

Among the techniques used to look for a non-expressed consent to arbitration we can mainly identify: (i) the group of companies doctrine; (ii) the theories based on contract law; and (iii) a theory based on the concept of "dispute". It will be demonstrated that all these theories present several problems that impede us to accept them as a feasible solution to allow joinder and therefore to avoid parallel proceedings in investment arbitration. In fact these theories are only aimed at finding a substitute for consent in a single arbitration without effectively offering a tool to prevent the multiplication of proceedings. Indeed, it is highly probable that, in a situation of parallel proceedings started with the aim of multiplying the fora that can hear a dispute (such as the one we are analysing), *consent of all the involved parties to a single forum does not actually exist*. Supporting these theories to allow a joinder in investment arbitration, therefore, would mean falling into a loop: it would mean to extend jurisdiction to a non signatory person on the basis of a consent that does not exist, while jurisdiction in arbitration is by nature based on consent. Indeed the truth is that a solution to the problem of parallel proceedings cannot be found at the jurisdictional stage without avoiding falling into a research for consent. Furthermore,

[58] Townsend, International Arbitration 2006: Back to Basics? (2007), 359 and ss., Barin, International Arbitration 2006: Back to Basics? (2007), 375 and ss., Voser (2009) (n. 41), 347, Mantilla Serrano (2010) (n. 37), 24, Bond, Multiparty Arbitration (2010), 35 and ss., Cox, Multiparty Arbitration (2010), 49, Bove (1995) (n. 44), 786 and ss., Voser, Meier, Austrian Yearbook on International Arbitration (2008), 115 and ss., Swoboda, Journal of Dispute Resolution (2011), 465 and ss., Polinari (2006) (n. 37), 537, Byrnes, Pollman, Harvard Negotiation Law Review (2003), 289 and ss., Lamm, Aqua, George Washington International Law Review (2003), 714 and ss.

[59] The word "extension" has been criticized by Hanotiau (2006) (n. 37), 4 and ss., who stated that it "is misleading, and, moreover, is probably wrong to a large extent since, in most cases, courts and arbitral tribunals still base their determination of the issue on the existence of a common intent of the parties and, therefore, on consent".

the lack of a real consent by the party to be joined would also mean that the nationality requirement of BITs is not satisfied and therefore there is a strong legal obstacle to join a person that does not have the nationality of one of the two States which signed a BIT in proceedings started under such BIT.

According to the group of companies doctrine "arbitration agreements may be extended to other affiliate company of a contractual party provided that such 'non-signatory' was somehow involved in the conclusion, performance or termination of the contract in dispute".[60] The doctrine has been applied in the very well known case *Dow Chemical v. Isover Saint Gobain*,[61] in which the arbitral tribunal "considered it was not bound to apply any national law, but free to apply instead what is considered to be international trade usages relating to group of companies".[62] The tribunal stated that previous ICC decisions "progressively create case law which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international commerce, to which rules specific to international arbitration, themselves successively elaborated, should respond".[63] Having therefore found that all the claimants were part of the same group of companies and that they had participated in the conclusion, performance and termination of the contract (such involvement being known by all the other parties), notwithstanding the fact that not all these claimants were signatories to the arbitration agreement, the tribunal stated that "irrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality (une réalité économique unique) of which the arbitral tribunal should take account when it rules on its own jurisdiction" [64] and therefore accepted jurisdiction on all the abovementioned claimants.

Anyway, "it is important to note that the tribunal did not abandon the requirement for consent, but merely considered that, in the particular circumstances of the case, consent of all the parties was implied":[65] "in the present case, the circumstances and the documents analysed (...) show that such application conforms to the mutual intent of the parties".[66]

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[60] Wilske, Shore, Ahrens, The American Review of International Arbitration (2006), 74. With regard to the autonomous standing and the *raison d'étre* of this doctrine see the analysis conducted by Ferrario, Journal of International Arbitration (2009), 647 and ss. For an in depth analysis of the case law and scholarship related to the doctrine refer to Brekoulakis (2010) (n. 1), 150 and ss. See also Park (2009) (n. 2), 22 and ss. See also Mayer, Multiple Party in International Arbitration (2009), 189 and ss., Hanotiau, *Pervasive Problems in International Arbitration* (2006), 279 and ss.

[61] ICC Case No. 4131, 23 September 1982, 9 Y.B. Comm. Arb. 131 (1984). The premises are perfectly described by Wilske, Shore, Ahrens (2006) (n. 60), 75: "Various companies of the Dow Chemical group had brought arbitration proceedings against Isover Saint Gobain even though not all of them had entered into the relevant distribution contracts, which contained arbitration clauses".

[62] Wilske, Shore, Ahrens (2006) (n. 60), 75

[63] *Dow Chemical v. Isover Saint Gobain*, 136.

[64] Ibid.

[65] Wilske, Shore, Ahrens (2006) (n. 60), 76. Similar conclusions have been reached by Hanotiau, Journal of International Arbitration (2001), 271-272.

[66] *Dow Chemical v. Isover Saint Gobain*, 136-137.

While this doctrine has found large application in France,[67] it "has never been universally accepted and it might have experienced more criticism than sympathy in the arbitration community. The doctrine has consequently been rejected by numerous arbitral tribunals. Arbitral tribunals in any event stressed that the existence of a group was not *per se* sufficient to justify the extension of an arbitration agreement and proceeded to a thorough evaluation of the facts confirming or disproving the parties' intention to be bound".[68]

In light of the above, and considering the already mentioned lack of consent to joinder in cases of parallel proceedings in investment arbitration arising from several claims brought by entities of the same group, it does not seem possible to make recourse to the group of companies doctrine, due to the circumstance that it does not seem possible to disregard the common intention of the parties to arbitrate.[69]

Furthermore, and most importantly, it is worth noting that the application of the group of companies doctrine could risk to not satisfy the nationality requirements of the relevant BIT in case the third person to be joined in the arbitration (i.e. the company of the group which did not sign the arbitration agreement) does not have the same nationality of the claimant.

In the context of international commercial arbitration some alternatives to the group of companies doctrine have been developed by US Courts and scholarship. Such possible remedies to the problem of parallel proceedings have been borrowed by contract law and are therefore strictly related to the existence of a contract.[70] The reference goes to the following doctrines: (i) incorporation by reference;[71] (ii) assumption;[72] (iii) piercing the corporate veil;[73] (iv) agency;[74] and (v) estoppel.

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[67] Hanotiau (2006) (n. 37), 48 and ss.

[68] Wilske, Shore, Ahrens, (2006) (n. 60), 77-78; the Authors refer to ICC Case No. 5721, Collection of ICC Arbitral Awards II, 400 (1994); ICC Case No. 9517, 16(2) ICC Bull. 80 (2005); ICC Case No. 10818, 16(2) ICC Bull. 94 (2005). The doctrine has been strongly rejected by Sandrock, The International Lawyer (1993), 941 and ss. For an analysis of the development of the doctrine in Switzerland see Habegger, European Business Organization Law Review (2002), 517 and ss., and Zuberbuhler, ASA Bulletin (2008), 24 and ss., while for the analysis of the English case law in reference to the doctrine see Woolhouse, Arbitration International (2004), 435 and ss. It is worth emphasizing that England has always been the strongest opposer of the doctrine. With regard to USA, as it will be shown below they have made recourse to other tools to extend arbitral jurisdiction to third persons.

[69] See Brekoulakis (2010) (n. 1), 192-198.

[70] See Hosking (2004) (n. 2), 490 and ss., Hanotiau, (2001) (n. 65), 255 and ss., Brekoulakis (2010) (n. 1), 28 and ss.

[71] "Incorporation by reference applies when a party signs an agreement that incorporates, or references, a second agreement which includes an arbitration clause. Even if the party did not sign the contract including the arbitration agreement, it will be compelled to arbitrate because it signed the contract referencing the contract requiring arbitration". Courtney, Richmond Journal of Global Law & Business (2009), 586.

[72] "A non-signatory may be bound under the theory of assumption if he manifested intent to arbitrate through his conduct and another party relied on that conduct. The idea behind this theory is that the non-signatory should be allowed to express intent to arbitrate and then later assert that an arbitral award is invalid. The non signatory will be considered to have 'impliedly agreed to arbitrate'". Courtney (2009) (n. 71), 586.

[73] "Veil piercing is a term well-known in corporate law. It can bind a non-signatory to an agreement if the agreement was signed by the parent, subsidiary, or affiliate of a corporation. Courts have justified

Considering that, as stated above, joinder can be a useful tool only in parallel proceedings arising from multiple claims by entities of the same group under different BITs, the vast majority of such theories are not useful to justify a joinder in investment arbitration, due to the fact that in case of BIT claims there is no contract at all (indeed, we talk about arbitration without privity). Theories based on contract law are useless if there is no contract!

The only theory that can offer a solution in the case at hand is the doctrine of arbitral estoppel. Few Authors have given attention to the application of this doctrine in international arbitration.[75] According to Prof. Brekoulakis "[t]he doctrine of equitable estoppel reflects the general legal principle of '*non venire contra factum proprium*' (...): a party is prevented from asserting rights against another party when the latter justifiably relied on the conduct of the former and changed his position to his detriment as a result of such reliance. The principle, as its name indicates, is based on fair and equity considerations, which makes it difficult to delineate. In arbitration the theory has developed a specific meaning (...). The term arbitral estoppel better reflects the specific meaning of the doctrine in the context of arbitration and non-signatory parties. The doctrine has been relied upon by the US courts to estop a signatory party from avoiding arbitration with a non-signatory, but also to estop a non-signatory party from avoiding arbitration with the signatory party".[76] As pointed out by Brekoulakis,[77] two versions of the doctrine of arbitral estoppel have been developed by US Courts: equitable arbitral estoppel and intertwined arbitral estoppel.

"The equitable version is based on the suggestion that if a party attempts to exercise rights under a contract, which contains an arbitration clause, then this party will be normally bound by the arbitration clause too. Here the crucial factor is whether the party seeking to avoid arbitration has gained any substantial direct benefit from the contract including an arbitration agreement".[78] This version of estoppel is

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piercing the corporate veil in situations to prevent fraud or other wrong, or where a parent dominates and controls a subsidiary. It is a very fact intensive analysis and courts tend to only apply this theory in egregious circumstances". Courtney (2009) (n. 71), 587.

[74] Agency "is rooted in traditional laws of agency. Agency is: the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called principal, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by making of contracts. A principal may be bound to an arbitration agreement signed by the agent. However there must have been an agency relationship and when the contract was signed the agent must have been acting 'within the scope of the agency relationship'. Problems arise when the principal does not want to arbitrate and where there is no contract between the principal and the agent". Courtney (2009) (n. 71), 586-587. On the issue of veil piercing see Tyler, Kovarsky, Stewart, Multiple Party in International Arbitration (2009), 149 and ss., referring in particular to the very well known cases *Bridas S.A.P.I.C. v. Government of Turkmenistan*, 345 F.3d 347 (5th Cir. 2003), cert. denied, 543 U.S. 937 (2004) and 447 F.3d 411 (5th Cir. 2006), cert. denied, 127 S. Ct. 664 (2006). See also Koutoglidou, Multiple Party in International Arbitration (2009), 255 and ss., Stoehr, Washington and Lee Law Review (2009), 1409 and ss.

[75] See, *inter alia*, Brekoulakis (2010) (n. 1), 131 and ss., Hanotiau (2001) (n. 65), 263 and ss., Hosking (2004) (n. 2), 529 and ss., LaForge, Texas Law Review (2005-2006), 225 and ss.

[76] Brekoulakis (2010) (n. 1), 131-132.

[77] *Id*. 133 and ss.

[78] *Id.*, 133.

conceptually inappropriate to justify a joinder to avoid cases of parallel proceedings in investment arbitration. Indeed, in the cases analysed in this paragraph, first of all, there is no contract at all, and, secondly, it is not possible to draw up an analogy between the case of a party which takes the advantages of a contract and the case of a party that gets the advantages of a BIT, due to the fact that the only persons which can take the advantages of a BIT in a State are the persons who have the nationality of the other contracting State.[79]

In the intertwined version of arbitral estoppel "the courts attach less importance to whether the party avoiding the arbitration agreement has gained a substantive and direct benefit from a contract containing the arbitration clause. Instead, courts will enjoin a signatory to arbitrate its claim against a non-signatory (and vice versa) if they are satisfied that a 'tight relatedness of the parties, contracts and controversies' exist. (...) courts will usually focus on the following two conditions which must apply concurrently:

- first, the dispute between the signatory and the non-signatory must be intertwined with the contract containing an arbitration clause, and
- second, the non-signatory must have contractual or close corporate links with one of the signatories".[80]

This version of the doctrine of arbitral estoppel seems more suitable to justify a joinder in investment arbitration. Indeed, the fact that it is not focused on the existence of a contract but on the relationship existing between the various parties and disputes plays in favour of such suitability. It could be therefore said that when two closely interrelated entities of a group get the advantages of the same treaty provision, they will be estopped to arbitrate the same dispute several times and they shall mandatorily bring all claims against the host State in the same dispute. However, this very suggestive idea does not keep into consideration the nationality requirement: usually the various entities of a corporate chain do not have the same nationality and therefore they will not be entitled to arbitrate the same claim under only one BIT. Hence, again, to have all the claims heard before only one arbitral tribunal there would be the need of a new consent of all the parties involved in the transaction (in order to let the arbitration arise from the new arbitration agreement and not from the BIT). In conclusion, if the theory of intertwined estoppel has the advantage of thwart the importance of the requirement of consent (even if, according to Brekoulakis, such requirement is still requested in practice by the courts),[81] such

[79] Finally, this doctrine seems to completely ignore the doctrine of separability of arbitration clauses within a contract in international commercial arbitration. See Lew, Mistelis, Kroll, *Comparative and International Commercial Arbitration* (2003), 101 and ss. On separability in BITs see Zarra, The American Review of International Arbitration (2014), 593 and ss.

[80] Brekoulakis (2010) (n. 1), 135.

[81] Brekoulakis (2010) (n. 1), 178-179, states that "the fact that the dispute between the signatory and the non-signatory is intertwined with the contract containing the arbitration clause" is a fact pattern analysis which "arguably demonstrate assent to arbitrate". "Thus neither the arbitral estoppel nor the group of companies doctrine ever developed as a separate and autonomous basis of jurisdiction. The true essence of these doctrines has been to presume or at least facilitate the deduction of consent. (...)

theory cannot be considered a useful tool to justify a joinder in international investment arbitration.[82]

The final theory that has been developed in order to bind third persons to arbitrate requires "us to focus not on putative consent of non-signatories, but *on the scope of the dispute* submitted for arbitration and the *scope* of the original *arbitration clause*. If a dispute strongly implicates a non-signatory and is covered by a broad arbitration clause, a tribunal will have jurisdiction to decide the dispute, even if that means that it has to assume jurisdiction over a party that has not signed the arbitration clause" (emphasis in original).[83] This theory, which has been already criticized when it has been proposed, [84] presents various gaps and is finally fallacious to constitute the base for binding non-signatories avoiding a consent based reasoning. Furthermore, as we will see, it could never be the basis to justify a joinder

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It follows that non-signatory theories fail to look outside the consensual context, and arguably miss the opportunity to look into the interests of third parties *stricto sensu* and examine whether and under what conditions any such party may have a role in arbitration. Naturally thus, all third parties *stricto sensu* are still altogether excluded from the arbitration process". This assertion seems unfounded in two regards. First of all, it does not seem true that the intertwined version of arbitral estoppel is based on consent. On the contrary it seems based on equity and justice consideration according to which if there is a strong interrelation between two entities (to be analysed on a case by case basis), such entities cannot avoid to consider themselves bound by the acts of another. This is demonstrated also by Fellas, *Conference Materials of the School of International Arbitration 30th Anniversary Conference: "The Evolution and Future of International Arbitration: The Next 30 Years"* (2015), 13, according to whom "the 'intertwined estoppel' theory is one developed specifically for the arbitration context and appears to be based on some intuitive sense of fairness more than some robust notion of reliance: it does not seem unfair to require a party that has already agreed to arbitrate one dispute with one party to arbitrate an intimately intertwined dispute with another party". Secondly, interest of third parties *stricto sensu* are by nature excluded from an arbitration and this cannot be seen as a surprise! At most, the presence of third persons in arbitration can be justified by the interest of the two parties originally involved (i.e. the party which has signed an arbitration agreement only with one of the strictly interrelated entities) and not to safeguard the interest of a third person which is excluded from the arbitration from the very beginning of it.

Brekoulakis's critics to intertwined estoppel goes on stating, at 179, that: "it is questionable whether the fact patterns developed in the context of non-signatory theories may safely warrant the deduction of intent to arbitrate". This assertion seems wrong because, as we have tried to demonstrate above, intertwined estoppel is not based on consent and is not a substitution for it. It is for this reason (i.e. the fact that it is not based on consent) that estoppel has attracted some critics. See Hanotiau (2001) (n. 65), 265 and United States Court of Appeal for the Second Circuit in *Thomson-CSF S.A. v. American Arbitration Association*, 64 F.3d 773 (2nd Cir. 1995).

[82] In Chapter 3 we will consider the doctrine of intertwined estoppel once again in order to see whether it can play a role in the extension of res judicata to third parties.

[83] Brekoulakis, *Conference Materials of the School of International Arbitration 30th Anniversary Conference: "The Evolution and Future of International Arbitration: The Next 30 Years"* (2015), 38. The Author, at 39, goes no stating "whether a certain dispute can ("kiss" and) awaken the jurisdiction of an arbitral tribunal depends on the scope of the arbitration agreement". For the reasons we will see below, this approach is completely fallacious.

[84] Fellas (2015) (n. 81), criticized Brekoulakis's approach because it ignores theories based on contract law. Voser, *Conference Materials of the School of International Arbitration 30th Anniversary Conference: "The Evolution and Future of International Arbitration: The Next 30 Years"* (2015), 1 and ss., strongly criticizes Brekoulakis because he fails to give importance to the requirement of consent, on which arbitration is naturally based. In the opinion of the present author, as it will be seen below, problems are not related to the lack of consent, but on the inconsistency of the proposed approach.

in investment arbitration, due to the already analysed problems related to the nationality requirement.

In fact, focusing on the scope of arbitration clause, means to focus on the boarders that the parties have drawn for their dispute through an arbitration clause that they negotiated and *on which they have given their consent* (*sic!*). Hence, when Brekoulakis says that his theory avoids falling into a consent based reasoning he is inconsistent with the reality of the fact: everything arises from arbitration clauses is consensual by nature![85]

In light of the above, we cannot ignore that the parties have given their consent to arbitrate a certain dispute through an arbitration clause *only to the other signatory party of that arbitration clause*. Therefore not only this approach misses the point of the consensual nature of arbitration agreement, but erroneously also tries to surreptitiously extend a clearly expressed consent to persons which are not bound by such consent.

Given the above considerations, it is easy to say that if a State in a BIT gives its consent to arbitrate disputes related to such BIT against nationals of the other contracting State of the BIT, it is not possible in investment arbitration to extend jurisdiction of arbitral tribunals to nationals of States other than the two contracting States by keeping into consideration the broadness of the word "dispute" contained in the arbitration clause of the BIT.

On the basis of all the above, joinder cannot be considered as a useful instrument to avoid parallel proceedings in investment arbitration.

2.1.2.2 Consolidation

Consolidation is "the act or process of initiating into one single case several independent proceedings which are pending or initiated".[86] This remedy to parallel proceedings has emerged in the context of commercial arbitration but has been widely discussed (and sometimes applied) also in parallel proceedings in investment arbitration. Consolidation is generally referred to as a mechanism to avoid contradictory judgments and to ensure efficiency and fairness.[87] With reference to the

[85] As it will be shown in Chapter 3 below, focusing on the concept of dispute and on the legal relationship underlying the claim that is brought before the arbitral tribunal is essential in order to understand the scope of the award. However, these concepts are not relevant in order to expand the jurisdiction of the tribunal.

[86] Pair, *Consolidation in international commercial arbitration* (2012), 10. Various Authors have examined consolidation. See, *inter alia*, Cremades, Madalena (2008) (n. 35), 532 and ss., Hackman (2009), 1 and ss., Hoellering, Dispute Resolution Law Journal (1997), 41 and ss., DeCamp, Journal of Dispute Resolution (1994), 113 and ss., Gillies, Hymel, Asia Pacific Law Review (2009), 169 and ss., Hascher, Journal of International Arbitration (1984), 127 and ss., Barron, Journal of International Arbitration (1987), 81 and ss., Aiken (2009), 1 and ss., Kazutake, Annual Survey of International and Comparative Law (2003), 189 and ss.

[87] Ibid. See also Chiu (1990) (n. 51), 53 and ss., Stipanowich (1986-1987) (n. 6), 488 and ss., Pryles, Waincymer, www.arbitration.icca.org (2009), 41 and ss., Crivellaro (2005) (n. 25), 400 and ss., Kaufmann Kohler, Boisson de Chazournes, Bonnin, Mbengue (hereinafter Kaufmann Kohler *et al.*),

scenarios outlined in Paragraph 2.1.2 above, consolidation might be, in principle, useful in all of them:[88] consolidation does not require strict identities of the parties involved in the two proceedings and could have, in principle (as will be demonstrated below when referring to the *Softwood Lumber* disputes), a quite broad application.

However, it should be first of all noted that it is not possible to consolidate two proceedings that are not concurrently pending.[89] Finally, in scenario 2) (i.e. several claims started by shareholders of the investor company) there are serious due process concerns[90] related to the appointment of the arbitral tribunal in case of consolidation of two or more claims[91] and to the confidentiality of proceedings.[92]

Various BITs,[93] multilateral treaties,[94] institutional rules[95] and national laws[96] make reference to consolidation, but – interestingly – the ICSID Convention and Rules do not set forth for this method of coordination of proceedings, with an evident *lacuna* in the ICSID procedural system. From an analysis of such legal sources, some Authors have identified the following essential requirements in order to have consolidation:[97] [98]

ICSID Review FILJ (2006), 81 and ss. Hascher (1984), 132, stated that consolidation involves certain teleological goals: (i) avoiding conflicting awards; (ii) avoiding expenses and costs; (iii) ensure efficiency. In the end, according to this Author, consolidation serves the interest of justice.

[88] With particular regard to scenario 3) (i.e. contract and treaty claims), Wehland has highlighted the possibility for a claimant to start together a single claim under various legal sources. See Wehland (2013) (n. 11), 115 and ss. This optimistic scenario, however, is not suitable in the context of the present book: indeed, the assumption of the present research is that an entity commences parallel contract and treaty claims with the aim of taking benefit of more than one forum for the resolution of a certain dispute. The possibility of starting one claim under different sources has been accepted also by Luiso, Rivista dell'arbitrato (2007), 604 and ss.

[89] Wehland (2013) (n. 11), 109-110 and 119.

[90] See Yannaca-Small, OECD International Investment Perspectives (2006), 237 and ss. The Author states that, increasing the complexity of the proceedings, consolidation increases also the margin of errors by arbitrators. Arbitrators, moreover, shall give to the parties full opportunity to present their casel

[91] Please refer to Paragraph 2.1.2.1 above. See Yannaca-Small, (2006) (n. 90), 236.

[92] This issue will be better examined below.

[93] E.g., Art. 33 of the US Model BIT, Art. 32 of the Canada Model BIT, Art. 10.26 of the Australia-Chile Free Trade Agreement.

[94] See art. 1126 NAFTA and II.27 of the TPP.

[95] See Art. 10 of 2012 ICC Rules, Art. 4(1) of the Swiss Rules. See also Pair (2012) (n. 86), 15 and ss. For a detailed analysis of Art. 10 of the ICC Rules, see Pair, Frankenstein, Emory International Law Review (2011), 1061 and ss. See also, for an analysis of the 1998 ICC Rule on consolidation, Whitesell, Multiple Party Action in International Arbitration (2009) 203 and ss.

[96] E.g. Article 1046 of The Netherlands Code of Civil Procedure and Section 6B f the Hong Kong Ordinance, which make reference to a form of court ordered consolidation of claims. Section 35 of the English Arbitration Act and many others, on the contrary, require express consent to consolidation. See, for other references, Yannaca-Small, (2006) (n. 90) 229. For an analysis of a US approach see Kerner, Washington University Law Quarterly (1991), 349 and ss.

[97] See Kaufmann Kohler *et a*l. (2006) (n. 87), 85 and ss.

[98] With regard to the entity that has to take the decision to consolidate, various modalities have been used in international investment law. The reference can go, *inter alia*, to a consolidation tribunal (such as in the case of art. 1126 NAFTA), to the arbitral tribunal itself (such as in S. 35 of the EAA), to national Courts (such as in art. 1046 of The Netherlands Code of Civil Procedure). In investment arbitration, the initial request to consolidate is usually made to a third person; this can be, *e.g.*, the ICSID Secretary General (see Art. 1126.3 NAFTA). This person will then establish a consolidation tribunal that will take

- *consent of all the parties to consolidate*: parties shall express, directly (through an express agreement) or indirectly (by referring to treaties, rules or national laws which contain an express consolidation provision in their agreement) their acceptance for consolidation. In investment arbitration, when two arbitrations are pending under two different BITs, if the parties do not expressly agree on consolidation, the only way to have consolidation on request of only one party is the case when both BITs involved provide for consolidation, due to the fact that in this case all the parties previously agreed on consolidation. In this regard it should be noted that – if the sources of consent do not already provide for consolidation – it is unlikely that the parties will give their consent after the dispute has arisen, in light of the fact that they have taken "a deliberate decision to commence a second arbitration";[99] when there is an arbitration under the NAFTA (and today the TPP) it is provided that, according to Art. 1126 NAFTA and Art. II.27 TPP a party can ask for consolidation in case there are two or more disputes arising from the same State measure (i.e. having a question of law or fact in common). Considering that starting an arbitration under these treaties the investor implicitly accepted these rules (and this constitutes, in principle, a sufficient basis for consent), once the request for consolidation is made during the proceedings "party autonomy is not relevant for considering a consolidation request under Article 1126".[100]
- *connexity of the cases to be consolidated*: some treaties require "questions of law or fact in common",[101] others refer to disputes "arising from the same circumstances".[102]
- *identity of dispute settlement mechanisms*: if the mechanisms of dispute resolution are very different, it is almost impossible to

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the decision to consolidate. It has been questioned whether this last decision is an order that is subject or not to challenge. According to Kaufmann Kohler *et al*. (2006) (n. 87), 102, the order of consolidation is not an award and is not subject to challenge, due to the fact that it has only procedural effects. In the opinion of the present author this position is questionable, due to the circumstance that the consolidation order has several substantive repercussion on the parties' rights during the proceedings.

[99] Pryles, Waincyer (2009) (n. 87), 28. This is why it seems that only in case there is previous acceptance of consolidation this mechanism seems able to work well. In this last case, in fact, arbitrators (or institutional administrators) would be entitled to order a compulsory consolidation upon request of only a party and without the necessity of looking for the consent of all the parties involved. Anyway, there have been critics to compulsory consolidation. See Chi, ssrn.com (2008), 1 and ss. Compulsory consolidation has been operated also in other fields of international law. See the ICJ South West Africa cases, ICJ Reports 1961, 14 and ss. See also the South-Eastern Greenland case, PCIJ Ser. A/B, No. 48 (1932), 270. For a more detailed analysis of the case law in international law (regarding also the ITLOS and WTO) see Kaufmann Kohler *et al*. (2006) (n. 87), 104 and ss.

[100] Yannaca-Small (2006) (n. 90), 236.

[101] E.g. Art. 1126 NAFTA.

[102] E.g. Art. 10.25 CAFTA-DR, Art. 33 of US-Uruguay BIT, Art. 15.24 of US-Singapore FTA.

coordinate the two pending proceedings and join them into one proceeding;[103]

- *fair and efficient dispute resolution*: consolidation shall serve the efficient resolution of the dispute and the interest of justice.

From an analysis of the case law, however, it appears that, even in case of parallel arbitrations initiated under the same treaty, Tribunals did not apply uniformly the requirements for consolidation.

As perfectly expressed by Shany, indeed, when considering consolidation, "the dilemma before us is thus predominantly ideological: which of the conflicting values – respect for private autonomy or the need to promote public order – should prevail. Of course, the dilemma has institutional implications. In particular, it raises questions concerning the proper role of supervising institutions (…). Are they merely designed to facilitate and execute the common will of the parties to arbitrate, or, in the alternative, to ensure the objective attainment of public policy (or systemic) goals? (…) This myriad of considerations seems to suggest that it would be difficult, if not indeed impossible, to lay out a general formulation regulating the conditions for consolidation, which would suit the concerns and capabilities of each legal regime that governs investment or commercial disputes".[104]

This lack of uniformity has been strictly related to the requirement of consent: what if one of the parties, after having expressed its consent to rules providing for consolidation, clearly shows its unwillingness to consolidate the two parallel proceedings?

This situation of uncertainty and inconsistency is perfectly demonstrated by a comparison of certain disputes arisen in the context of the NAFTA investment Chapter: the *Corn Products* (*Cord Syrup*)[105] and *Canfor* (*Softwood Lumber*)[106] cases.

In the *Cord Syrup* cases, Mexico asked to consolidate two cases, which, according to the consolidation tribunal, had certain questions of law or fact in common for the purposes of art. 1126 NAFTA (i.e. they all arose from State measures pertaining to the sugar market). Anyway, the Tribunal noted that the two companies were "direct and fierce competitors" and this circumstance would have rendered necessary complex confidentiality measures during the proceedings that would have rendered consolidation extremely difficult. Consolidation, the Tribunal said, would have run against due process: "the parties should not have to calculate which items of information, evidence, documents and arguments they can share with their competitors and which ones they cannot share". Therefore, notwithstanding the fact

[103] Kaufmann Kohler *et al.* (2006) (n. 87), 88-89.

[104] Shany, ICSID Review FILJ (2006), 136.

[105] *Corn Products International Inc. v. United Mexican States*, ICSID Case N°. ARB(AF)/04/1, and *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case N° ARB(AF)/04/5, Order of the Consolidation Tribunal, 7 September 2005. See also Etteh (2010), 11 and ss.

[106] *Canfor Corporation v. United States of America* (UNCITRAL), and *Tembec et al. v. United States of America* (UNCITRAL), and *Terminal Forest Products Ltd. v. United States of America* (UNCITRAL), Order of the Consolidation Tribunal, 20 May 2005.

that arbitrating under NAFTA the claimants should have already accepted Art. 1126 of such Treaty, "largely because of their strong competition, the claimants do not wish to have their claims consolidated" and the Tribunal refused the consolidation request by Mexico. "The Tribunal is persuaded that notwithstanding certain common questions of fact and law, the numerous distinct issues of state responsibility and quantum further confirm the need for separate proceedings". This means, in conclusion, that the satisfaction of the requirements set forth above is not *per se* sufficient to give the certainty that consolidation would be operated.

Opposite conclusion have been reached by the *Softwood Lumber* Consolidation Tribunal. The three claimants were Canadian producers of softwood lumber allegedly affected by certain measures of the United States. The respondent State asked for consolidation of the three claims on the basis of the fact that the same NAFTA provisions were involved in the three proceedings. These had factual and legal circumstances in common. The claimants objected consolidation stating that there was only similarity between the circumstances, that there was no risk of conflicting judgments (as there was instead in the *CME* and *Lauder* cases) due to the fact that the companies were not affiliated and that consolidation would have involved severe delays. In conclusion, claimants stated that consolidation would have been against the consensual nature of arbitration. The Tribunal, after having recalled in detail the legislative history and the rationale (i.e. the policy considerations set out above and in particular the efficient resolution of claims - in the sense of procedural economy) of art. 1126 NAFTA, cited Henri Alvarez[107] and stated that "Chapter 11 of NAFTA (...) is not the usual private, consensual context of international commercial arbitration. Rather, Chapter 11 creates a broad range of claims which may be brought by an equally broad range of claimants who have mandatory access to a binding arbitration process without the requirement of an arbitration agreement in the conventional sense nor even the need for a contract between the disputing parties. *In view of this, some compromise of the principles of private arbitration may be justified*" (emphasis added). Hence, after having recalled its discretionary power to order consolidation, the Tribunal did so. Arbitrators specified that the desirability to avoid conflicting awards is not limited to cases where the parties are the same, but also in cases with the same legal issues arising out of the same event or related to the same measure. Finally, contrary to the *Cord Syrup* Tribunal, the Tribunal stated that "concerns over confidentiality are, in the view of the Consolidation Tribunal, not relevant when considering a request of consolidation, save for exceptional cases where consolidation would defeat efficiency of process or would infringe the principle of due process. (...) The general trend in investor-State arbitration is transparency of process, a trend to which the Consolidation Tribunal subscribes. Within the perspective of that trend, the issue of confidentiality must be approached with caution. (...) the fact that parties to proceedings are competitors is not unique to consolidation proceedings. (...) It has

[107] Alvarez, Arbitration International (2000), 404.

never been seriously suggested that arbitration cannot proceed in those cases for the mere reason that the parties are competitors and that disclosure of confidential information is purportedly bound to occur".[108]

In light of all the above, even if the approach taken by the *Softwood Lumber* Consolidation Tribunal is fully shared by the present author, it is possible to draw the following conclusions. First of all, consolidation is applicable only in very limited situations, i.e. proceedings that are concurrently pending, under the same institutional rules and in presence of consent by all the parties to consolidation.[109] Secondly, even when the above requirements are satisfied, some other considerations (e.g. the confidentiality of proceedings) may lead arbitrators to not operate consolidation and maintain two (or more) separate proceedings.

The picture that emerges is therefore extremely uncertain and cannot lead us to see consolidation as a general and reliable remedy to the problem of parallel proceedings in investment arbitration.

2.1.2.3 Quasi consolidation

Quasi consolidation mechanisms are the ones "whereby formally separate arbitrations are heard by the same panel of arbitrators and awards are coordinated both in terms of substance and timing".[110] This mechanism, which is not provided by any institutional rule or national law, could be useful in all the scenarios 1), 2) and 3) outlined in paragraph 2.1.2 above, due to the fact that the two proceedings still proceed in parallel, even if they are heard by the same arbitral tribunal. This has happened several times in the framework of ICSID. It is worth noting the several cases regarding aluminium and bauxite producers against Jamaica, which were heard by the same Tribunal and produced identical results.[111] The same happened in two cases brought by Italian investors against Morocco[112] and in several of the cases brought against Argentina after the economical crisis.[113] The same happened in the already

[108] *Softwood Lumber* cases, consolidation order, 52-55. On this matter see Guglya, Journal of International Dispute Settlement (2011), 186 and ss.

[109] With regard to the issue of consent, it is worth considering what happened in the already cited *CME* and *Lauder* cases. In these cases, willing to rely only on *res judicata*, Czech Republic refused the consolidation of claims and two completely different awards were issued. Due to the formalities related to consent, therefore, consolidation was precluded and a very bad result from the perspective of the good administration of justice came out.

[110] Wehland (2013) (n. 11), 110.

[111] *Alcoa Minerals of Jamaica Inc. v. Jamaica*, ICSID Case No. ARB/74/2, *Kaiser Bauxite Company v. Jamaica*, ICSID Case No. ARB/74/3, *Reynolds Jamaica Mines Limited and Reynolds Metals Company v. Jamaica*, ICSID Case No. ARB/74/4.

[112] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4 and *Consortium RFCC v. Royaume du Maroc*, ICSID Case No. ARB/00/6.

[113] See, e.g., the already cited cases *Sempra v. Argentina* and *Camuzzi v. Argentina*. See also *Electricidad Argentina S.A. and EDF International S.A. v. Argentine Republic*, ICSID Case No. ARB/03/22; *EDF International S.A., SAUR International S.A. and Leòn Participationes Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23. Other cases are reported by Wehland (2013) (n. 11), 111-112.

cited (see Chapter 1) cases related to the Yukos saga (*Yukos Universal v. Russia*, *Hulley Enterprises v. Russia* and *Veteran Petroleum v. Russia*).[114]

Quasi consolidation of proceedings obviously increases the coordination between them and lowers the possibility that inconsistent awards are issued.

However, this form of coordination has still several drawbacks. First of all it does not reduces the expenses for the host State, which still have to sustain the costs of two arbitration proceedings. Indeed, quasi consolidation "does not necessarily permit rationalizing the use of resources, as submissions, hearings and decisions" which "are often separate for each proceedings. Moreover, this method may raise issues of due process if a Tribunal relies on knowledge acquired in one case to resolve another".[115] As it has been stated by Nicklisch "it is, however, by no means always the case in arbitrations conducted in accordance with the rules of two-party proceedings that an identical panel of arbitrators will automatically guarantee the avoidance of inconsistencies. There is no certainty that the statement of undisputed facts may not differ in the two proceedings and, above all, that the taking of evidence may not lead to different results. Such discrepancies between statements of fact and results of the taking of evidence cannot always be prevented even by an identical panel of arbitrators and can only be avoided by conceding to the third (and fourth) party - even if only to a restricted degree – the right to participate in the initial proceeding, and by ensuring that in the second proceeding, the findings of the first proceeding can no longer be contested in their substance by the parties".[116] Finally, quasi consolidation is still based on the consent of the parties that – for whatsoever reason – may decide to not give it.

In light of the above – as stated in Chapter 1 – it is possible to say that some examples of quasi consolidation (such as the *Yukos* cases) deserve approval, having lead to one single award and to a total coordination of proceedings. However, the sole fact that quasi consolidation is based on consent brings a very high level of uncertainty on the reliability of such mechanism and exclude it from the list of the general solutions to the problem of parallel proceedings; it is, indeed, uncertain whether and when quasi consolidation will be applied. Moreover, it is not possible to exclude *a priori* that, even in presence of quasi consolidation, divergent results arise from the proceedings. For these reason, quasi consolidation is not a valid solution for the aim of the present book.

2.1.3 Collective proceedings started by investors (in a nutshell)

[114] See also *Gemplus and Talsud v. Mexico* ICSID Case No. ARB(AF)/04/4, Award, 16 June 2010.
[115] Kaufmann Kohler *et al.* (2006) (n. 87), 75.
[116] Nicklisch (1994) (n. 48), 65. The risk of inconsistent decisions even in cases of quasi consolidation was outlined by the High Court of Hong Kong in the *Shui On* case, *Re Shui On Construction Ltd. and Schindler Lifts (HK) Ltd*, HKLR 117 (1986), in van den Berg (ed.), 14Yearbook Commercial Arbitration 215 (1989). See Miller, Arbitration International (1987), 88.

When several investors, which are in the same substantial situation, having suffered the same (or sufficiently similar) losses within the same period of time due to the same wrongful acts of a host State, start together a set of proceedings against the host State, we are in front of collective proceedings started by investors. These proceedings have been sometimes admitted in investment arbitration[117] and have also been referred to as "mass claims".

This definition has generated a widespread debate, due to the fact that, usually, in international law it has been used with a technical meaning, referring to "a process designed to deal with a high number of claims that arise out of the same extraordinary situation or event and are filed with the decision making body within a limited period of time".[118] In international law, therefore, mass-claims are necessarily decided on an individual basis by judicial bodies that are judicial or quasi-judicial in nature.[119] Other Authors, however, have stated that in investment arbitration there is no difference between collective proceedings started by investors and mass-claims, due to the circumstance that this last definition shall be used in an a-technical sense. The majority of the Tribunal in *Abaclat*, indeed, stated that "for the sake of simplicity and clarity, the Tribunal will refer to mass proceedings as a qualification for the present proceedings, whereby this term should be understood as referring simply to the high number of Claimants appearing together as one mass, and without any prejudgment on the procedural classification of the present proceedings as a specific kind of collective proceedings recognized under any specific legal order".[120] The Tribunal, at para 482, expressly stated that mass proceedings "fall under the more general concept of collective proceedings". A similar conclusion was reached by the majority of the Tribunal in *Ambiente Ufficio*.[121]

Collective proceedings in investment arbitration, therefore, are inspired by class actions developed in US law and are conceptually different from mass-claims as developed in international law. In US law the class action is a procedural device that "allows a small number of individual plaintiffs to represent a larger group of plaintiffs in one litigation proceeding against a single defendant who caused a similar injury to all of the plaintiffs".[122] In order to have a class action in US law,[123] the following

[117] See, *inter alia*, *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, where the claims have been brought by 60.000 Italian bondholders, and *Ambiente Ufficio S.p.A. and Others v. Argentine Republic*, ICSID Case No. ARB/08/9. See Kabra, Arbitration International (2015), 425 and ss. A recent decision involving this kind of proceedings is *Giovanni Alemanni and Others v. The Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, 17 November 2014

[118] Kosovo Housing and Property Claims Commission, Res. No. 7, 11 April 2013, HPCC/RES/7/2003, para. 1.4

[119] Van Houtte, McAsey, ICSID Review FILJ (2012), 232. See also *Abaclat and Others v. Argentine Republic*, Dissenting Opinion, George Abi-Saab, 28 October 2011, para. 180, and *Ambiente Ufficio S.p.A. and Others v. Argentine Republic*, Dissenting Opinion, Santiago Torres Bermudez, 2 May 2013, para. 99. See also Heiskanen, Multiple Party Actions in International Arbitration (2009), 297 and ss.

[120] *Abaclat and Others v. Argentine Republic*, para. 180

[121] Paras. 119-120

[122] Daly, University of Miami Law Review (2007), 105

[123] Federal class-action suits are governed by Federal Rule of Civil Procedure 23.

requirements (which have been used also in international commercial arbitration)[124] are necessary:[125]

1) *numerosity requirement*: the class shall be so large that a joinder would be impracticable;[126]
2) *commonality requirement*: there are questions of law and of fact common to the claimants;
3) *typicality requirement*: the representative plaintiffs' claims and defences are typical of those of the entire class;
4) *representativeness requirement*: the representative plaintiffs will fairly and adequately protect the interests of the entire class.

Furthermore, in arbitration it is necessary the consent of all the parties involved: there can be no class actions in arbitration if all the parties involved have not given their consent.[127] This requirement is less controversial in investment arbitration than in commercial arbitration. Indeed, the "system of arbitration without privity assumes that the offer is made to more than one potential investor"[128] and thus nothing in BITs' wording seems to preclude collective proceedings by investors, considering that States' consent has already been provided.[129] Once all the investors will decide to start an investment claim, they are entitled to do so.

The debate regarding collective proceedings in investment arbitration is still in course and it is not clear what will be the role and the utility of this procedural device in the "fight" against parallel proceedings.[130] In particular, with regard to the numerosity requirement, it shall be highlighted that it is not clear whether it is required and what is an adequate number of claimants in order to have collective proceedings in investment arbitration. As of today, no case in investment arbitration considered the numerosity requirement as essential in order to have collective proceedings started by investors. In *Funnekotter v. Zimbabwe*[131] an ICSID Tribunal heard the merits of a case involving 13 Dutch Investors, without any objection to

[124] Daly, (2007) (n. 122), 105 and ss., Hanotiau, Arbitration International (2004), 39 and ss., Lacovara, Arbitration International (2008), 541 and ss., Jeydel, Dispute Resolution Journal (2002), 3 and ss.
[125] Daly (2007) (n. 122), 106.
[126] *Id.*, 114, notes that in this case consolidation would not be feasible and would be against the interests of all the parties. It would lengthen and complicate proceedings.
[127] See American Arbitration Association, Supplementary Rules for Class Arbitration (2003). See also *Deiulemar Compagnia di Navigazione S.p.A. v. M/V Allegra*, 198 F.3d 473, 482 (4th Cir. 1999, and *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269, 275 (7th Cir. 1995). According to the US Supreme Court, whether an arbitration clause prohibits or allows class actions is for the arbitrators and not for the courts to decide. See *Green Tree Financial Corp. v. Bazzle*, 123 S. Ct. 2402 (2003), and 351 S.C. 244, 569 S.E.2d 349 (S.C. 2002).
[128] Kabra (2015) (n. 117), 436. See also Steingruber, ICSID Review FILJ (2012), 241 and Strong, YB International Arbitration (2013), 288.
[129] Concerning the requirement of consent in collective proceedings under Article 25 of the ICSID Convention, see Kabra (2015) (n. 117), 432 and ss. Some Authors have questioned is one of admissibility and not one of jurisdiction. See Kabra, 438 and ss., De Brabandere, Journal of International Dispute Settlement (2012), 614 and ss.
[130] Pharaon, Arbitration International (2015), 589 and ss.
[131] *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009.

jurisdiction by the respondent State. If the approach taken in this decision should find confirmations in the future (and the present author does not see reasons to say the contrary, even in light of previous case law),[132] collective proceedings by investors could become a very useful form of coordination of proceedings in cases regarding scenario 2) outlined in paragraph 2.1.2 above (multiple claims by the various shareholders of a company), provided that all the shareholders have the same nationality (this last circumstance seems not to be very common in today's multinational commerce).[133] Instead, if it should be ascertained that a far more large number of claimants is required to start collective proceedings in investment arbitration (such as in the *Abaclat* case), this procedural device would not have any utility against a limited number of parallel proceedings (as the ones we are dealing with in this book) and could be useful only in very large-scale arbitrations.

However, as in the case of quasi consolidation, collective proceedings are based on a discretional choice of the claimants (which, it is worth to repeat, shall have the same nationality) to start collective proceedings. Such procedural device is therefore a good form of coordination *when it is used and when it is possible to make recourse to it*, but cannot be considered as a general tool to which arbitrators can make recourse to prevent parallel proceedings. Collective proceedings are not, therefore, a valuable solution for the purposes of the present book.

2.2 Remedies based on arbitrators' discretion only

[132] *Antoine Goetz & Others and S.A. Affinage des Metaux v. Republic of Burundi*, ICSID Case No. ARB/01/2, and *The Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL (formerly *Consolidated Canadian Claims v. United States of America*), Award on Jurisdiction, 28 January 2008.

[133] It is worth noting that there could be various due process and confidentiality concerns in relation to collective proceedings in investment arbitration. Concerns related to the confidentiality requirement have in particular been expressed by Justice Scalia in *AT&T Mobility LLC v. Concepcion et ux.*, Certiorari to the United States Court of Appeals for the Ninth Circuit, 27 April 2011. Due process concerns are related to: (a) the efficient conduct of proceedings; (b) fairness to all disputing parties, which shall maintain their right to be heard and to present their case. There can be also problems related to the modalities of appointment of arbitrators. According to Kabra (2015) (n. 117), 444 and ss., the "methods adopted to manage 'mass claims' do not impinge upon parties' right to a fair hearing, as long as tribunals undertake individual assessment of facts. (…) due process is not an end in itself, but merely a means to achieve a just and fair settlement of a dispute. (…) making 'mass claims' inadmissible results in a frustrating situation for both investors and states since the former is denied an effective remedy and the latter becomes susceptible to potentially conflicting decisions". Concerning confidentiality, as it has been done by the *Softwood Lumber* Consolidation Tribunal (mentioned above), it should be noted that confidentiality has a limited applicability in investment arbitration, due to the public nature of this form of dispute resolution. Therefore, as stated by Daly (2015) (n. 122), 125 "confidentiality (…) is not an absolute notion" and therefore confidentiality should deprive arbitration of the tool given by collective proceedings. Finally, with regard to possible concerns of efficiency, see Daly, 126 and ss., who highlights the positive and negative repercussions of class arbitrations on the efficiency of proceedings.

The major problem related to collective proceedings in investment arbitration seems to be the lack of expertise by arbitrators in the case management in scenarios involving a very high number of claimants and therefore the manageability of the case. Another issue could be the costs and the fees to be sustained by the parties in cases which, due to the very high number od claimants, present a very high level of complexity.

2.2.1 *Forum non conveniens, comity and the suspension of proceedings*

It is disputed, in cases of parallel proceedings in international law, whether an arbitrator, after having ascertained to have jurisdiction, has discretion to decline such jurisdiction (or to suspend the proceedings pending before it, waiting for the decision of the other court) on the basis of considerations related to efficiency, deference to the work of other courts and tribunals and the fair administration of justice. Some Authors have expressed the view that arbitrators cannot decline a validly conferred jurisdiction,[134] others have said that this could be done only if there is a clear contestation by a party,[135] and still others have stated that it is possible for an arbitrator to decline jurisdiction keeping into consideration purposes of justice and efficiency. Among this last category of Authors, some have expressed the view that the possibility to decline jurisdiction (or to suspend proceedings) is only exceptional,[136] while others have advocated "a more generous use of the possibility to stay where the other forum is overall a more appropriate forum to try the dispute".[137] In this patchwork of ideas, the number of opinions and decisions[138] that consider possible a form of suspension of proceedings seems however higher than the number of Authors who do not consider possible this exercise of discretion. For this reason, we will assume (for the purpose of this paragraph) that in international law it is possible to suspend proceedings or, as we will better see in Chapter 3 below, to decline jurisdiction when the good administration of justice so require.

Two are the main tools that have been used by judges in national law systems in order to exercise the discretion to suspend proceedings: *forum non conveniens* and international comity.

According to the *forum non conveniens* doctrine, a court may decline jurisdiction on a dispute whenever there is a clearly more appropriate forum which can better related to the dispute (we could say: the *natural forum* of that dispute),[139] i.e.

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[134] Soderlund, Journal of International Arbitration (2005), 314, Lew, *Parallel State and Arbitration Proceedings* (2005), 310, Yannaca-Small, The Oxford Handbook of International Investment Law (2010), 1021.

[135] Gaja, The Statute of the International Court of Justice: A Commentary (2012), 579.

[136] Schneider, Arbitration International (1990), 111-112. See also *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, para. 271.

[137] Wehland (2013) (n. 11). See also Cuniberti, ICSID Review FILJ (2006), 412, Douglas, British Yearbook of International Law (2003), 264. Lowe, Australian Yearbook of International Law (1999), 191 and ss., seems to admit this possibility in several situation.

[138] See *Administration of the Prince von Pless (Germany v. Poland)*, PCIJ No. 52 Ser. A/B, 16 (1933), *Battus v. Bulgaria*, French-Bulgarian Mixed Arbitral Tribunal,11 February 1922, 1 R.D.T.A.M., 794, *Mox Plant Arbitration (Ireland v. UK)*, Order of 24 June 2003, 42 I.L.M. (2003), para. 28. This possibility seems to have been admitted also by the ICJ in the *TimorLeste v. Australia* case, Order of 28 January 2014; on this decision see Bonafè, Ordine Internazionale e diritti umani (2014), 331. With reference to ICSID arbitration, see *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, paras. 92, 128.

[139] Pauwelyn, Salles, Cornell International Law Journal (2009), 113.

better satisfying the interest of the parties and the interest of justice.[140] In investment arbitration, *forum non conveniens* could be interpreted as follows: an arbitral tribunal does not exercise its (already ascertained) jurisdiction on a dispute when it deems that there is another international tribunal that, for its particular competences, is more appropriate to hear the dispute.[141]

International comity has been defined in the well-known *Hilton v. Guyot*[142] case of 1895. Comity has been intended as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws".[143] Comity has been seen as a "protean concept of jurisdictional respect"[144] and in international litigation has very often been applied – in its meaning of adjudicatory comity – as a form of deference towards the work of other courts and tribunals, i.e. recognizing decisions issued by other courts and tribunals, refraining from judging on a dispute that is being already judged in another forum (in this regard comity is very similar to *forum non conveniens)* and refraining from issuing order which can interfere with the jurisdiction of another forum (i.e. anti-suit injunctions, on which see Paragraph 2.2.2 below). In international arbitration, comity could be a form of deference that one tribunal recognizes to other tribunals, refraining from exercising its jurisdiction[145] (and/or, as it will be seen below, from issuing anti-suit injunctions).

Some Authors[146] believe that these techniques share the same rationale, i.e. to respect jurisdiction of other arbitrators in parallel cases, while others[147] have stressed that *forum non conveniens* is devoted more to the interests of the parties (i.e. there is a more appropriate forum for both of them to celebrate the proceedings), while international comity would be exercised in view of the good relationship between two national legal systems. Considering that they have different origins[148] and that they are applied in different national systems,[149] we will deal separately with their

[140] Hartley, *International Commercial Litigation* (2015), 205 and ss. See also Childress, Virginia Journal of International Law (2012), 157 and ss.
[141] This approach seems the one taken by Lowe (1999) (n. 137), 191 and ss.
[142] 159 U.S. 113, 164 (1895).
[143] On the concept of comity, see Watson, *Joseph Story and the Comity of Errors* (1991), 1 and ss., Paul, Harvard International Law Journal (1991), 1 and ss., Paul, Law and Contemporary Problems (2008), 19 and ss., Childress, University of California Davis (20109, 11 and ss., Dodge, Columbia Law Review (2015), 1 and ss., Bleimaier, The Catholic Lawyer (1979), 327 and ss.
[144] *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfservisoren*, 361 F.3d 11, at 19 (1st. Cir. 2004)
[145] Shany, Regulating Jurisdictional Relations (2007), 166 has said that exercising comity means "to defer, when appropriate, to other courts and to treat their procedures and decisions with courtesy and respect".
[146] Jansen Calamita, U. Pa. Journal of International Economic Law (2006), 606.
[147] Pauwelyn, Salles, (2009), (n. 139) 112.
[148] Forum non conveniens developed first of all in Scottish courts and has then been applied in England pursuant to the 1987 House of Lords' decision in *Spiliada Maritime Corporation v. Cansulex* [1987] AC 460. See, for a detailed analysis of this evolution, Hartley (2015) (n. 140), 205 and ss. For the origins of the concept of comity, it is necessary to refer to Authors cited in footnote 143 above.
[149] Comity is mainly applied by US Courts. In other jurisdictions it is possible to find the concept of "reciprocal respect".

suitability to offer a valuable remedy to the problems raised by parallel proceedings in international law.

With regard to *forum non conveniens*, it immediately emerged that this doctrine is "almost exclusively known in common law systems and it could be difficult to sell it as a general principle of law".[150] As a consequence, it is questionable whether and according to which law (or powers) arbitrators should be entitled to apply this doctrine. This question could be answered making reference to the inherent powers of arbitral tribunals, but – due to the lack of case law regarding the application of *forum non conveniens* by international tribunals – there is not still a clear answer to it.[151] Secondly, and most importantly, *forum non conveniens* is by nature a doctrine which involves a very high amount of discretion by decision makers.[152] Therefore, sometimes *forum non conveniens* could be wisely used in order to avoid parallel proceedings, but in other cases the result could be opposite. This means that such discretion results in the non reliability of the doctrine to solve the problems related to parallel proceedings, due to the non predictability of what the judge will deem appropriate to do ("to stay or not to stay?", we could say!) in the interest of justice. For the above considerations, we cannot, in the opinion of the present author, look at *forum non conveniens* as a possible general remedy to parallel proceedings in international arbitration.[153]

With regard to international comity, the discourse is similar. Indeed, it is doubtful whether, being mainly applied in the US national law system, comity is also part of international law and can therefore be freely applied by arbitrators. Furthermore, it cannot be ignored that, even in national legal systems, international comity has sometimes been strongly criticized[154] as a very vague principle that does not constitute any guidance for judges. According to these critics, as a consequence, international comity could not offer any form of regulation in case of parallel proceedings. Even though the present author has already expressed the opinion that national judges should use the concept of comity in order to limit the issuance of anti-suit injunctions,[155] it is extremely doubtful whether the concept of comity can be a valid tool in order to prohibit an international arbitrator by exercising its jurisdiction.

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[150] Pauwelyn, Salles (2009) (n. 139), 110. For the application of forum non conveniens around the world see Fawcett (ed.), *Declining Jurisdiction in Private International Law* (1995), 1 and ss.

[151] The question is partially answered (it seems in the negative) by Linton, Tiba, Chicago Journal of International Law (2009), 423-424.

[152] The doctrine (and the discretion that it involves) has been analyzed by a moltitude of Authors. See, *inter alia*, Zenjie, Netherlands International Law Review (2009), 143 and ss., Heiser, Kansas Law Review (2008), 609 and ss., Hicks, Review of Litigation (2009), 659, Hill, Vanderbilt Journal of Transnational Law (2008), 1177 and ss., Juratowich, International and Comparative Law Quarterly (2014), 477 and ss..

[153] This opinion is shared by Zoppo (2013), 224-226 and Virzo, *Il regolamento delle controversie nel diritto del mare: rapporti tra procedimenti* (2008), 269 and ss.

[154] See Mann, *Foreign Affairs in English Courts* (1986), 136, Tan, Virginia Journal of International Law (2005), 303 and ss. This last Author has defined comity as "amorphous" and has stated that it shall be regarded "simply as a cautionary reminder". Judge Cardozo called comity "a misleading word" which "has been fertile in suggesting a discretion unregulated by general principles". See *Loucks v. Standard Oil Co. of New York*, 120 N.E. 198, 201 (N.Y. 1918).

[155] Zarra, Rivista di diritto internazionale privato e processuale (2014), 561 and ss.

Indeed, as in the case of *forum non conveniens*, suspending proceedings on the basis of comity is a mere exercise of discretion of the arbitrator, based on his sensibility as a lawyer, and not the consequence of the application of a precise rule.[156] Hence, it is possible to conclude that there is no rule of international law that imposes the suspension of proceedings to an arbitrator.[157] This is confirmed by the very incoherent case law of investment Tribunals with regard to the issue of suspension. While in the *SPP v. Egypt*[158] and *SGS v. Philippines*[159] cases the Tribunals, even if recognizing that there is no international law rule which compelled them to do so, operated a stay of proceedings pending a prior dispute in another *forum*, in other cases tribunals have "either explicitly or implicitly refused to stay proceedings in favour of a contractual forum".[160]

In light of the above (and of the still doubtful question of the discretion of arbitrators of staying arbitral proceedings), even if when applied comity can be a valid form of coordination among tribunals, it is highly questionable that international comity may be proposed as a solution for the issues related to parallel proceedings in investment arbitration.[161]

2.2.2 *Arbitral anti-suit injunctions and the infringement of kompetenz-kompetenz*

[156] Wehland (2013) (n. 11), 211-212, seems to treat comity as a rule that in some cases could impose to arbitrators to stay proceedings. According to his opinion, there are certain situations in which there is a presumption in favor of a stay and in which arbitrators should not hesitate to do so.

[157] This critic is shared by Cannizzaro, European Journal of Legal Studies (2007), stating that the legal basis of comity and judicial discretion are "uncertain" and their content "indeterminate".

[158] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction I, 27 November 1985, paras. 53-56. This is a real case of comity between two international Tribunals, due to the fact that the ICSID Tribunal staid the proceedings pending before it waiting for the termination of an already pending ICC arbitration, on the basis of the fact that "when the jurisdictions of two unrelated and independent tribunals extend to the same dispute, there is no rule of international law which prevents either tribunal from exercising its jurisdiction. However, in the interest of international judicial order, either of the tribunals may, in its discretion and as a matter of comity, decide to stay the exercise of its jurisdiction pending a decision by the other tribunal.

[159] See n. 25 above. According to Wehland (2013) (n. 11), 213, "The majority of the tribunal, while finding that it had jurisdiction with regard to the investor's claims under the treaty's umbrella clause, took the view that the contractual dispute resolution provision should nevertheless be given effect, and decided to stay the proceedings so that the Philippine courts could render a decision on the underlying contractual issues, In doing so, the tribunal seemed to base itself both on the principle of comity and on consideration of estoppel and the prohibition of *venire contra factum proprium*".

[160] Wehland (2013) (n. 11), 213. This situation has very often arisen in case of treaty claims before investment tribunals and contract claims before national courts (which are not part of our research). See *Holiday Inns v. Morocco*, ICSID Case No. ARB/72/1, unpublished decision mentioned by Schreuer et al. (2009) (n. 14), 364. In this case the Tribunals, while refusing to stay its proceedings, emphasized the supremacy of international proceedings over purely internal proceedings. See also *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003, para. 76, Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, para. 95, Eureko v. Poland (UNCITRAL), Partial Award of 19 August 2005, para. 114, BG Group v. Argentina (UNCITRAL) Award of 24 December 2007, para. 183. See also several other similar precedents mentioned by Wehland, 213, footnote 42.

[161] The above concerns are shared by Virzo (2008) (n. 153), 265-268.

An anti-suit injunction is an order, generally issued by common law courts, which forbids a party from commencing or continuing an action in another jurisdiction or arbitral tribunal, before a final determination of the dispute is reached by the court that issued the injunction.[162] In case a party does not comply with an anti-suit injunction issued by a national court, such party will be liable of contempt of court.[163]

Case law has showed a general tendency to accept also the possibility that arbitrators issue anti-suit injunctions to restrain a party from going on with a dispute in a court or in another arbitral tribunal. For the sake of the present book, we will only deal with anti-suit injunctions issued by an arbitral tribunal in order to restrain proceedings pending in another arbitral tribunal.[164]

In this regard, in the past it has been several times questioned whether arbitrators have the power to issue anti-suit injunctions.[165] This criticism seems today outdated, due to the fact that several tribunals, in particular within the framework of ICSID, have issued anti-suit injunctions to protect their jurisdictions.[166] This has been considered as part of the power of arbitral tribunals to issue interim measures.[167] On

[162] Raphael, *The Anti-suit Injunction* (2008), 1 and ss., Zarra (2014) (n. 155), 561 and ss., Bermann, Columbia Journal of Transnational Law (1990), 589 and ss., Hartley, The American Journal of Comparative Law (1987), 487 and ss., Atteritano, Rivista dell'arbitrato (2010), 441 and ss., Gaja, Rivista di diritto internazionale (2009), 503 and ss., Benedettelli, Rivista dell'arbitrato (2014), 701 and ss., Goldhaber, Stanford Journal of Complex Litigation (2013), 376 and ss., Barcelò, Cornell Law Faculty Publication (2007), 1 and ss., Fisher, Bond Law Review (2010), 1 and ss., Fernandez Rozas, Anti-suit Injunctions in International Arbitration (2005), 73 and ss., Fumagalli, Rivista dell'arbitrato (2005), 583 and ss., Phull, Journal of International Arbitration (2011), 21 and ss., Tan (2005) (n. 154), 286 and ss., Ortolani, MPILux Working Paper (2015), 1 and ss., Seriki, International Arbitration Law Review (2011), 19 and ss., Ali, Nesbitt, Wessel, International Arbitration Law Review (2008), 12 and ss., Chavier, Suffolk Transnational Law Journal (1990-1991), 257 and ss.

[163] See Section 37 of the English Supreme Court Act of 1981.

[164] Levy, IAI Arbitration Series (2005), Gaillard, *ICCA Congress Series* (2007), 235 and ss., Leandro, Rivista di diritto internazionale (2015), 815 and ss., Gaillard, *Pervasive Problems in International Arbitration*, 203 and ss. (2006)

[165] Gaillard (2007) (n. 164), 240 and ss. The reasons for such critics are, according to Gaillard, mainly three: (i) that it is improper for arbitral tribunals to address injunctions to State courts; (ii) that anti-suit injunctions violate the *kompetenz-kompetenz* of the other court/tribunal involved; and (iii) that an arbitral tribunal issuing anti-suit injunctions would be a judge in its own case. To this circumstances it could be also added that, as noted by Benedettelli (2014) (n. 162), 706 anti-suit injunctions can be considered *lato sensu* as orders with a criminal sanction and therefore would be out of the competence of arbitral tribunals.

[166] See Gaillard (2007) (n. 164), 244 and ss., Goldhaber (2013) 376 and ss. The reference goes in particular to *Holiday Inns v. Morocco*, decision reported by Pierre Lalive, British Yearbook of International Law (1980), 134, *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*, ICSID Case No. ARB/84/4, Award of 6 January 1988, *Ceskoslovaska Obchodni Banka (CSOB) v. Slovak Republic*, ICSID Case No. ARB/97/4, Procedural Order n. 2 of 9 September 1988, Procedural Order n. 3 of 5 November 1998 and Procedural Order n. 4 of 11 January 1999, *Société Générale de Surveillance S.A. (SGS) v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Procedural Order n. 2 of 16 October 2002, *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order n. 1 of 1 July 2003.

[167] With regard to interim measures in ICSID arbitration, see Luttrell, Arbitration International (2015), 394 and ss., while concerning international commercial arbitration see Drahozal, International Council for Commercial Arbitration, International Commercial Arbitration: Important Contemporary Questions (2003), 179 and ss., and Carlevaris, *La tutela cautelare nell'arbitrato internazionale* (2006), 1 and ss.,

this point, it seems therefore worth to borrow the words of who said that "arbitral anti-suit injunctions are admissible and legitimate if they are mentioned within the arbitration rules of the arbitral seat or within the selected institutional rules. Anyway, the possible unfulfilment of arbitral anti-suit injunctions does not involve criminal sanctions both because arbitral tribunals do not have this power and because 'contempt' is a form of non compliance with orders issued by public authorities and not by arbitral tribunals. The remedy against unfulfilment of arbitral anti-suit injunctions can therefore only be damages".[168]

Hence, assuming that anti-suit injunctions can be issued by arbitral tribunals, it is now worth considering the advisability of the issuance of such orders. In this regard, it is worth noting that anti-suit injunctions are *in personam* orders, which, in principle, should not interfere with the jurisdiction of the other arbitral tribunal. On the contrary, however, it is obvious that anti-suit injunctions strongly *de facto* interfere with the jurisdiction of the second tribunal, due to the fact that – in case the compelled party decides to stop the proceedings before it – its jurisdiction will be affected by an order of another tribunal.[169] This is, in the opinion of the present Author, a clear and undue interference with the *kompetenz-kompetenz* of the second arbitral tribunal. As stated by Levy, "it is a fundamental principle that each [Court or] arbitral tribunal has jurisdiction to rule on its own jurisdiction or, in other words, has *kompetenz-kompetenz*".[170] In a previous paper, the present Author has already stated that anti-suit injunctions should be only issued by national courts in extreme circumstance and that judges should exercise a very strong restraint in issuing such orders (against other national proceedings) due to reasons of adjudicatory comity.[171] Transposing this idea in the field of international arbitration, the present Author argues that international arbitrators cannot issue anti-suit injunctions without unduly interfering with the *kompetenz-kompetenz* of another arbitral tribunal and therefore should absolutely refrain from doing so.[172]

Kaufmann Kohler, Antonietti, *Arbitration Under International Investment Agreements: A Guide to Key Issues* (2010), 507 and ss., DeBattista (2008).

[168] Leandro, Rivista di diritto internazionale (2015), 818.

[169] See Atteritano (2010) (n. 162), 450-451 who says: "I do not feel comfortable with the theory of the *in personam* nature of anti-suit injunctions. (…) I think that anti-suit injunctions (…) generate a certain disequilibrium between the two judges which is not justified by the New York Convention and which generates also a strong disequilibrium between the parties involved in the arbitrations".

[170] Levy (2005) (n. 164), 117. The principle of kompetenz-kompetenz is unanimously considered as the fundamental basis of arbitral jurisdiction and is worldwide recognized as such. See, on this principle Lew, Mistelis, Kroll, (2003) (n. 79), 129 and ss.

[171] Zarra (2014) (n. 155), 571 and ss.

[172] Benedettelli (2014) (n. 162), 732. See also Atteritano (2010) (n. 162), seems to share this opinion when he says: "We can say that anti-suit injunctions are *in personam* and not directed to the other judge; we can say that they are based on considerations of convenience due to the relationship of a certain forum with the dispute; we can say that anti-suit injunctions could be helpful for the prosecution of the arbitration, but the final result is always the same: a judge imposes his opinion to another judge!" and this is against the principle of kompetenz-kompetenz. According to Gaillard (2007) (n. 164), 261 and ss., the opportunity to issue an anti-suit injunction should be evaluated on a case by case basis.

Moreover, even if we would admit that anti-suit injunctions could be easily issued in international arbitration, case law shows that the arbitral tribunals (the proceedings of which should be, as already stated, *de facto* affected by the order) can simply ignore an anti-suit injunction and go on with the proceedings.[173] It is therefore strongly arguable that the efficacy of anti-suit injunctions is very limited, because the same principle of *kompetenz-kompetenz* has the consequence that arbitrators are free to determine their jurisdiction and to ignore any order aimed at influencing such jurisdiction. This is perfectly demonstrated by the *Salini v. Ethiopia*[174] case, in which the arbitral tribunal completely ignored an anti-suit injunction issued by the Court of Addis Abeba, stating that an arbitral tribunal is only subject to party autonomy and cannot be influenced by the decisions of other courts or tribunals. A similar conclusion was reached in several other cases,[175] including the already mentioned *SGS v. Pakistan*, where the ICSID Tribunal completely ignored an anti-suit injunction issued by the Court of Islamabad.[176] This position has also been confirmed by the English House of Lords in *Donohue v. Armco*,[177] when it said that "the risk inherent in an anti-suit injunction, if it is unwisely granted, is that it will not succeed in stopping a party (...) nor dissuade the courts of other countries from entertaining the litigation".

Finally, even if we would be inclined to admit that anti-suit injunctions could be a useful tool to avoid parallel proceedings in investment arbitration, we should also consider that such orders are completely based on a discretionary exercise of power by the arbitrators and it is not possible to rely in advance on the issuance of an anti-suit injunction (indeed, they could be considered the reverse side of the coin with regard to *forum non conveniens*).

For all the above reasons, in conclusion, it is strongly arguable that anti-suit injunctions are not a useful tool to manage parallel proceedings in investment arbitration.

2.3 Conclusions

The present Chapter has highlighted the unsuitability to solve the issue of parallel proceedings of all the remedies that are applicable at the jurisdictional phase of investment arbitration. As we have tried to demonstrate, in the current legal framework, jurisdiction is necessarily based on consent and it is not possible to

[173] Tan (2006) (n. 154), 305, Gaja (2009) (n. 162), 506, Hill, Chong, *International Commercial Disputes* (2010), 375. Another possibility is that a battle of anti-suit injunctions, anti-anti-suit injunctions and so on begins. With this regard see Schimek, Baylor Law Review (1993), 499 and ss.

[174] ICC Case No. 10623/AER/ACS.

[175] See *Companhia Paranaense de Energia-COPEL v. UEG Araucaria Ltda*, ICC Case No. 12656/KGA/CCO, reported in Quass Duarte, Antitrust and Unfair Competition Law (2010), 21. The Tribunal stated: "as the parties have agreed that this Tribunal has its judicial seat in Paris and therefore is subject to French arbitration law, any decision of a Brazilian court or any other court as to the validity of the arbitration agreement is not binding on the Tribunal".

[176] For other cases, see Zarra (2014) (n. 155), 579 and ss.

[177] I.L.Pr. 21 (2000).

imagine a situation in which arbitrators extend consent beyond the boarders set forth by the parties. All the theories based on a research of implicit consent (e.g. the group of companies doctrine) have been strongly criticized and the theories which try to bypass at all the research of consent (such as Brekoulakis's theory) miss the real framework of arbitral jurisdiction.

As a consequence, remedies such as consolidation and joinder cannot be considered as general solutions to the problem of parallel proceedings, due to the fact that, as we have tried to demonstrate, it is highly probable that one of the parties will not give its consent to these form of coordination. Furthermore – and most importantly – ICSID Convention and Rules are completely silent on the possibility to coordinate parallel/multiple proceedings or to join third parties and this means that the only plausible solution is quasi-consolidation (that, indeed, seems the only one that has been applied in a certain number of cases). Such remedy, as we have tried to demonstrate above, does not give any certainty on the effective coordination of the solutions of the two parallel cases. On the basis of the fact that the majority of investment arbitrations are held in the ICSID framework, we are today stuck in a situation of total lack of rules providing for coordination of proceedings and/or possible involvement of third parties.

The current situation in investment arbitration is therefore one in which ICSID arbitration does not provide for any form of solution to parallel proceedings, while *ad hoc* arbitration is by nature more consensual (*i.e.* similar to commercial arbitration) and therefore still strictly anchored to the impossibility to extend the proceedings to third parties without consent by all of them.

In light of the above, having examined the unsuitability of existing rules to solve the issue at stake, it is necessary to try to find a solution to parallel proceedings in the framework of general international law, which, as it will be demonstrate, is always to be considered applicable in investment arbitration. This will be the task that will be carried out in Chapter 3.

SECTION 2

Remedies to the problem of parallel proceedings

Chapter 3

Abuse of process, res judicata and collateral estoppel: the available tools against parallel proceedings

Chapter 1 and 2 have tried to demonstrate that there is no general remedy to parallel proceedings in investment arbitration to be applied at the jurisdictional phase of arbitral proceedings. As we have seen, this is not surprising. Jurisdiction in arbitration is mainly regulated by party autonomy and there is no chance for arbitrators to decline a validly conferred jurisdiction in case of parallel proceedings. Similarly, we have demonstrated that it is not possible to rely on tools, such as *forum non conveniens* and comity, which are solely based on the discretion of arbitrators. Anti-suit injunctions, in turn, seem to run against the basis of the whole international arbitration law, the principle of *kompetenz-kompetenz*.

However, this cannot be the end of the story. We have demonstrated that several policy considerations (i.e. reliability and legitimacy of arbitration as an adjudication process, judicial economy, efficiency and finality) impose to avoid and limit parallel proceedings. If such policy considerations cannot find a place when arbitrators consider their jurisdiction, this does not mean that they cannot be kept into account at a later stage in the proceedings, i.e. the admissibility phase.

Indeed, it is strongly arguable that, if at the admissibility stage arbitrators have – as recognized by the vast majority of authors and tribunals – inherent powers in order to safeguard the good administration of justice and to ensure the proper exercise of the judicial function, such inherent powers shall be exercised by them in order to prevent and preclude the continuation of parallel proceedings. The good administration of justice would be indeed not ensured if general principles of international law and fundamental canons of judicial proceedings (such as judicial economy) are violated by the continuation of duplicative proceedings.

Chapter 3 is therefore aimed at finding a legal basis for the application of the above powers by arbitrators. It will start (Paragraph 3.1) with an analysis of the distinction between jurisdiction and admissibility in investment arbitration and of the possible sources of such distinction. In order to understand the law applicable at the admissibility stage, the discussion will then move to the analysis of the law applicable in investment arbitration and, in particular, to the applicability of general principles of international law. It will be demonstrated that, at the admissibility phase, arbitrators have the inherent power to preclude the continuation of proceedings that are against general principles of international law (Paragraph 3.2).

After having excluded the applicability of *lis pendens* in investment arbitration (Paragraph 3.3), the analysis will then turn on the specific general principles of international law whose violation may be at the basis of a declaration of

inadmissibility, namely good faith and *ne bis in idem* (Paragraph 3.4). Both of these principles may be applied differently and may be specified in other more specific principles or rules. In particular, the principle of good faith can give rise to the doctrine of abuse of process (analysed in Paragraph 3.5), while the *ne bis in idem* principle has generated the principles of claim preclusion (analysed in Paragraph 3.6) and issue preclusion (analysed in Paragraph 3.7). In fact it will be demonstrated that abuse of process, issue estoppel and, if interpreted broadly, *res judicata* are valuable tools in order to avoid, or at least limit, the effects of parallel proceedings. However, prior to apply such doctrines, it is essential to make, on a case-by-case basis, a coordination of any of them with the principle of due process. In light of the above, we will firstly provide the abstract framework of any of these doctrines and then make an assessment of the concrete ways in which they can operate in investment arbitration (Paragraph 3.8). Finally, and keeping into account all the above discussion, a proposal to amend investment arbitration rules in order to render them more effective and policy oriented will be made (Paragraph 3.9).

3.1 *Jurisdiction and admissibility. The legal basis for the distinction and its role in the fight against parallel proceedings*

The distinction between jurisdiction and admissibility is a simple one: "[j]urisdiction refers to the power of a court or judge to entertain an action, petition or other proceeding. (…) By contrast, admissibility concerns the power of a tribunal to decide a case at a particular point in time in view of possible temporary or permanent defects of the claim".[1] Therefore, "if jurisdiction reflects legal power – that is, the power to adjudicate a dispute" – rules of admissibility should be considered "as pertaining to the terms permitting an international court to decline to exercise its legal powers. In other words, international courts may be authorized not only to decide a legal case, but also to decide not to decide it".[2] Hence, at the admissibility stage, arbitrators keep into consideration "alleged impediments to consideration of the merits of the dispute which do not put into question the investiture of the tribunal as such".[3]

[1] Waibel, Legal Studies Research Paper Series, University of Cambridge (2014), 2.
[2] Shany, *Questions of Jurisdiction and Admissibility before International Courts* (2015), 47.
[3] Paulsson, *Global Reflections on International Law, Commerce and Dispute Resolution* (2005), 617. See also Rosenfeld, Leiden Journal of International Law (2016), 137 and ss., Williams, *The Oxford Handbook of International Investment Law* (2008), 868 and ss. It is worth highlighting that, when referring to inadmissibility of a claim, we refer to a legal of preclusion to the exercise of a validly conferred jurisdiction. This is the main difference with comity: when a claim is declared inadmissible, it is so in light of the existence of a legal reason (i.e. a preclusion) which imposes to do so. On the contrary, when jurisdiction is declined for reasons of comity, the only reasoning at the basis of the arbitrators' choice is their sensibility, i.e. their alleged respect for other tribunals. When we talk about comity there is, therefore, no legal impediment to the exercise of jurisdiction; instead, such an impediment is present when a claim is declared inadmissible.

A claim may be declared inadmissible when it is *in concreto* precluded, due to legal impediments to hear *that* claim at *that* time. On the contrary, a tribunal does not have jurisdiction if, *in abstracto*, the tribunal cannot hear the dispute at hand, regardless of timing and preclusions. Therefore, as it has been suggested, "an accurate approach is as follows: if the objection concerns the power or faculty of the court or tribunal to deal with the case as a whole [i.e. when the objection regards the existence of consent or the arbitrability of the dispute], the objection is jurisdictional; if the objection concerns the suitability of a particular claim to be dealt on its merits at a relevant procedural time, the objection regards the admissibility of a claim".[4]

It should be noted that, sometimes, in investment cases, the distinction between jurisdiction and admissibility has been denied by arbitral tribunals, in particular due to the fact that it does not find support in any relevant legal source.[5] In other cases, Tribunals have avoided to make such a distinction, stating that it is "a distinction without difference", i.e., according to this view, the two concepts would allegedly coincide.[6] These criticisms seem to fall short. As confirmed by several sources,[7] Tribunals[8] and Authors,[9] indeed, the two concepts are "as different as night and day".[10]

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[4] Hugues Arthur, Anuario Mexicano de Derecho International (2015), 458. A similar concept has been expressed by Heiskanen, ICSID Review FILJ (2013), 7, where he says that "while jurisdiction is about the scope of the State's consent to arbitrate, admissibility is about whether the claim, as presented, can or should be resolved by an international tribunal, which otherwise has found jurisdiction". The dichotomy between jurisdiction and admissibility is also accepted by Douglas, *The International Law of Investment Claims* (2009), 135, according to whom "[f]or an investment treaty tribunal to proceed to adjudge the merits of claims arising out of an investment, it must have jurisdiction over the parties and the claims, and the claims submitted to the tribunal must be admissible".

[5] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004, para. 131 and ss., *Methanex Corporation v. USA*, UNCITRAL (NAFTA), Partial Award on Jurisdiction and Admissibility, 7 August 2002, *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 July 2003, para. 41, *Bayindir v. Pakistan*, ICSID Case No. ARB/02/29, Decision on Jurisdiciton, 14 November 2005, paras. 85-87, *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, para. 33, *Consorzio Groupement L.E.S.I. – Dipenta v. Republique Algerienne Democratique et Populaire*, ICSID Case No. ARB/03/8, Award, 10 January 2005, para. 40. For other references see Heiskanen (2013) (n. 4), 2, footnote 2.

[6] *Renée Rose Levy and Gremcitel S.A. v. Republic of Perù*, ICSID Case No. ARB/11/17, Award, 9 January 2015; *Pac Rym Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012.

[7] See Art. 79 of the ICJ Rules of Court, Art. 44 of the Articles on State Responsibility promulgated by the International Law Commission and Art. 35(3) of the ECHR.

[8] *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill s.r.l., and S.C. Multipack s.r.l. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, para. 63, *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, *Antoine Goetz & Others and S.A. Affinage des Métaux v. Republic of Burundi*, ICSID Case ARB/01/2, Award, 21 June 2012, *SGS Société Générale de Surveillance v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, *Pantechniki SA Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, paras. 50-68. See also *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Dissenting Opinion of Keith Highet, 26 September 2001, para. 58. Several other authorities are mentioned by Heiskanen (2015) (n. 4), 9, footnote 32.

The legal foundation of the distinction between jurisdiction and admissibility in investment arbitration may be twofold.

In ICSID arbitration such foundation has been found in Art. 41(2) of the ICSID Convention, stating that "[a]ny objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, *or for other reasons is not within the competence of the Tribunal*, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute" (emphasis added). According to Heiskanen the word *competence* used in Art. 41 has to be understood as a synonym of *admissibility*. Indeed, in Heiskanen's opinion, admissibility and competence are one and the same concept, only viewed from a different viewpoint: one from the perspective of the tribunal (competence), the other from the perspective of a claim (admissibility).

However, the distinction between jurisdiction and admissibility may be also explained, in general terms, by reference to the inherent powers of arbitral tribunals,[11] i.e. the powers which are not expressly provided in the international instruments regulating the tribunals' jurisdiction and are used to fill in the *lacunae* of such instruments.[12] The existence of inherent powers has found broad acceptance both in the case law[13] and in scholarship,[14] so that it has been said that "the general application by courts and tribunals of the notion of inherent powers may warrant the conclusion that a *general principle has gradually taken shape in international law*, whereby international judicial bodies may exercise those powers that prove necessary for guaranteeing the sound administration of justice and protecting their legal nature"

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[9] See, *inter alia*, Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol. 2, 439 (1986), Gouiffés, Ordonez, Arbitration International (2015), 107 and ss., Salles, *Forum Shopping in International Adjudication* (2014), 141 and ss., Shany (2015) (n. 2), 47 and ss., Newcombe, *Evolution in Investment Treaty Law and Arbitration* (2011), 187 and ss., Briggs, The American Journal of International Law (1985), 373 and ss., Waibel (2014) (n. 1), 2 and ss., Heiskanen (2013) (n. 4), 1 and ss. (the Author, at 3, footnote 11 indicates several other references), Walters, Journal of International Arbitration (2012), 651 and ss., Potestà, Sobat, Journal of International Dispute Settlement (2012), 137 and ss. Zeiler, International Investment Law for the 21st Century, 77 and ss., at 91 seems to recognize the distinction in general terms, but expresses doubts on its applicability in investment arbitration.

[10] Paulsson (2005) (n. 3), 603. See also De Brabandere, Journal of International Dispute Settlement (2012), 616.

[11] The foundation of the distinction between jurisdiction and admissibility has been found in the tribunals' inherent powers by Newcombe (2011) (n. 9), 194, and by Shany (2015) (n. 2), 50.

[12] For a detailed history of the development of this concept see Brown, British Yearbook of International Law (2006), 205 and ss.

[13] See, *inter alia*, PCIJ, *Mavrommatis Palestine Concessions (Greece v. UK)*, PCIJ Rep Series A No. 2 (1924) I, 16; ICJ, *Legality of the Use of Force (Serbia and Montenegro v. Belgium)* (Preliminary Objections) (2005), 44 ILM 299; ICJ, *Nuclear Tests (Australia v. France)* (1974) ICJ Rep 253, 259-260; ICJ, *Nuclear Tests (New Zealand v. France)* (1974) ICJ Rep 457, 463; ad hoc arbitration, *Rio Grande Irrigation and Land Company*, 6 RIAA 131, 135-6 (UK-US, 1923).

[14] See, inter alia, Palombino, La Comunità Internazionale (2004), 708 and ss., Brown (2006) (n. 12), 195 and ss., Mitchell, Heaton, Michigan Journal of International Law (2010), 561 and ss., Pierini, University of Catania – Online Working Legal Paper (2015), 1 and ss., Weiss, International Investment Law for the 21st Century (2009), 185 and ss., Orakhelashvili, Leiden Journal of International Law (2007), 36.

(emphasis in original).[15] Indeed, it seems that the necessity to ensure that judicial bodies properly exercise their function fully justifies the possibility that international courts and tribunals have powers that are not explicitly conferred to them, in order to grant the good administration of justice.[16]

This idea has found support also in international investment arbitration.[17] In this regard, it is worth noting that there is explicit legal foundation for the existence of inherent powers in ICSID arbitration (i.e. Article 44 of the ICSID Convention[18] and Article 19 of the ICSID Arbitration Rules).[19] The same can be said with regard to UNCITRAL Rules[20] and other institutional rules.[21] Several policy considerations (such

[15] Gaeta, *Man's Inhumanity to Man* (2003), 367. There is no such broad commonality of opinions with regard to the sources of such inherent powers. The following opinions have emerged: (i) inherent powers can be derived from general principles of rules of international law. See Inter-American Court of Human Rights, *Genie Lacayo (Request for Review of the Judgment of 29 January 1997)*, Order of 13 September 1997; (ii) inherent powers are to be considered as a category of implied powers. Such idea has been strongly criticized due to the fact that implied powers pertain to international organizations and not to international courts (see Gaeta, at 362); (iii) inherent powers are to be considered as functional to the exercise of the judicial function and are aimed at guaranteeing the proper administration of justice and the effectiveness of the courts' jurisdiction. The last opinion is the one that has gained the biggest support. See Palombino (2004) (n. 14), 714-715. The same definition of the word "inherent" (i.e., according to the Oxford English Dictionary), i.e. "something belonging to the intrinsic nature of that which is spoken of", seems to support this idea.

[16] The concept of "la bonne administration de la justice" has been deeply studied by Kolb, L'Observateur des Nations Unies (2009), 5 and ss. and Sakai, Japanese Yearbook of International Law (2012), 110 and ss. Kolb has demonstrated that international courts and tribunals have not only a private function (i.e. to do justice between the parties), but also a public function (i.e. to grant that justice is administrated in the proper way). This public function is the main foundation of inherent powers and can be also found in international investment tribunals, which involve States and therefore involve also the public interest. See also Kolb, *The Statute of the International Court of Justice* (2012), 806 and ss.

[17] See, *inter alia*, *International Company for Railway Systems (ICRS) v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/09/13, Procedural Order No. 2, 9 July 2010, *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V., ConocoPhillips Gulf of Paria B.V., v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Respondent's Request for Reconsideration, 10 March 2014. See also McDougall, Markbaoui, The Journal of World Investment and Trade (2014), 1062 and ss. Several other authorities are mentioned in Paparinskis ssrn.com (2012), 18 and ss., Topcan, ICSID Review FILJ (2014), 633 and ss. The existence of inherent powers is also confirmed by the fact that the International Law Association has dedicated to the study of such powers a biennial conference. See ILA, *Report for the Biennial Conference in Washington D.C. in April 2014* (2014), 1 and ss. Paparinskis, 8 and ss. has explained the various legal reasons at the basis of the existence of inherent powers in investment arbitration.

[18] "Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. *If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question*" (emphasis added).

[19] "The Tribunal shall make the orders required for the conduct of the proceeding".

[20] Art. 17(1) states that "Subject to these Rules, *the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate*, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute" (emphasis added).

as the necessity to ensure the integrity of process, the promotion of fair and efficient dispute resolution, the interest of justice and the interest of the parties) also militate in this sense. It seems therefore possible to say that international arbitration tribunals have the power to manage their proceedings as they deem appropriate (provided that they respect the rules and regulations under which they have been constituted) and, in particular, have the power to distinguish between jurisdiction and admissibility phases.[22]

At the admissibility stage arbitrators usually consider preliminary objections, i.e. the questions related (also) to the merit that refer "to prerequisites to the existence and development of adjudicatory process".[23] Such questions have a material character (i.e. they have to be logically assessed before the merits, e.g. a time bar) and material effects (i.e. they can potentially prevent or postpone a decision on the merits, e.g. a claim whose discussion violates a general principle of international law). From the decision of preliminary questions related to the merit it could, therefore, derive that a tribunal decides that the discussion of some issues (or of the entire claim)

[21] See, inter alia, Art. 22(2) of the ICC Rules, stating that "In order to ensure effective case management, *the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate*, provided that they are not contrary to any agreement of the parties" (emphasis added) and Art. 14(5) of the LCIA Rules, stating that "The Arbitral Tribunal shall have *the widest discretion to discharge these general duties*, subject to such mandatory law(s) or rules of law as the Arbitral Tribunal may decide to be applicable; and at all times the parties shall do everything necessary in good faith for the fair, efficient and expeditious conduct of the arbitration, including the Arbitral Tribunal's discharge of its general duties" (emphasis added).

[22] According to Salles (2014) (n. 9), 160 and ss., there are three possible approaches to the distinction between jurisdiction and admissibility. The first approach does not distinguish at all between the two concepts and treats both of them as acceptability of the claim (so-called "indifference approach"). The second approach considers jurisdiction as a tribunal-centered approach and admissibility as a claim-centered approach ("objectivist approach"). Finally, the third approach says that all evaluations centered on consent pertain to jurisdiction, while the remaining reasons to decline a claim regard admissibility ("conventionalist-residualist approach"). In the opinion of the present author both the second and the third approaches are acceptable and may find support in the case law and in scholars' opinions. It is difficult here to say if admissibility pertains to the merit phase of proceedings or whether it constitutes a separate and autonomous stage of international process. In the opinion of the present author, also in light of the circumstance that, as stated by Salles, at 176, "admissibility questions may arise under general principles of law that regulate resort to international adjudication" and are therefore governed by the law applicable at the merit stage of investment arbitration proceedings (i.e., as we will see in paragraph 3.2 below, public international law), admissibility seems to be a question of merit.

[23] Salles (2014) (n. 9), 110. On the contrary, "preliminary objections are actions by a party, notably the respondent, that raise these prerequisites for the existence and development of adjudicatory process". The same Author, at 155, explains that "the category of admissibility – a complement to the category of jurisdiction – is the usual channel for preliminary objections based on the broader set of norms governing the procedural rights and obligations of the parties".

is precluded.[24] Such a judicial limitation of the scope of the decision has been defined "absorption".[25]

The above fosters the idea that the distinction between jurisdiction and admissibility finds support also in the canon of judicial economy.[26] Indeed, the existence of a phase of the proceedings in which arbitrators deal with preliminary issues of merit that can potentially absorb the whole discussion on the merit, leading to a declaration of inadmissibility of the whole dispute, seems to be a good way to save time and costs.[27]

The admissibility stage has been recognized as the policy tool that can be used in order to avoid forum shopping and parallel proceedings "while the jurisdiction of each international tribunal and the architecture of the international judiciary are left untouched".[28] Indeed, in this phase, *by exercising their inherent powers and dismissing claims whose continuation runs against the good administration of justice, arbitrators may protect their judicial function and the legitimacy of investment arbitration as a whole*. As noted by Shany, "since international courts derive much of their authority from notions of the rule of law and from their perceived role as guardians of the international rule of law, allowing parties to adjudication to utilize them in ways that violate substantive procedural international law could undermine their own legitimacy".[29] This means that, whenever arbitrators realize, at the admissibility

[24] The issue of preliminary questions has been deeply studied by Lamberti Zanardi, Rivista di diritto internazionale (1965), 537 and ss., Morelli, Rivista di diritto internazionale (1971) 5 and ss., Sperduti, Rivista di diritto internazionale (1974), 649 and ss., Morelli, Rivista di diritto internazionale (1975), 5 and ss.

[25] This expression is due to Lauterpacht, *The Development of International Law by the International Court* (1958), 77. As explained by Palombino, Leiden Journal of International Law (2010), 913, it is possible to distinguish between absorption *stricto sensu* and *lato sensu*. The first "postulates a certain order between the issues to be decided – that is the presence of an issue which, as a matter of logic, should be analysed before the others; if the decision as to the former issue is able to settle the dispute by itself (absorbing issue), it either precludes or implies a solution to the latter (absorbed issue). The second type of absorption, instead, takes place where the judge does not wish to enter into a particular question raised in the proceeding and to this end decides the issue which is logically anterior to the others but in any case enables the dispute to be settled and the resolution of that question to be precluded or implied". In the present book, we will deal only with absorption *stricto sensu*.

[26] The concept has been fully analysed by Palombino (2010) (n. 25), 910 and ss.

[27] It is still doubtful whether issues pertaining to the admissibility phase can be raised *ex officio* by arbitrators or shall be necessarily introduced in the proceedings by the parties. Gouiffés, Ordonez (2015) (n. 9), 121-122, seems to support the second idea. However, Article 19(1) of the Rome Statute of the International Criminal Court seems to support a different opinion. Such rule states that "The Court shall satisfy itself that it has jurisdiction in any case brought before it. *The Court may, on its own motion, determine the admissibility of a case in accordance with article 17*" (emphasis added). Following (by analogy) this idea, that seems more compliant with the aim of the present book and which is supported by the finding that admissibility is a policy tool aimed at safeguarding the legitimacy of international investment arbitration tribunals (in particular against forum shopping techniques), we could state that arbitrators could raise concerns related to abuse of process, *res judicata* and collateral estoppel by themselves. This approach is the preferable one according to the opinion of the present author.

[28] Salles (2014) (n. 9), 158. The Author further says that "focusing on admissibility puts all tribunals on an equal footing, but it also underscores the need for a case by case assessment of the conditions underlying adjudication". This is precisely the aim of the present book. Similarly, see Douglas (2009) (n. 4), 141.

[29] Shany (2015) (n. 2), 154.

stage, that the continuation of (duplicative) proceedings runs against the proper administration of justice and risks to undermine the judicial function that they administrate, both because such continuation runs against the canon of judicial economy and because it runs against general principles of international law, they have to exercise their inherent powers in order to preclude these proceedings to go on.

The next paragraphs will be aimed at individuating the legal tools to which arbitrators may refer at the admissibility stage in order to prevent parallel proceedings and preclude their continuation. It is here submitted that such tools may be individuated in certain principles of international law, such as good faith and *ne bis in idem*. However, prior to move to examine the various principles that might limit parallel proceedings, it is necessary to explain why and how general principles of international law are applicable in investment arbitration.

3.2 *The applicability of general principles of international law in investment arbitration*

The applicability of general principles of international law in investment arbitration, that today is quite unanimously accepted, has been the object of severe debates. Hence, in this paragraph, we will briefly examine the issue of the law applicable in international investment arbitration.[30]

In the determination of applicable law, the first task of a tribunal is to ascertain whether the parties have expressed any choice in this regard;[31] indeed, party autonomy is always the first source of regulation in arbitration. This is confirmed by several arbitration rules, such as art. 42(1) of the ICSID Convention, which, at its first sentence, says that "[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties". Similarly, Art. 35 of UNCITRAL Arbitration Rules states: "[t]he arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute".[32]

In modern investment disputes, sometimes (but not very often)[33] the choice of the applicable law is made by the parties. Such choice is usually made by reference to the applicable BIT or in the investment contract existing between the State and the investor.

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[30] The subject has been extensively dealt with by Begic, *Applicable Law in International Investment Disputes* (2005), 1 and ss., and Kjos, *Applicable Law in Investor State Arbitration* (2013), 1 and ss. See also Belohlavek, Cerny, International Journal of Law and Management (2012), 443 and ss.

[31] Kahn, Indiana Law Journal (1968), 6 and ss., Feuerle, Yale Studies on World Public Order (1977), 103 and ss., Shihata, Parra, ICCA Congress Series No. 7 (1996), 294 and ss., Gaillard, Banifatemi, ICSID Review FILJ (2003), 375 and ss., Schreuer, www.univie.ac.at (2007), 9 and ss., Tawil, UNCTAD Course on Dispute Settlement in International Trade, Investment and Intellectual Property, 11 and ss., Crespi Reghizzi, Rivista di diritto internazionale privato e processuale (2009), 28 and ss., Giardina, Rivista di diritto internazionale privato e processuale (1982), 679 and ss., Beniassadi, International Tax and Business Lawyer (1992), 61 and ss.

[32] In the same vein, Art. 21 of the ICC Rules of Arbitration says that "The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute".

[33] Gaillard, Banifatemi (2003) (n. 31), 379.

When BITs make reference to the applicable law, they usually mainly refer to the same BIT, public international law and, sometimes, also to the law of the host State.[34] Very few BIT do not refer to international law,[35] while the present author has not been able to find a BIT referring only to the law of the host State.

The situation can be different in investment contracts: in these sources usually the reference goes mainly to the law of the host State, even if it is not rare to find investment agreements referring also to international law.[36]

With regard to the cases in which the parties have made a choice of applicable law different from international law, the issue is whether arbitrators have the power to integrate such parties' choice and apply also principles and/or rules of international law that they consider essential for the case at hand. In this regard, it should be noted, first of all, that "international law is frequently incorporated into domestic law through a variety of techniques. To the extent that it thereby becomes applicable internally, it may be seen as part of a system of domestic law chosen by the parties and may be relied upon before an ICSID tribunal".[37] However, even if one should find that international law is not (directly or indirectly) applicable, it is worth noting that the modern trend is to consider that investment arbitrators have the freedom to apply the principles of international law that they consider essential for the good resolution of the case.[38] This idea is clearly put forward by Tawil, who stated that "there are good

[34] An example of BIT referring to all these systems of law is Art. 10 of the 1992 Argentina/Netherlands BIT, stating that "The Arbitration Tribunal addressed in accordance with paragraph (5) of this Article shall decide on the basis of the law of the Contracting Party which is a party to the dispute (including its rules on the conflict of law), the provisions of the present Agreement, special Agreements concluded in relation to the investment concerned as well as such rules of international law as may be applicable".

[35] See the exhaustive list made by Gaillard, Banifatemi (2003) (n. 31), 377-378. See also Gaillard, *Annulment of ICSID Awards, IAI Series on International Arbitration N°1* (2004), 226-227. This Author mentions the Australia-Egypt BIT ans the Belgium & Luxembourg-Mongolia BIT, which do not mention international law but only refer to the same BITs, to the law of the host States and to other agreements between the parties.

[36] See Crespi Reghizzi (2009) (n. 31), 28. Some ICSID cases report choices by the parties of national law and international law. See *AGIP v. République Démocratique du Congo*, Award, 30 November 1979, 67 Int. Law Rep. 318 (1984) and *Kaiser Bauxite Company v. Jamaica*, Award, 6 July 1975, 114 Int. Law Rep 144 (1999).

[37] Tawil (2003) (n. 31), 9.

[38] See Beniassadi, International Tax and Business Lawyer (1992) 62 and ss., Bjorklund, *Mandatory Rules in International Arbitration* (2011), 270, Donovan, *Mandatory Rules in International Arbitration* (2011), 282 and ss. The reference goes to the essential principles of international commerce, which are considered by part of the scholars as constituting the transnational or "truly international" public policy. Such a concept shall not be confused with the concept of *jus cogens* (on which see Orakhelashvili, Peremptory Norms in International Law (2008), 7 and ss.). For a broader understanding of the concept of transnational public policy see Lalive, ICCA Congress Series No. 3 (1986), 257 and ss., Dolinger, Texas International Law Journal (1982), 167 and ss. See also Mann, British Yearbook of International Law (1957), 20 and ss., Gal, Cornell International Law Journal (1972), 55 and ss. The concept of transnational public policy has been recently applied by two investment arbitration awards, i.e. *World Duty Free Company Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006, *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006. The idea that "investment law must be interpreted consistently with international law" is put forward also by van Aaken, Finnish Yearbook of International Law (2006), 91 and ss. The applicability of these rules is supported also by the principle *iura novit curia*, according to which the judge is not bound by the legal allegations of the parties; such principle has been considered a general principle of international law

reasons for the proposition that there is at least some place for international law even in the presence of an agreement on choice of law which does not mention it".[39] In the opinion of this author arbitrators have "a reluctance to abandon international law in favour of the host State's domestic law. The complete exclusion of international law as a consequence of an agreed choice of law containing only a domestic legal system would lead to undesirable consequences. It would mean that an ICSID tribunal would have to uphold discriminatory and arbitrary actions by the host State, breaches of its undertakings which are evidently in bad faith or amount to a denial of justice as long as they conform to the applicable domestic law. It would mean that a foreign investor, by assenting to a choice of law, could sign away the minimum standards for the protection of aliens and their property developed in customary international law. Such a solution would be contrary to the goal of the Convention to stimulate investment through the creation of a favourable investment climate".[40]

Such an approach seems confirmed by Article 4 of the 2013 Resolution of the *Institut de Droit International* on *Legal Aspects of Recourse to Arbitration by an Investor Against the Authorities of the Host State under Inter-State Treaties*, stating that "Arbitral tribunals, when referring to notions defined in municipal law (...) shall at the same time respect the relevant rules of international law".

Having ascertained that international law is applicable even when the parties have made an autonomous choice of law, we have now to turn on the issue of the applicability of international law when the parties have not made an express choice of applicable law. Such a circumstance is not unusual in investment cases.[41] In order to assess the issue a distinction between cases brought under the auspices of ICSID and other investment cases is required.

With regard to ICSID cases, the issue of applicable law in absence of a choice is regulated by Art. 42(1), second sentence, of the Washington Convention, stating that

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since Sereni, *Principi generali di diritto e processo internazionale* (1955), 79; in this regard see also Kolb (2012) (n. 16), 820 and ss. With regard to the applicability of the principle in arbitration, see Carlevaris, Rivista dell'arbitrato (2007), 505 and ss., Spagnolo, *Towards Uniformity: the 2nd Annual MAA Schlechtriem CISG Conference* (2011), 181 and ss., Kaufmann-Kohler, Arbitration International (2005), 631 and ss., Kurkela, ASA Bulletin (2003), 486 and ss., Lew, ssrn.com (2010), 1 and ss. For a broad analysis of the concept of mandatory rules in arbitration see Mistelis, *Mandatory Rules in International Arbitration* (2011), 292, Zhilsov, Netherlands International Law Review (1995), 81 and ss.

[39] Tawil, (2003) (n. 31), 9.

[40] Tawil (2003) (n. 31), 10In accordance with this idea, see the illuminating opera by Feuerle, (1977) (n. 31), 105 and ss., stating, at 107, that arbitrators have "generally interpreted the parties' choice of law clauses liberally so as to enable the tribunal to invoke rules not expressly designates, such as international law, general law principles, or the law of third states, even where the parties had made determinations which seemed to be comprehensive". This idea seems compliant with what stated by McNair, British Yearbook of International Law (1957), who said that contracts concluded by States and foreign investors, even if not governed by public international law, "can more effectively be regulated by general principles of law than the special rules of any single territorial system". Sacerdoti, *I contratti tra stati e stranieri nel diritto internazionale* (1972), 262, has further stated, in this regard, that general principles of international law can be considered *ipso facto* applicable to these contracts. This idea does not seem completely followed by Crespi Reghizzi (2009) (n. 31), 28 and ss., and by Giardina (1982) (n. 31), 679 and ss.

[41] Gaillard, Banifatemi (2003) (n. 31), 379.

"[i]n the absence of such agreement [i.e. the agreement on the applicable law], the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) *and* such rules of international law as may be applicable" (emphasis added).[42] Art. 42 is not clear in expressing the relationship between the law of the host State and international law. Various theories have been put forward in this regard.

A first (and old) theory stated that, in absence of a choice by the parties, disputes should have been mainly regulated by the national law of the host State. The reason for this was that the reference to international law "seems to be precluded from the subsidiary references [to such law] established by the Convention in the absence of a choice of law by the parties".[43] This theory seems completely outdated. Indeed, as it has been explained, it was based on the (today unfounded) assumption that international law regulating foreign investment was very undeveloped and was unable to regulate the very complex relationships between States and foreign investors.[44]

A second theory, close to the first one, has been developed by Prof. Reisman. He states that investment disputes should be governed by national law, unless such law is against international *jus cogens*.[45] The justification for Reisman's theory is that the national law of the host State *must* have an effective role. Anyway, as stated by Gaillard and Banifatemi,[46] this idea seems to go against the reading of art. 42 of the ICSID Convention, which does not make any reference to *jus cogens* and, on the contrary, seems to put national law and international law on the same level.[47]

A third theory, developed on the basis of the decisions of the *Klockner*[48] and *Amco*[49] *ad hoc* committees, and supported by several scholars,[50] put forward the idea that international law shall have only a supplemental and corrective function vis-à-vis domestic law. International law should only intervene in case of *lacunae* in the applicable national law system or in case such system runs against international law obligations.

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[42] According to par. 41 of the Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Disputes between States and National of other States, available at icsid.worldbank.org, such reference to international law shall be intended as a reference to the sources indicated in Article 38(1) of the ICJ Statute.

[43] Kahn (1968) (n. 31), 31.

[44] Kahn (1968) (n. 31), 31, said that "while the international law in this area is still very uncertain and of limited scope, its importance will grow with the corresponding development of the law of investment".

[45] Reisman, ICSID Review FILJ (2000), 380.

[46] (2003) (n. 31), 400 and ss.

[47] The idea that national and international law were on the same level within the framework of Art. 42 was already put forward in 1982 by Giardina (1982) (n. 31), 693.

[48] *Klockner v. Cameroon*, ICSID Case No. ARB/81/2, *Ad Hoc* Committee Decision, 3 May 1985.

[49] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on the Application for Annulment, 16 May 1986. The approach was followed also in *CDSE v. Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000.

[50] See Crespi Reghizzi (2009) (n. 31), 32 and ss., Giardina, The Law and Practice of International Courts and Tribunals (2006), 29 and ss., Schreuer (2007), 12.

The last mentioned approach has been criticized by Gaillard and Banifatemi,[51] who – on the basis of the decision of the *ad hoc* Committee in *Wena*[52] – have explained that international law is directly applicable in investment disputes in light of the interpretation of Art. 42 imposed by Art. 31 and followings of the 1969 Vienna Convention on the Law of Treaties. According Gaillard and Banifatemi, the word "and" contained in the second sentence of Art. 42 means only "and". As a consequence, arbitrators, in case of lack of a choice by the parties, shall apply the national law of the host State *and* the applicable rules of international law. The two systems are on an equal footing. "[I]nternational law constitutes a legal order fully operating [in investment arbitration] in both its public policy function and as a body of substantive rules".[53]

This theory, which has found support in the work of many other scholars,[54] seems the most correct and appropriate for a form of arbitration which has a strong public international law component[55] and that, usually, finds its foundation in international law treaties.

Having ascertained that international law is applicable in ICSID cases where the parties did not make any choice of law, we have now to turn to non-ICSID cases. A reference to some institutional rules can here be of certain support for the research. The second sentence of Art. 35 of the UNCITRAL Rules says that "[f]ailing such designation [of applicable law] by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate". Similarly, the second sentence of Art. 21(1) of the ICC Rules stipulates that "[i]n the absence of any such agreement [on the applicable law], the arbitral tribunal shall apply the rules of law which it determines to be appropriate". It therefore seems that arbitrators are called to assume a proactive role in the determination of applicable law.[56] In this regard, it is obvious that – given the duty of arbitrators to issue an enforceable award – they will keep into consideration and apply all the rules related to the field of law in which the legal relationship at hand finds its foundation (i.e., in investment cases, mainly international law).[57] Given the above, it seems quite certain that arbitrators will apply international law also in non-ICSID investment cases where the parties have failed to make a choice of law.[58]

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[51] (2003) (n. 31), 403 and ss.

[52] *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Application for Annulment, 5 Feb 2002, paras. 38-40.

[53] Gaillard (2004) (n. 35), 234.

[54] See, *inter alia*, Fenyvesi, Adam Antal PhD tanulmanyok (2005), 57 and ss. The idea that "national and international law should not be understood as mutually exclusive sets of rules" was already set forth by Feuerle in 1977. See Feuerle (1977) (n. 31), 115.

[55] See Douglas, Brithish Yearbook of International Law (2003), 151 and ss.

[56] In non-ICSID cases, the determination of applicable law seems to be closer to the one made by arbitrators in international commercial arbitration. See Lew, *Applicable Law in International Commercial Arbitration* (1978), 1 and ss.

[57] *Ibid*.

[58] This is also confirmed by the vast reference that investment tribunals use to make to ICJ case law. See Pellet, ICSID Review FILJ (2013), 223 and ss. In this regard, see also Douglas (2009) (n. 4), 40,

As a conclusion, we can affirm that international law is always applicable in international investment disputes.[59] This means that the assessment that arbitrators will have to make in order to decide whether a certain claim is admissible shall be based, *inter alia*, on public international law and, in particular, for what is relevant in the present book, on general principles of international law, i.e. general principles developed and applied in international law. Such principles are legal sources, usually with a very broad meaning, which – by themselves or by means of a more specific principle or rule gathered by them – express the key goals and values of international law. For this reason, they have always to be respected.[60] Indeed, it is today "undisputed that general principles have acquired a role in the shaping of rules in the area of foreign investment protection and play a prominent role in arbitrations between States and foreign nationals".[61] As a consequence, if the continuation of

according to whom "[a]n investment treaty tribunal has the inherent authority to characterise the issues in dispute and determine the laws applicable thereto".

[59] Such a conclusion is shared by Bjorklund (2011) (n. 38), 268. See also Donovan, (2011) (n. 38), 276.

[60] Palombino, *Il trattamento giusto ed equo degli investimenti stranieri* (2012), 47 and 55 and ss. General principles of international law are usually found out by international judges on the basis of an *inductive-deductive process*. *Firstly* judges draw a principle from already existing norms (inductive step) and, *secondly*, they express a specific rule for the concrete case from the general principles they have drawn before (deductive step).

[61] Gazzini, Journal of World Investment and Trade (2009), 103. In this regard, it is worth noting that – in the present book – the reference to "general principles of international law" shall not be understood as a reference to the general principles that are common to national law systems and that are mentioned in Art. 38(1)(c) of the ICJ Statute. The distinction (if any) between general principles and general principles of international law (both sources of general international law) has been one of the most debated questions in international law and is still an open issue. See, in this regard, Gaja, *Max Planck Encyclopedia of Public Internationa Law*, (2008), par. 8 and 21 and ss. In particular, Gaja, at par. 8, has clarified that "the application of [a] principle in international law does not necessarily depend on the fact that the principle is common to a number of municipal systems". This means, according to Prof. Gaja, that there could exist general principles of international law that are not born in the practice of municipal law but are a *sub-specie* of customary international law. The same idea is expressed by Gazzini (2009), 104, where he says "general principles of law coexist both in the domestic legal systems of the generality of the States *and* in international law" (emphasis in original). Strozzi, La comunità internazionale (1992), 164 has finally stated that "international judges apply always international principles, even if *strengthened* by a correspondence with analogous principles of municipal law. Hence, general principles common to municipal systems correspond to already existing principles of international law (…) otherwise they cannot be considered as part of positive international law" (emphasis in original). The issue of the nature of general principles of international law has been the object of several studies. On this matter see also Carpanelli, *General Principles of Law – The Role of the Judiciary* (2015), 125 and ss. A very exhaustive work has been written by Magnani, *Nuove prospettive sui principi generali nel sistema delle fonti nel diritto internazionale* (1997), 71 and ss., while Sereni (1955) (n. 38), 1 and ss., has deeply studied the general principles regarding international processes. See also Gaillard, World Arbitration & Mediation Review (2011), 161 and ss., Nolan, Sourgens, World Arbitration & Mediation Review (2009), 505 and ss., Lammers, *Essays on the Development of the International Legal Order in memory of Haro F. van Panhuys* (1980), 53 and ss., Ellis, European Journal of International Law (2011), 949 and ss., Di Benedetto, *International Investment Law and the Environment* (2013), 73, Balladore Pallieri, *I "principi generali del diritto riconosciuti dale nazioni civili nell'art. 38 dello statuto della Corte permanente di Giustizia internazionale* (1931), 1 and ss., Freeman Jalet, UCLA Law Review (1963), 1041 and ss. However, also in light of the fact that both these sources are to be considered as part of general international law (and therefore are both applicable in investment arbitration), in the present book a more pragmatic approach will be followed and the reference will only go, in general terms, to

duplicative proceedings runs against general principles of international law, arbitrators should exercise their inherent powers aimed at safeguarding the proper exercise of their judicial function and preclude such duplicative proceedings to go on.

We will now turn on the examination of general principles of public international law that may be helpful in avoiding parallel proceedings and ensure a good administration of justice by investment tribunals.

3.3 *An inadequate solution for the problem of parallel proceedings: the "first in time" rule*

The first in time rule, or *lis pendens*, is one of the main doctrines which civil law countries (and the EU) use in order to avoid parallel proceedings. According to this doctrine "when two courts have been seized of the same dispute [and none of them has still decided such a dispute], the court seized second should decline jurisdiction and let the court seized first decide the dispute".[62] The application of *lis pendens* relies only on the time factor. The judge seized first shall go on with the proceedings, the second shall stay. The only conditions to apply *lis pendens*, are that the parties, the object of their claims (*petitum*) and the legal basis of such claims (*causa petendi*) coincide in the two proceedings (so-called triple identity test).[63]

According to Reinisch "it can hardly be disputed that *lis pendens* is (...) a rule of international law applicable in international proceedings. The widespread use and similarity of the concept of *lis pendens* in the national procedural laws of States of *all* legal traditions as well as its inclusion in a number of bi- and multilateral agreements is evidence that *lis pendens can be regarded as a general principle of law in the sense of Article 38 of the ICJ Statute*. Further, the existence or application of such a rule was generally acknowledged in the few cases where *lis pendens* claims were made before international courts or tribunals" (emphasis added).[64] This would mean that if two international arbitral tribunals are seized of the same dispute (i.e. the triple identity test is met), the tribunal seized second should decline to exercise its jurisdiction.

However, this statement is not convincing for two main reasons. First of all, no international tribunal has ever applied *lis pendens*; secondly, several national legal systems (i.e. all the systems pertaining to the common law) do not apply *lis pendens* at all. It is therefore questionable that *lis pendens* is a general principle of international

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general principles of international law. This approach also corresponds to the general pragmatic attitude of investment tribunals.

[62] Cuniberti, ICSID Review FILJ (2006), 382.

[63] The triple identity test is usually applied very strictly in national court proceedings. However, the Court of Justice of the European Union has developed a less strict approach to such test, and in particular to the requirements of *petitum* and *causa petendi*, in order to avoid that the same judgement is started in two EU member States, in one as a claim for damages and in the second as a request for negative declaration of lack of liability. See McLachlan, *Lis pendens in International Litigation* (2009), 117 and ss. As it will be shown in paragraphs 3.6 and 3.7 the present author strongly believes that a strict application of the triple identity test would lead to manifest injustice and would foster abuses.

[64] Reinisch, The Law and Practice of International Courts and Tribunals (2004), 50. This opinion is shared by Hober, *Res Judicata and Lis Pendens in International Arbitration* (2013), 330.

law and, moreover, it is arguable that *lis pendens* is not even a principle of law, but a mere rule. These lines of reasoning will be developed in the present paragraph.

With regard to the development of *lis pendens* in international law, it is worth noting that the relevant case law is "too scarce and non-determinative"[65] to confirm the existence of such a principle. In all the cases where *lis pendens* has been invoked, international tribunals have avoided to apply it. In *Certain German Interests in Polish Upper Silesia*,[66] the PCIJ refused to consider whether *lis pendens* is a general principle of international law due to the circumstance that the triple identity test was not met. In *Factory at Chorzow*[67] the same PCIJ "made reference albeit indirectly, to the principle of estoppel, rather than the *lis pendens* doctrine".[68] Similarly, in his separate opinion in the *MOX Plant* case, Judge Treves stated that the legal status of *lis pendens* is a "completely open" issue.[69] Finally, and most importantly, in the *SPP* case[70], the tribunal did not find itself bound by *lis pendens* and stated that "when the jurisdictions of two unrelated and independent tribunals extend to the same dispute, there is no rule of international law which prevents either tribunal *from exercising jurisdiction*" (emphasis added). All these decisions, albeit mentioning *lis pendens*, show a clear reluctance to apply the first in time rule to parallel proceedings in international law. Several investment arbitral tribunals have also dealt with the issue and none of them has applied the rule.[71]

Moving to the acceptance of *lis pendens* in national law systems, while it is true that *lis pendens* has found broad acceptance in almost all civil law systems (including EU law,[72] due to the circumstance that EU countries are for the majority civil law systems), it is worth noting that this rule has never found application in common law systems.[73] This is due to the fact that, historically, common law systems – which were

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[65] Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003), 244. Notwithstanding the above, Shany has also stated that *lis pendens* could be qualified as a general principle if one takes into account the single systems of justice. The present author does not share this opinion; an answer can be given using the words of Gaja, (2008) (n. 61), par. 7: "general principles that exist in municipal systems of law do not necessarily form part of international law. The main reason lies in the difference in structure between international society and municipal societies". Moreover, as will be shown below, *lis pendens* is not accepted in a relevant number of municipal systems.

[66] *Germany v. Poland*, Judgment (1925) PCIJ (ser. A) No.6, 20.

[67] *Germany v. Poland*, Jurisdiction (1927) PCIJ (ser. A) No. 9.

[68] Nguyen, Bond Law Review (2013), 157.

[69] International Tribunal for the Law of the Sea, Ireland v. United Kingdom, Case No. 10, Request for Provisional Measures, 3 December 2001.

[70] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1990.

[71] See *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award, 8 August 1980, *Compania de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 21 November 2000, *Alex Genin and others v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003. For other references see Cuniberti (2006) (n. 62), 381, footnote 1.

[72] See 1968 Brussels Convention and EU Regulations 44/2001 and 1215/2012.

[73] The issue is deeply analysed in Shany, ssrn.com (2006), 45 and ss., Cuniberti (2006) (n. 62), 402 and ss., McLachlan (2009) (n. 63), 48 and ss. and 143 and ss., Nguyen (2013) (n. 68), 158-159, Yannaca-Small, *The Oxford Handbook of International Investment Law* (2008), 1021 and ss., Das, www.academia.edu, 1

based on the coexistence of common law and equity courts – have not seen parallel proceedings as a necessary evil.[74] What common lawyers are looking for is the resolution of a case in the *most appropriate* forum and not in the forum first seized. If the judge second seized believes that he is the most appropriate judge to hear the case, he will go on with the proceedings.[75] In the words of Lord Goff "there is, so to speak, a jungle of separate, broadly based, jurisdictions all over the world (…) The basic principle is that each jurisdiction is independent. *There is therefore, as I have said, no embargo on concurrent proceedings in the same matter in more than one jurisdiction*" (emphasis added).[76] Similarly, in the US, Wilkey J stated that "*parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously*, at least until a judgment is reached in one which be plead as *res judicata* in the other" (emphasis added).[77]

For the above reasons, common lawyers have started to make recourse to the Scottish doctrine of *forum non conveniens* and to anti-suit injunctions, two discretionary tools that we have already examined in Chapter 2 above. It is only worth repeating here that *forum non conveniens* and anti-suit injunctions are not related to considerations of time, but only on a discretionary evaluation of the appropriateness of the court to hear a certain case.

In light of the above, it is evident that it is not possible to rely on *lis pendens* as a general principle of international law. Not all States rely on this doctrine and the international case law, as shown above, goes against this idea.[78]

In fact it is even arguable that *lis pendens* is not a principle of law. Indeed, if we consider Dworkin's distinction between principles and rules,[79] we find out that a principle expresses a tendency of a system of law towards certain values and certain objectives to be reached (we could describe it as a "transformator of extra positive

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and ss., Soderlund, Journal of International Arbitration (2005), 301 and ss., Bregensjo, *Lis Alibi Pendens in International Arbitration* (2013), 39 and ss., Orrego Vicuna, *Parallel States and Arbitral Procedures in International Arbitration* (2005), 207 and ss. The matter has been also the subject of the International Law Association Toronto Conference, from which originated the *Final Report on Lis Pendens and Arbitration*, further analysed by Ma, Contemporary Asia Arbitration Journal (2009), 56 and ss. The concept of *lis pendens* in international litigation with an EU perspective has been analysed by Consolo, Rivista di diritto internazionale (1997), 5 and ss., Salerno, Rivista di diritto internazionale (1999), 363 and ss.

[74] For an historical analysis of *lis pendens* see McLachlan (2009) (n. 63), 48 and ss.

[75] Baumgartner, Zeitschrift für Zivilprozeß International (1998), 218, stated that "civil lawyers should not forget that, in the common law world, the search for the just and fair resolution of every single case has a long tradition in equity procedure, which developed in response to the rigid procedure in the common law courts, and which, often manned by clergy, operated on reason and morality rather than on legal technicalities".

[76] House of Lords, *Airbus Industrie GIE v. Patel*, [1999] 1 AC 119 (HL), 132-133.

[77] *Laker Airways Ltd v. Sabena Belgian World Airlines*, 731 F.2d 909 (DC Cir. 1984).

[78] See Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration* (2013), 194-196, Yannaca-Small (2008) (n. 73), 1015, Shany, *Regulating Jurisdictional Relations between National and International Courts* (2007), 158, Yang, Tsinghua China Law Review (2011), 352.

[79] Dworkin, *Taking Rights Seriously* (1978), 14-15. The subject has been deeply analized by Viola, Zaccaria, *Diritto e interpretazione* (2009), 366 and ss. See also Iovane, Ars Interpretandi (2008), 124 and Strozzi (1992) (n. 61), 168.

(moral, social or other) needs into the legal system),[80] while a rule is something more concrete, i.e. a precise order to do something, not to do something, or to do something in a certain way. It is the opinion of the present author that *lis pendens* is a precise rule applied in certain systems of law, which imposes to judges to decline jurisdiction whenever another judge has previously been seized of the same dispute. *Lis pendens* is an answer to the needs of efficiency and to the canon of judicial economy that has been given in certain legal systems.[81] Referring to *lis pendens* as a general principle of international law is therefore erroneous. As a consequence, considering that – as stated by Bin Cheng – Article 38(1)(c) of the ICJ regards "principles, not rules",[82] *lis pendens* cannot anyway be regarded as encompassed in Art. 38(1)(c).

In conclusion, *lis pendens* cannot be adopted as a solution to the problem of parallel proceedings in investment arbitration.

3.4 *Sources of general international law providing for solutions to the problem of parallel proceedings: the principles of good faith and ne bis in idem and their concrete applications*

Good faith and *ne bis in idem* are broadly referred as general principles of international law.[83] Indeed, with regard to proceedings before international courts and tribunals, such principles – in their procedural dimension – can be considered as the source of other general principles and/or rules that are essential to the correct regulation of such proceedings. Indeed, as general principles, they have been considered to play "a middle role between the *lex lata* and the *lex ferenda*, being wholly neither one, nor the other. They have that just degree of abstraction and concreteness, to be able to be dynamic and filled with some specific legal meaning at once. (…) Their specific role in the formative stage of new rules (at the legislative

[80] Kolb, Netherlands International Law Review (2006), 7. The word "principle" comes from the Latin "*primium capere*" and means something which generates something else. Indeed, principles are used by judges in order to decide the most difficult cases in order to find out rules to be applied in cases of *lacunae* of law and in order to avoid a *non liquet*.

[81] Wehland (2013) (n. 78), 132, has put in direct relationship *lis pendens* and judicial economy, stating that such canon is the real rationale behind the first in time rule.

[82] Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), 24.

[83] See *Certain Norwegian Loans (France v. Norway) (Jurisdiction)* [1957] ICJ Rep 9, at 53; *Nuclear Tests (Australia v France) (Merits)* [1974] ICJ Rep 253, at 268; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (Jurisdiction and Admissibility)* [1984] ICJ Rep 392, at 419; *Border and Transborder Armed Actions (Nicaragua v. Honduras) (Jurisdiction and Admissibility)* [1988], ICJ Rep. 68, at 105-106; *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 107. See also O'Connor, Good Faith in International Law (1991), 5 and ss., Conforti, *Il principio di buona fede* (1987), 89 and ss., Kolb (2006) (n. 80), Cremades, American University International Law Review (2012), 781, Mitchell, Melbourne Journal of International Law (2006), 341, De Brabandere (2012) (n. 10), 609, Kotzur, Max Planck Encyclopedia of Public International Law (2012) par. 1 and ss., Ziccardi Capaldo, *Atti del convegno in memoria di Luigi Sico* (2011), 510. Reinhold, ssrn.com (2013), 2 has – on the contrary – argued that good faith serves "a mediatory role between a rule and a principle". The concept of good faith has been deeply analysed by Litvinoff, Tulane Law Review (1997), 1646 and ss.

level) and their dynamic function in the application of the law indeed permits to look at them as a type of source of law which goes far beyond the idea of subsidiary filling *lacunae*".[84]

In the present paragraph we will briefly analyse the principles of good faith and *ne bis in idem*, in order to introduce the doctrines of abuse of process, which directly derives from the principle of good faith, and *res judicata* and collateral estoppel, which are specifications of the principle of *ne bis in idem*. Such doctrines will be proposed, in the remaining part of this Chapter, as a possible solution to the problem of parallel proceedings.

Good faith

The principle of good faith, which has been largely recognized as a "generally accepted principle of international law",[85] "requires every right to be exercised honestly and loyally. (...) A reasonable and *bona fide* exercise of a right in such a case is one that is appropriate and necessary for the purpose of the right (...). It should at the same time be fair and equitable as between the parties and not one which is calculated to procure for one of them an unfair advantage in the light of the obligation assumed. (...) the principle of good faith establishes an interdependence between the rights of a State [i.e. of a subject] and its obligations".[86] We talk, in this regard, of material (or substantive) good faith. It derives that the principle of material good faith controls the exercise of substantial rights. The direct consequence of the principle of material good faith is that, in case rights are exercised *in mala fide*, an abuse of rights will take place.

The principle of good faith has also a procedural dimension, i.e. it "requires the parties not to undertake any action which could frustrate or substantially adversely affect the proper functioning of the procedure chosen, the point being to protect the object and purpose of the proceedings. (...) it is perfectly open to a party to further its own interests even at the expense of the other party. But this selfishness has some limits. It cannot disregard requirements of a proper functioning of the procedure as

[84] Kolb (2006) (n. 80), 9.

[85] Aust, *Handbook of International Law* (2010), 8, has talked about a *fundamental* principle of international law. See also Tamburini, *Trattamento degli stranieri e buona fede nel diritto internazionale generale* (1984), 44 and ss. The Author expressly criticizes the opinion expressed in Zoller, *La bonne foi en droit international public* (1977), 1 and ss., according to whom good faith would not be a source of rights and duties but only a canon of ethics. The opinion that good faith is a source of international law, essential in order to integrate the *lacunae* of the system, has been strongly already expressed by Sperduti, La comunità internazionale (1952), 42 and ss., and Virally, American Journal of International Law (1983), 133. See also *Certain German Interests in Polish Upper Silesia (Germany v. Poland)* [1926] PCIJ (Ser. A) No. 7, 33. This approach has been partially criticized by Curti Gialdino, Rivista di diritto internazionale (1960), 427 and ss.

[86] Cheng (1953) (n. 82), 123-126. The idea that the principle of good faith is related to the principle of equality of the parties in the proceedings has been also explored by Sereni (1955) (n. 38). However, this last Author stated that the principle of good faith derives from the principle of equality between the parties and is not on its same level.

such".[87] The direct effect of a violation of the principle of procedural good faith is that, in case a process is initiated or conducted in bad faith, an abuse of process will take place.[88]

The above distinction between material and procedural good faith has been endorsed in investment arbitration by the *Abaclat* Tribunal.[89] While material good faith regards the modalities with which an investment has been assumed (and in particular the legality of the investment in light of the applicable law), procedural good faith concerns "the context and the way in which a party, usually the investor, initiates the (…) claim seeking protection for its investment". Such a distinction entitles us to talk about abuse of rights and abuse of process in investment arbitration.

It is worth repeating here that the principle of good faith, both procedural and substantial, has a common core, i.e. the necessity to exercise a right in compliance with the goals of this right and without the aim of generating a prejudice to other parties. However, the principle of good faith requires to be filled in by judges on a case-by-case basis, keeping into account the concrete circumstances of the single case. For this reason it is essential to highlight the very active role of judges and arbitrators in applying both the principle of good faith and the deriving doctrines of abuse of right/process.[90]

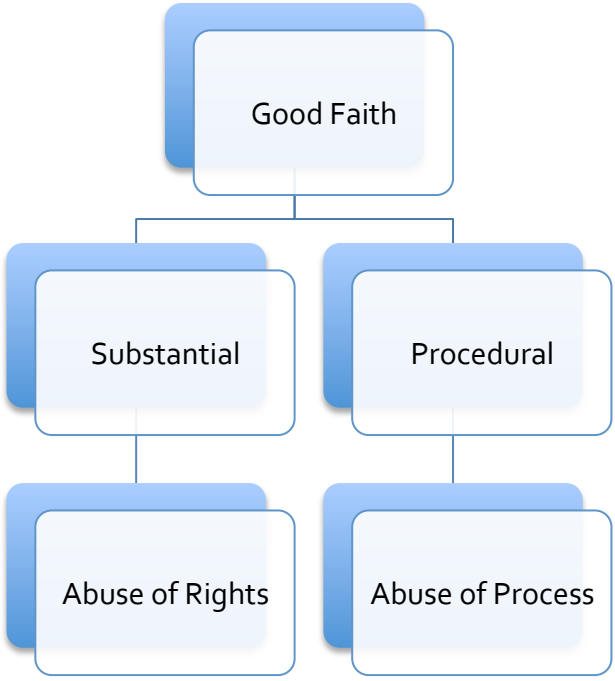
As already stated, for the sake of the present book, we will only focus on the doctrine of abuse of process, which will be deeply analysed in paragraph 3.5 below.

[87] Kolb (2012) (n. 16), 831. The procedural dimension of good faith is perfectly explained by Art. 3(10) of the DSU, stating that WTO Members will engage in WTO dispute settlement procedures in good faith. See also art. 300 of the UNCLOS, regarding "good faith and abuse of rights" and Art. 38 of the Peruvian *Ley de Arbitraje* (D.O. 2008, 1071), stating that "the parties are required to respect the principle of good faith in all of their acts and participations in the course of arbitral proceedings and to cooperate with the arbitral tribunal in the development of the arbitration".

[88] See in this regard Ascensio, Chinese Journal of International Law (2014), 777, according to whom "good faith is a general principle of international law and the concept of abuse of process is deduced form this principle in all systems of law". dalla Massara, Rivista di diritto civile (2008), has highlighted that the principle of good faith and the related doctrine of abuse of process are useful in order to safeguard the values which constitute the heart of any legal system.

[89] *Abaclat and others v. Argentina* (supra n. 8), paras. 647-649.

[90] Tamburini (1984) (n. 85), 50.



Ne bis in idem

According to the principle of *ne bis in idem* (also called principle of finality, according to the Latin maxim "*interest rei publicae ut sit finis litium*"), something that has been judicially decided once, cannot be decided again. Such a definition of the principle of finality assumes the perspective of the judge, who cannot hear a dispute that has been already decided. The principle can be also seen from the perspective of the parties: for them, once issued, a decision is final and binding and precludes a new discussion of the case.[91] From the perspective of a judge, the principle is said to have a negative effect, while from the perspective of the parties it is said to have a positive effect.[92] In the opinion of the present author the positive and the negative effects are to be considered as two sides of the same coin: the issue cannot be discussed again because the award is binding, and vice versa. [93]

Ne bis in idem is the main answer that almost all legal systems have given to the public necessities of finality,[94] efficiency[95] and legal certainty; at the same time, *ne*

[91] See Volpino, *L'oggetto del giudicato nell'esperienza americana* (2007), 1 and ss.

[92] As it has been noted by Volpino (2007) (n. 91), 47, the case law and scholars (in particular in the US) have mainly considered *ne bis in idem* from its negative perspective, which is considered essential to ensure finality.

[93] The principle has a very long history. We can indeed find it in Greek, Roman and old Ecclesiastical Law. See Barnett, *Res Judicata, Estoppel and Foreign Judgments* (2001), 8 and ss., Van Bockel, *The Ne Bis in Idem Principle in EU Law* (2009), 1 and ss. It should be noted that the negative effect of the principle has been occasionally questioned. See Wehland (2013) (n. 78), 182. However, this opinion does not seem to find support in other Authorities. This is confirmed by the same Wehland, at 193, when he says that "one could imagine a preclusive effect, where forums in a second set of proceedings would altogether be prevented from rendering a new decision on the merits of the dispute".

[94] An exceptional plea against finality can be found in Sinai, Duke Journal of Comparative and International Law (2011), 387 and ss.

[95] See Comoglio, *Il principio di economia processuale, vol. 2* (1980), 109. See also *Blonder-Tongue v. University of Illinois Foundation*, 402 US 313 (1971, , 328-329, where it has been stated that "in any

bis in idem serves the private interest to protect individuals, ensuring them that once a dispute is decided, it will be final and binding. It is largely recognized as a general principle of international law.[96] Indeed, the principle of *ne bis in idem* has found an extremely broad application. It has been recognized by civil and common lawyers, as well as in commercial and criminal law.[97] It has been considered "essential to *judicial operation*, to the orderly working of the judicial branch. If disputants could just reopen their adjudicated disputes, there would be no end to litigation, nor any beginning of authority. *Finality is not just an efficient policy, it is a necessary condition for the existence of the judiciary*"[98] (emphasis in original). Indeed "the doctrine of *res judicata is primarily one of public policy* and only secondarily of private benefit to individual litigants" (emphasis added).[99]

With regard to this principle, there is no uniformity in terminology. Several Authorities prefer to talk about the principle of *res judicata*.[100] However the same name *res judicata* is also often used – in a stricter sense – to make reference to the doctrine of claim preclusion,[101] which is a specification of the broader principle that we have called *ne bis in idem* and that will be analysed later in this paragraph.[102] In order to avoid confusion, we will refer to *ne bis in idem* as the general principle, while the name *res judicata* will be used to refer to the less broad concept of claim preclusion.

It is, in theory, possible to distinguish between a substantive *ne bis in idem*, according to which someone cannot pay more than once for the same acts or

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lawsuit where a defendant, because of the mutuality principle, is forced to present a defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, *there is an arguable misallocation of resources*" (emphasis added).

[96] See Cheng (1953) (n. 82), 153 and 336, Lowe, African Journal of International & Comparative Law (1996), 38, Shany (2003) (n. 65), 245, Reinisch (2004) (n. 64), 44, Nguyen (2013) (n. 68), 144. The principle has been affirmed in several decisions. See, *inter alia*, *Société Commerciale de Belgique (Belgium v. Greece)* 1939 PCIJ (Ser. A/B) No. 78, at 174; *Polish Postal Service in Danzig*, 1925 PCIJ (Ser. B) No. 11, at 30; *Interpretation of Judgments Nos. 7 and 8 Concerning the case of the Factory at Chorzow (Germany v. Poland)*, 1927 PCIJ (Ser. A) No. 11, at 21; *Factory at Chorzow (Germany v. Poland)*, 1927 PCIJ (ser.A) No. 17 (Merits) (Dissenting opinion of Judge Ehrlich); *Orinoco Steamship Co. (US v. Venezuela)* 11 RIAA 227, 239 (1910); *Petrobart v. Kyrgyz Republic*, SCC Case No. 126/2003, Award, 29 March 2005, 64; *Waste Management Inc. v. United Mexican States (No. 2)*, ICSID Case No. ARB(AF)/00/3, Decision on Preliminary Objection, 26 June 2002. The only dissenting voice has been Sacerdoti, TDM (2005), 104-105. However Sacerdoti's position, expressed in a legal opinion in the CME case, goes against what has been unanimously said for various centuries.

[97] See Palombino, Italian Yearbook of International Law (2002),123 and ss., Hober (2013) (n. 64), 126 and ss., Conway, International Criminal Law Review 82003), 217 and ss., Varvaele, Utrecht Law Review (2005), 100 and ss., Aghenitei, Flamanzeanu, Challenges of the Knowledge Society (2011), 131 and ss., Luparia, *La litispendenza internazionale* (2012), 34 and ss., Perez Manzano, *La prohibicion constitucional de incurrir en ne bis in idem* (2002), 1 and ss.

[98] Casad, Clermont, *Res Judicata* (2001), 4.

[99] See *Coca Cola Co. v. Pepsi-Cola Co.*, 36 Del. (6 W.W. Harr.) 124, 130, 172 Atl. 260, 262 (1934). See also Vestal, Iowa Law Review (1964), 45.

[100] See, *inter alia*, Cheng (1953) (n. 82), 153 and 336, Lowe, (1996) (n. 96), 38, Shany (2003) (n. 65), 245, Reinisch (2004) (n. 64), 44, Nguyen (2013) (n. 68), 144.

[101] See, *inter alia*, Brower, Henin, Kemperink, *Building International Investment Law: The First 50 Years of ICSID* (2015), 55.

[102] The idea that the doctrine of *res judicata* is an expression of the broader principle of ne *bis in idem* has been clearly expressed by Leo, Diritto penale e processo (2008), 513.

omissions, and a procedural *ne bis in idem*, according to which a person cannot be judged more than once for the same offence. However, contrary to what we have said for good faith, the distinction between the substantial and procedural dimensions of the principle seems useless in this case; indeed, it seems that there exist only one principle of *ne bis in idem*, which have both substantial and procedural value.[103] Such aspects are in fact the two sides of the same coin, i.e. the fact that there cannot be more than one judgment for the same dispute.

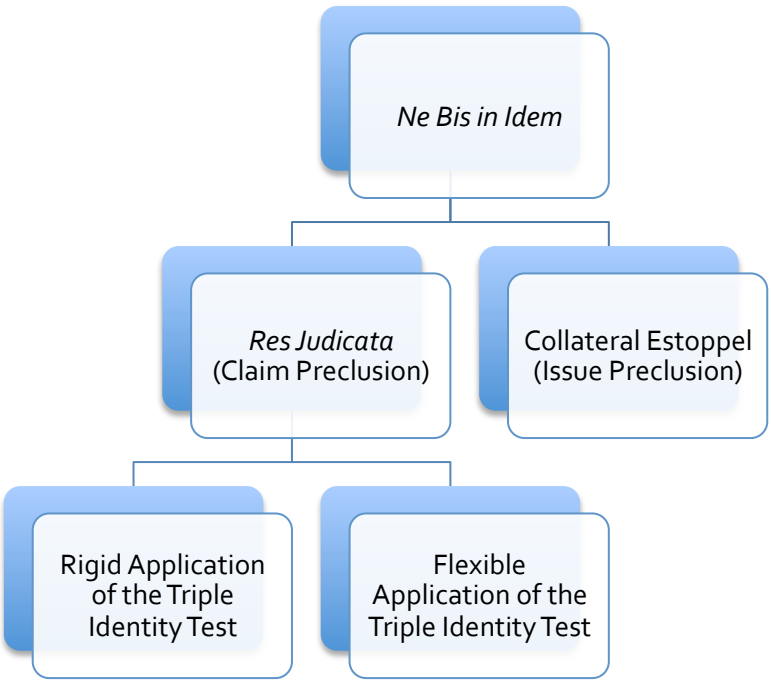
The broad application of the *ne bis in idem* principle all around the world has brought to different developments of the same principle. Such differences regard mainly two aspects.

First of all, it is commonly said that the *ne bis in idem* principle is based on the application of the already mentioned triple identity test, i.e. identity of parties, claim and legal basis of the claim. However, as we will see in paragraph 3.6 below, there is no uniformity (both in international law and among municipal systems) on the content of these requirements. Just to make an example, we could ask ourselves whether the requirement of the same parties shall be intended as referring to parties in a formal sense (i.e. the nominal parties) or in a substantial sense (i.e. the centres of interest); whether the requirement of the same claim shall be intended to cover only what has been formally claimed by the parties or also what they could have claimed but did not claim; or, finally, whether the requirement of identity of the legal basis of the claim shall be intended in a formal way or in a broader sense. All these doubts are still open in international law[104] and let Shany talk about a "somewhat inconsistent" application of the principle of finality in international law.[105]

Secondly, while civil law systems have developed only the concept of claim preclusion (usually referred to as *res judicata*), i.e. the idea that a judgment on a claim precludes another discussion of such claim, common lawyers also apply the doctrine of issue preclusion (usually referred to as collateral estoppel), according to which issues or fact or law actually litigated and determined within a broader claim, and which were essential for the judgment on such claim, cannot be litigated again.[106]

In light of the above we can only talk about a "*ne bis in idem* family",[107] such family being composed of several doctrines, as described in the chart below.

[103] This idea has been already developed by Palombino (2002) (n. 97), 132.
[104] Nguyen (2013) (n. 68), 146.
[105] Shany (2003) (n. 65), 253.
[106] See Polasky, Iowa Law Review (1954), 217, stating that "collateral estoppel, despite its development quite apart from the other aspects of res judicata, seems now to be classified as only a facet of that broad generic concept".
[107] Van Bockel (2009) (n. 92), 34.



Paragraphs 3.6 and 3.7 below will be aimed at deeply examine the various approaches and ideas underlying the *ne bis in idem* family. We will analyse their application in municipal law and their status in international law in order to understand which of them could be a useful instrument in order to avoid parallel proceedings in investment arbitration.

3.5 *Abuse of process in international investment arbitration*

In investment arbitration an abuse of process takes place when an investor, owning a certain procedural right, exercise its right in a way, or for a scope, that is contrary to the aim for which such a right has been granted (i.e. in bad faith).[108] This entitles the Tribunal to preclude the exercise of that right by the claimant by way of a declaration of inadmissibility, although such right is an actual and valid one.[109]

The following can be identified as the main requirements for an abuse of process to occur:

a) the ownership of a valid procedural right;

b) the possibility that, *in abstracto*, such procedural right can be exercised also for scopes which are different from the ones for which the right has been granted;

[108] Pino, *Eguaglianza, ragionevolezza e logica giuridica* (2006), 116.

[109] De Brabandere (2012) (n. 10), 619-620. Ascensio (2014) (n. 88), 784. See also, on the doctrine of abuse of rights in international law, Gestri, Rivista di diritto internazionale (1994), 5 and ss. With regard to the doctrine of abuse of right in EU law see Losurdo, *Il divieto di abuso del diritto nell'ordinamento europeo* (2011), 107 and ss., Gestri, *Abuso del diritto e frode alla legge nell'ordinamento comunitario* (2003), 1 and ss.

c) the exercise of the procedural right for a scope that, *in concreto*, generates a prejudice to the other party and to the proper functioning of the relevant method of dispute settlement.

However, the same existence of the doctrine of abuse of process has been questioned (in particular in investment arbitration) due to:[110] (i) the lack of a legal basis for it;[111] (ii) an erosion of the principle of party autonomy; (iii) a possible violation of the principle of due process.

In order to answer such criticisms it is necessary to start from a brief reference, in general terms, to the doctrine of abuse of rights.

In the words of Hersch Lauterpacht, "[t]he essence of the doctrine [of abuse of rights] is that, as legal rights are conferred by the community, the latter cannot countenance their antisocial use by individuals; that the exercise of a hitherto legal right becomes unlawful when it degenerates into an abuse of rights; and that there is such an abuse of rights each time the general interest of the community is injuriously affected as the result of the sacrifice of an important social or individual interest to a less important, though hitherto legally recognized individual right".[112] The conviction that every right shall be exercised fairly and in good faith, thus avoiding anti-social effects deriving from the exercise of such right, is deeply rooted in all the systems of law[113] and has been considered, even since the early twentieth century, as a general principle of law.[114] It derives that only a right that is exercised in good faith *deserves* the protection of the law. This is today also expressly recognized by some

[110] See, with regard to the notion of abuse of process in general, Scarselli, Rivista di diritto processuale (2012), 1467 and ss., Picò y Junoy, Rivista di diritto processuale (2013), 171 and ss., Cordopatri, Rivista di diritto processuale (2012), 883 and ss. A general attempt of balancing abuse of process and fundamental rights has been tried by Comoglio, Rivista di diritto processuale (2008), 319 and ss.

[111] See, in general terms, the criticisms reported by Ascensio (2014) (n. 88), 764.

[112] Lauterpacht, *The Function of Law in the International Community* (2010 ed.), 294. The history of the doctrine of abuse of rights is deeply analysed by Lettieri, Marini, Merone, *L'abuso del diritto nel dialogo tra corti nazionali ed internazionali* (2014), 18 and ss.

[113] See Byers, McGill Law Review (2002), 391 and ss. The Author perfectly demonstrates the wide application of the doctrine of abuse of rights in both civil and common law systems.

[114] Lauterpacht (2010 ed.) (n. 112), 300 and ss. The Author explains that, at his time, even if the common law world did not know the doctrine of abuse of right, it had equivalent principles that supplied to its function. According to the Author, at 308, "the possibilities of the application of the doctrine of abuse of rights in relations among States are manifold". See also Iluyomade, Harvard International Law Journal (1975), 47 and ss. With regard to the case law, see the *Lighthouse case (Turkey v. Greece)*, [1934] PCIJ (Ser. A/B), No. 62, *Certain German Interests in Polish Upper Silesia (Germany v. Poland)* [1926] PCIJ (Ser. A) No. 7, *Free Zone Case (France v. Switzerland)* [1932], PCIJ (Ser. A/B) No. 46, *Nottebohm (Liechtenstein v. Guatemala)* [1955] ICJ 4, 370, *Barcelona Traction (Belgium v. Spain)* [1970] ICJ 1, 324. Several other cases are mentioned in Gestri (1994) (n. 109), 19 and ss. Particularly relevant is the Award of 4 March 1925 rendered in the *Tacna-Arica ad hoc* arbitration between Chile and Peru, where the sole arbitrator expressly endorsed the doctrine of abuse of rights as basis for its decision, stating that Chile used its laws with the sole purpose of generating damage to Peruvian people.

international sources of law,[115] as well as in the vast majority of national legal systems.[116]

The theory of abuse of rights has been recognized also in investment arbitration, *notwithstanding the fact that it usually*[117] *lacks of a normative basis*.[118] It is here worth quoting para. 646 of the Decision on Jurisdiction and Admissibility issued in the *Abaclat* case: "(…) the theory of abuse of rights is an expression of the more general principle of good faith (…) a fundamental principle of international law, as well as investment law. As such, the Tribunal hold that the theory of abuse of rights is, in principle, applicable to ICSID proceedings".

In fact it is possible to observe that procedural rights have nothing different from other rights, unless the fact that they are to be exercised in a certain context, i.e. a process. As a consequence, such rights can be abused. The right to initiate a process may itself be abused, in case the process is not initiated for the scope of doing justice, but with the aim of taking an undue advantage or creating harassment to the other party.[119] In general terms, all procedural rights shall be exercised avoiding to unduly bypass other rights or procedural fundamental rules. This is a direct consequence of the same fact that procedural rights are rights.[120] This is confirmed by Lauterpacht, when he says that "[i]t is easy to see why the doctrine thus conceived [i.e. abuse of rights] can be regarded as *one of great potentialities in the process of judicial legislation adjusting the law to new conditions and preventing unfair or anti-social use of rights*".[121] The logical consequence of this statement is that a party cannot use a process in order to obtain a personal advantage regardless of whether the initiation of that process

[115] See, *inter alia*, Art. 54 of the European Charter of Human Rights. For other references see Lettieri, Marini, Merone (2014) (n. 112), 24 and ss. See also Art. XX of the GATT, which has been seen as a rule "setting out a right (…) and then forbidding its abuse" by Di Benedetto (2013) (n. 61), 126.

[116] See Gestri (2003) (n. 109), 24-52, who has conducted a comparative analysis in relation to the application abuse of rights in national legal systems within the EU. See also Losurdo (2011) (n. 109), 25-36.

[117] There is a strong debate among scholars with regard to the necessity that investments are made in good faith and/or in accordance with the law of the host State. See Đajić, Proceedings of Novi Sad Faculty of Law (2012), 207 and ss., Carlevaris, Journal of World Investment and Trade (2008), 35 and ss., Tirado, Page, Meagher, ICSID Review FILJ (2014), 493 and ss., Lamm, Greenwald, Young, ICSID Review FILJ (2014), 328 and ss., Kriebaum, Austrian Arbitration Yearbook 2010 (2010), 307 and ss., Obersteiner, Journal of International Arbitration (2014), 265 and ss., Maniruzzaman, Amicus Curiae: Journal of the Society for Advanced Legal Studies (2012), 16 and ss.

[118] See, *inter alia*, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, *Malicorp Limited v. The Arab Republic of Egy*pt, ICSID Case No. ARB/08/18, Award of 7 February 2011. Several other references are contained in Georgilas, ILA Regional Conference 2013, Greece (2013), 14 and ss.

[119] Such an improper use of a right might be related to the French doctrine of *détourement de pouvoir*, according to which a power cannot be used for a goal that is different from the one for which such a power has been provided. The applicability of *détourement de pouvoir* in international law has been criticized by Gestri (1994) (n. 109), 11.

[120] See, in this regard, Gestri (1994) (n. 109), 9 and 22 and ss. This Author also cites several precedents on the point.

[121] Lauterpacht (2010 ed.) (n. 112), 294.

respects the (already mentioned) fundamental canons of justice.[122] The process is available for the parties provided that they make recourse to it according to its actual scopes.

It seems therefore possible to say that a judge has the duty to control, *in concreto*, that all procedural rights are exercised in good faith, notwithstanding the lack of a normative basis for such power. Such a duty, to be exercised at the admissibility stage, is an inherent power of every judge and shall be aimed at protecting the judicial function, the proper functioning of proceedings and the rights of the other party in the proceedings.[123] Only rights exercised in a way (or for a scope) that does not have such undesirable effects are to be considered, let us say, meritorious and deserve the protection of the law.[124] From the above it is possible to understand that the application of the doctrine of abuse of process involves an high amount of discretion for judges/arbitrators, who have to check if, in concrete, the exercise of a procedural right is, to borrow Lauterpacht's words, anti-social.[125]

According to Robert Kolb, even if the ICJ "has never found the conditions for an application"[126] of abuse of process, this does not exclude that such doctrine cannot find a place in its case law. However, it is worth noting that abuse of process can find its explicit recognition (other than in municipal laws)[127] in several international sources, such as Art. 35(3) of the European Convention of Human Rights,[128] Art. 294(1)[129] and 300[130] of the United Nation Convention on the Law of the Sea and Art.

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[122] Ghirga, *La meritevolezza della tutela richiesta* (2004), 78 and 89 and ss. For a reference to efficiency and judicial economy see also Lettieri, Merini, Merone (2014) (n. 112), 40.

[123] Ghirga, (2004) (n. 122), 77.

[124] Ghirga, (2004) (n. 122), 89 and ss. In 1982, in *Hunter v. Chief Constable of the West Midlands*, the House of Lords stated that abuse of process is essential to prevent "the administration of justice might be brought into disrepute among right-thinking people".

[125] All the above is confirmed in the *Interim Report: "Res judicata" and Arbitration* issued by the International Law Association, Berlin Conference, in 2004, 8, par. E. Gestri (1994) (n. 109), 10, has criticized the definition of abuse of rights on the basis of the anti-social exercise of such a right, stating that, used in this way, abuse of right might become a way to give legislative powers to judges and this would undermine the principle of legal certainty. Due to the proactive role of international judges, such an idea is not convincing with regard to international law. The present author, therefore, fully shares Lauterpacht's approach.

[126] Kolb (2012) (n. 80), 831.

[127] See Gaffney, Journal of World Investment and Trade (2010), 515 and ss., recalling applications of the doctrine in Canada, England, Australia and United States. Today the doctrine finds application, *inter alia*, also in France, Italy and Switzerland. For a detailed analysis of US practice see Dondi, Rivista di diritto processuale (1995), 787 and ss. Abuse of process does not seem to be recognized in Sweden. See Case T 8735-01, judgment of 15 May 2003, paras. 187-188.

[128] "The Court shall declare *inadmissible* any individual application submitted under Article 34 if it considers that:

> (a) *the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application*; or
>
> (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal". (Emphasis added).

[129] "A court or tribunal provided for in article 287 to which an application is made in respect of a dispute referred to in article 297 shall determine at the request of a party, or may determine *proprio motu*,

3(10) of the WTO Dispute Settlement Understanding.[131] According to Vaughan Lowe, however, regardless of a normative recognition, the doctrine is "well established, though occasions for its application are likely to be very rare. It indicates that a tribunals should decline jurisdiction in a range of circumstances where the action is rendered vexatious. These include cases where the purpose of the litigation is to harass the defendant, or the claim is frivolous or manifestly groundless".[132]

It is difficult (and maybe too early) to say here whether abuse of process can be considered as an autonomous principle of international law. It seems that, if seen as a procedural expression of the general principle of abuse of right, abuse of process can find a place in international law.[133] It is not debatable, however, that international courts and tribunals have the inherent power to preclude a claim to go ahead if such a claim, in concrete, amounts to an abuse of process.

With particular regard to international investment arbitration, all the above debate is very relevant. Indeed, being investment arbitration a form of dispute settlement that involves several public interests, it is of certain importance that such form of justice is not abused to the detriment of State parties. Indeed, several recent cases have discussed the existence and the requirements of the doctrine of abuse of process as a way to balance the over-formalistic approach to jurisdiction, on the one side, with the substantial necessity of a proper administration of justice, on the other side. Such cases mainly regarded a change of the investors' corporate structure, aimed at gaining the advantages of a certain BIT. In various cases Tribunals have stated that, if the final owner of the alleged investor had the same nationality of the host State (or a nationality of a State which was not a party of the relevant BIT) and such final owner purposefully modified the corporate structure in order to get the advantage of a BIT after a dispute arose, such conduct amounted to an abuse of process.[134] *In these cases, the recourse to the doctrine of abuse of process has not been*

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whether the claim constitutes an abuse of legal process or whether prima facie it is well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is prima facie unfounded, it shall take no further action in the case". (Emphasis added)

[130] "States Parties shall fulfil in good faith the obligations assumed under this Convention and *shall exercise the rights*, jurisdiction and freedoms recognized in this Convention *in a manner which would not constitute an abuse of right*". (Emphasis added)

[131] "It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, *all Members will engage in these procedures in good faith in an effort to resolve the dispute*. It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked". (Emphasis added)

[132] Lowe, Australian Yearbook of International Law (1999), 202.

[133] Ascensio (2014) (n. 88), 779.

[134] *Phoenix Action Ltd. v. the Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009; *Europe Cement Investment Trade v. Republic of Turkey*, ICSID Case No, ARB (AF)/07/2, Award, 13 August 2009; *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB (AF)/06/2, Award, 17 September 2009; *Renée Rose Levy and Gremcitel S.A. v. Republic of Perù*, ICSID Case No. ARB/11/17, Award, 9 January 2015; *Pac Rym Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012. See, with general regard to the doctrine of abuse of process and the changes of corporate structure, Cerny, Czech Yearbook of

(and cannot be) seen as a limitation of party autonomy and due process: if a party unlawfully exercises its procedural rights, and then this unlawful exercise is precluded by the tribunal, such a party cannot further claim that it has been deprived of its rights! Modern procedural law has, indeed, developed the idea that all the forms of protection granted in a process are conditioned to the circumstance that procedural rights are exercised in good faith. It is not surprising that such principle is applied in investment arbitration.

Abuse of process has been described as a perfect way of attracting attention on "systemic malfunctioning"[135] and to preclude the continuance of proceedings which run against fundamental canons of procedure and at the same time can be extremely onerous for the other party. It can be said that "the function of the concept is to correct a too formalistic approach of the procedure, taking into account elements of social finality and fairness".[136]

It is here submitted that, even if there has never been a decision *expressly* applying abuse of process in order to prevent parallel proceedings,[137] abuse of process can be a valuable tool in order to avoid that – bypassing some fundamental canons of procedure (i.e. the needs for finality, efficiency and proper administration of justice) as well as the principle of *ne bis in idem* – some parties initiate multiple proceedings on the basis of the same identical dispute.[138] In the words of Chester Brown, used in this way abuse of process would be "a *rule of public policy based on the desirability*, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive proceedings when one would do" (emphasis added).[139]

International Law (2012), 183 and ss., Voon, Mitchell, Munro, Journal of International Dispute Settlement (2014), 41 and ss., Topcan (2014) (n. 17), 627 and ss., Daujotas, ssrn.com (2012), 1 and ss.

[135] Ascensio (2014) (n. 88), 785. The idea to let substance prevail on form is also confirmed by Prosper Weil's dissenting opinion in *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, Dissenting Opinion of Prosper Weil, 29 April 2004, para. 19 and ss., in which he focused on the goals of the ICSID regime and on the need to preserve the integrity of the system and stated that international courts must retain a minimal amount of both effectiveness and legitimacy in order to continue to operate. Shany (2003) (n. 65), 259 has put abuse of process in relation to *res judicata*. According to his opinion "abuse of process doctrine can serve as an additional justification for the adoption of (…) *res judicata* (…) and perhaps even support a liberal construction of [its] scope of application, so to encompass closely related multiple proceedings, which are extremely onerous for one party and of relatively little utility to the other party. It might also operate to restrict unjustified claim-splitting tactics". See also Ghosh, Arbitration International (2015), 665 and ss.

[136] Ascensio (2014) (n. 88), 764.

[137] On the contrary, in *CME v. Czech Republic*, UNCITRAL, Final Award 14 March 2003, par. 412, the Tribunal stated that, if jurisdiction is validly conferred, the commencement of two parallel proceedings cannot be seen as an abuse of process. The present author does not share this opinion, considering that – as it will be seen better in Paragraph 3.6 below – the *CME* Tribunal's approach fosters abuses of investment arbitration.

[138] This idea seems to be denied by Gaffney (2010) (n. 127), 529.

[139] Brown, Transnational Dispute Management (2011), 7.

This approach is indirectly confirmed by the *RSM and Grynberg* case,[140] where the Tribunal said that "the present case is no more than an attempt to re-litigate and overturn the findings of another ICSID Tribunal (…). Claimants' present case is thus no more than a contractual claim (previously decided by an ICSID Tribunal which had the jurisdiction to deal with Treaty and contractual issues) dressed up as a treaty case (…). *The tribunal finds that the initiation of the present arbitration is thus an improper attempt to circumvent the basic principles set out in [the ICSID] Convention Article 53* and the procedures available for revision and rectification of awards provided for in Article 51" (emphasis added). It is strongly arguable that the reasoning of the Tribunal, even if not mentioning abuse of process, was referring to and applying such a doctrine.

Thus, by way of a declaration of inadmissibility, tribunals have the power to preclude such abusive (and bad faith) claims to go ahead.[141] This approach is fostered by the fact that the doctrine of abuse of process seems applicable also in case of two (or more) parallel proceedings in which the claimants are formally different but represent the same substantive interests.[142] Such an approach seems to be confirmed by the Commercial Court of London in *Michael Wilson and Partners*. In this judgment, Mr. Justice Teare recognized that "mutuality is not a bar to an abuse of process argument".[143] As a consequence, notwithstanding the fact the parties in the previous arbitration were formally different (but substantially represented the same interest), he expressly stated that "it would be an abuse of the process of this court to permit MWP to make the same factual allegations which it had made in the arbitration and had been rejected". This approach seems to be the correct one also in order to avoid abuses of investment arbitration.

3.6 *Res judicata (claim preclusion)*

3.6.1 *Definition of res judicata and its role in ensuring the goal of the process*

[140] In *S Grynberg, Stephen M Grynberg, Miriam Z Grynberg, and RSM Production Corporation v Grenada*, ICSID Case No ARB/10/6, Award, 10 December 2010, paras. 7.3.6 and 7.3.7.

[141] The legal foundation of the possibility to issue such a declaration, as stated by Brown (2011) (n. 139), 8, is in the inherent powers of the Tribunal and in the necessity to ensure the proper administration of justice. See also *Waste Management v. Mexico (No. 2)*, ICSID Case No. ARB(AF)/00/3, Decision on Jurisdiction of 26 June 2002, paras. 49-50. Also Gestri (1994) (n. 109), 44, has stated that abuse of rights and abuse of process may be relevant at the admissibility stage and that such doctrines may constitute a way of protecting the judicial function of international courts and tribunals. According to this Author, such a protective function may justify the application of abuse of process even in lack of an express provision in written sources of law.

[142] As stated by Brown (2011) (n. 139), 6, the doctrine of abuse of process does not require the fulfilment of the triple identity test.

[143] *Michael Wilson & Partners v. Thomas Ian Sinclair, Sokol Holdings Incorporated, Eagle Point Investments Limited, Butterfield Bank (Bahamas)* [2012] EWHC 2560 (Comm). This approach has been applied since 1889 in *Reichel v. Magrath* (1889) 14 App Cas 665 and has been confirmed in *Arthur JS Hall v. Simons* [2002] 1 AC 615, 701 and in *OMV Petrom SA v. Glencore International AG* [2014] EWHC 242 (Comm), para. 16 and ss. See also Monichino, Fawke, Asian DR (2012), 123.

According to the principle of claim preclusion "a party generally may not relitigate a claim decided (...) by a valid and final judgment. The judgment extinguishes the whole claim, precluding all matters within the claim that were or could have been litigated in that initial action".[144] *Res judicata* regards a claim as a whole and precludes a second discussion of such a claim. The principle of claim preclusion is recognized in all legal systems, as well as in international law. However, not all countries have applied the principle of claim preclusion in the same way.[145] The principle, therefore, has a common core (i.e., first of all, the impossibility to re-litigate an already decided claim) but is composed of several aspects whose application often varies according to the different legal cultures and within international law.[146]

First of all it is worth focusing on the aspects of the principle that seem to be commonly applied. Firstly, it is commonly said (both in international law and municipal law) that, in order to be *res judicata*, the decision on a claim has to be final.[147] Secondly, to acquire the *res judicata* force, a judgment must be valid, i.e. issued at the end of a judicial procedure.[148] Thirdly, it seems undisputed that the extent of claim preclusion not only regards what has been pleaded by the parties during the proceedings, but also precludes all the related pleas that *could* have been filed before the judge and were not.[149] Finally, with particular regard to international arbitration, it is quite unanimously accepted that arbitral awards have the same *res judicata* value of court judgments: as a consequence, arbitral awards preclude a second discussion on the same case.[150]

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[144] Casad, Clermont (2001) (n. 98), 11. See also Brower, Henin, Kemperink (2015) (n. 101), 55. In common law it is usually distinguished between merger and bar. We have a merger when the plaintiff in the first action is successful and, therefore, is claim is merged in the judgment and cannot be re-litigated. We have a bar when the first judgment is in favor of the defendant and the plaintiff is therefore barred to start again such a claim.

[145] Casad, Clermont (2001) (n. 98), 5-6.

[146] See Hahn, Austrian Yearbook of International Law (2014), 330-331, Scobbie, Australian Yearbook of International Law (1999), 301.

[147] Hahn (2013) (n. 146), 331.

[148] Casad, Clermont (2001) (n. 98), 49. See also Carrington, Ohio State Law Journal (1963), 381, who has explained that the judgment shall be valid according to the law of the place where it has been issued.

[149] See, *inter alia*, Art. 2909 of the Italian Civil Code, Art. 400(2) of the Spanish Ley de Enjunciamiento Civil. On this point see De La Oliva Santos, *Oggetto del processo e cosa giudicata* (2005), 92, Casad, Clermont (2001) (n. 98), 62 and Polasky (1954) (n. 106), 218. See also Barnett (2001) (n. 93), 183-244 and *Henderson v. Henderson* (1843) 3 Hare 100. As explained by these last Authors, the rule according to which a plaintiff shall relitigate in a single dispute all reliefs arising from a transaction is a consequence of the need of efficiency of the judiciary. However, it should be noted that the the *Genocide* case, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Joint Dissenting Opinion of Judges Ranjeva, Shi and Koroma, ICj Rep. (2007), par. 9, some dissenting Judges stated that "as a matter of principle, a State is not precluded from legally raising a distinct claim arising from the same facts, where a separate point falls for decision within the same legal context". Contra, see the *Delgado* case quoted in Paragraph 269 below.

[150] See Hober (2013) (n. 64), 128 and ss., Gordon, Florida Journal of International Law (2006), 577 and ss., Bonato, Rivista di diritto processuale (2006), 669 and ss., Menchini, Rivista dell'arbitrato (1998), 775. See also Italian Supreme Court 16901/2015, as well as Art. 824-bis of the Italian Code of Civil Procedure, Art. 1484 of the French New Code of Civil Procedure, Art. 1055 of the German ZPO and Art. 387 of the

Moving to the uncertain aspects of *res judicata*, as we will see in Paragraph 3.6.2 below, the main points of disagreement are related to the triple identity test, according to which – in order to *res judicata* apply – the parties, the object and the legal grounds shall be identical.

A second point of discussion regards the extension of claim preclusion. While it is commonly accepted that the findings contained in the operative part of a judgment are *res judicata*, there is less certainty with regard to the reasoning of the court. In this regard, the German approach, which gives preclusive effect only to the operative part, is the strictest, while the French approach, which looks at the *dispositif* and to the underlying reasons is the broadest.[151] In this regard, however, it is worth noting that it is often impossible to completely divide the *dispositif* from its underlying reasons and, even if one would accept that only the operative part of the judgment generates claim preclusion, it is implied that such operative part needs to be understood and explained by its underlying reasons. Indeed, the Court of Justice of the European Union has stated that "the concept of *res judicata* under European Union law does not attach only to the operative part of the judgment in question, but also attaches to the ratio decidendi of that judgment, *which provides the necessary underpinning for the operative part and is inseparable from it*"[152] (emphasis added). This seems also to be the approach followed by international courts and tribunals.[153]

There are, finally, some distinctions which are applied in some systems and not in others. The main one regards the difference between formal *res judicata* and substantial *res judicata* (mainly recognized by the civil law systems).[154] The formal *res judicata* has to be seen from the procedural point of view, i.e. a decision that is not subject to any further appeal constitutes formal *res judicata*. The substantial *res judicata*, on the contrary, regards the relationship underlying the process: a decision is

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Swiss Code of Civil Procedure. The issue of the *res judicata* of international arbitration awards in national legal systems and vice versa will be examined in Paragraph 3.6.5 below.

[151] Also common law systems seem to accept that "res judicata affects both premises and conclusions". See Millar, Michigan Law Review (1940), 4.

[152] Decision of 15 November 2012, C-456/11, *Gothaer Allgemeine Versicherung AG ed altri c. Samskip GmbH*, par. 40.

[153] See, *ex multis*, the detailed reasoning developed in *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, paras. 7.23 and ss. See also *Barcelona Traction, Light and Power Co Ltd (Belgium v. Spain) (Second Phase)* [1970] ICJ Rep 3, 267, separate opinion of Judge Gros, stating that even if it is commonly said that *res judicata* only refers to the operative part of a judgment, it is also commonly accepted that international courts refer to the reasoning set forth in previous decisions. See also *Compagnie Generale de l'Orenoque* Case (Franco-Venezuelan Mixed Claims Commission 1905), *Pious Fund Arbitration (United States of America v. Mexico)*, and *Channel Arbitration*, mentioned in Schreuer, Reinisch, *Legal Opinion in CME v. Czech Republic* (2002), 23. See also Hober (2013) (n. 64), 321 and ss., Cheng (1953) (n. 82), 348-349. This opinion seems not shared by Wehland (2013) (n. 78), 191.

[154] See Millar (1940) (n. 151), 7, De La Oliva Santos (2005) (n. 149), 107 and ss. See, as an example of formal *res judicata*, Art. 324 of the Italian Code of Civil Procedure and, as an example of substantial *res judicata*, Art. 2909 of the Italian Civil Code. Another, less important, distinction is between absolute res judicata and relative res judicata, on which see Millar, *id*., 7. Absolute *res judicata* is cognizable by the second court regardless of a plea by a party, while substantial *res judicata* requires that a party files before the court a request to preclude the claim based on *res judicata*.

substantial *res judicata* in the sense that such a relationship, from which a dispute arose, acquire stability (i.e. the dispute is completely settled) on the basis of the binding force of a judicial decision.[155] Even if this distinction has been put in question on the basis of the fact that "a judgment does not become *res judicata* in the substantial sense until it has achieved the quality of formal *res judicata*",[156] it is essential in order to let us understand the *double function of any judicial process* and, therefore, to focus on the proper object of any process, including investment arbitration.

Indeed, it has been correctly pointed out that every process has: (i) a procedural function, i.e. to put in effect what the law dictates; and (ii) a substantial function, i.e. to finally settle the underlying dispute.[157] The procedural function focuses on the correct application of the law by the judge, while the substantial function focuses on the concepts of *dispute* and *legal relationship underlying the process*.[158] It is not possible to assume only a procedural perspective, on the basis of which a judgment fulfils its function (i.e. to ensure finality) just if the judge has correctly applied the law. On the contrary, it is strongly arguable that a judgment reaches its goal if the underlying dispute is completely (and forever) settled. Indeed, as it has been stated, at some point it is necessary to know with certainty the rights and obligations arising from a certain legal relationship; "a party [of such relationship] should not have to bring or defend multiple suits to establish his right or obligations arising out of a single incident [i.e. dispute]".[159] This means that, regardless of the formal elements of any single judgment (i.e. the parties, the object and the legal ground), *res judicata* shall not permit a second discussion of the already decided facts regarding a certain legal relationship; *such facts* shall be intended to be definitely settled by the first decision. Indeed, "[i]f a judgment [is] not conclusive as to what it actually determined, the adjudicative process would fail to serve its social function of resolving disputes".[160]

It is, in conclusion, necessary to focus on the public function of investment arbitration,[161] i.e. a vision of litigation "that is more sensitive to the need to ensure a

[155] It follows that only decisions on the merit are able to become substantial *res judicata*, due to the fact that any other decision does not have the effect of definitely stabilize legal relationships De La Oliva Santos (2005) (n. 149), 116.
[156] Millar (1940) (n. 151), 7.
[157] Allorio, *La cosa giudicata rispetto ai terzi* (1935), 11 and ss. This concept has been also developed by Carnelutti, *Istituzioni del processo civile italiano* (1956), 79.
[158] In this regard, see also Bonafè, *La protezione degli interessi di Stati terzi davanti alla Corte internazionale di Giustizia*, who proposes – in order to justify the intervention of third States as a party before the ICJ – the acceptance of a larger concept of "dispute", encompassing also the rights and obligations of third parties.
[159] Arbour, Louisiana Law Review (1974), 763.
[160] Currie, The University of Chicago Law Review (1978), 325.
[161] The processual nature of arbitration has been strongly argued by Vecchione, *L'arbitrato nel sistema del processo civile* (1971), 1 and ss. According to this view, arbitration has a public function as well as national litigation.

more effective use of social resources and that recognized the public consequences of any procedural regime",[162] rather than merely giving attention on its private function.

Given the above, the following discussion will be aimed at analysing the requirements that shall be satisfied in order to ensure that the substantial function of any investment arbitration (i.e. to finally settle investment disputes) is satisfied. The analysis will start from an analysis of the traditional approach to *res judicata* in international law. It will further discuss whether such an approach is appropriate and desirable for investment arbitration. The focus will finally go to on how arbitrators should approach the triple test in order to render it suitable to finally settle investment disputes and to ensure the good administration of justice.

3.6.2 *The traditional approach to res judicata: The triple identity test and the requirement of the same legal order. The CME/Lauder cases and a critic to the triple identity test as an over-formalistic approach, which does not take into account substance*

In international law, the traditional approach to *res judicata* is explained by Judge Anzilotti's dissenting opinion in the *Chorzow Factory: Interpretation Case*. He stated that "the decision of the Court has no binding force except between the Parties and in respect of that particular case: we have here three traditional elements for identification, *persona*, *petitum*, *causa petendi*, for it is clear that the particular case covers both the object and the grounds of the claim".[163] The parties are usually considered to constitute the subjective scope of application of *res judicata*, while *petitum* and *causa petendi* constitute its objective scope of application. Anzilotti construed its definition of the principle, which has given origin to the triple identity test, on the basis of what he thought to be the aspects of res judicata that were common to the various systems of law.[164] Indeed, Anzilotti considered *res judicata* as a general principle common to civilized nations in the sense of Art. 38 (1)(c) of the PCIJ Statute.

Since Anzilotti's statement, the triple identity test (and in particular the requirement of the same parties) has been very often rigidly and formally applied,[165]

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[162] Watson, Canadian Bar Review (1990), 626. The distinction between the public and private functions is clearly expressed in Polasky (1954) (n. 106), 219-220.

[163] [1927] PCIJ (ser. A), No. 13, 23.

[164] As we will see below, Anzilotti's assumption is today (at least partially) wrong, due to the circumstance that several systems of law do not apply a rigid and formal triple identity test. This approach has also been followed by some international tribunals.

[165] This approach is shared by Wehland (2013) (n. 78), 127, 185 and ss.; Kuhn, Journal of World Investment and Trade (2004), 7 and ss.; Bernhardt, *The Statute of the International Court of Justice* (2012) 1239 and ss., examining in particular Art. 59 of the ICJ Statute. See also the *Trail Smelter Arbitration (US v. Canada)*, Award of 11 March 1941, 3 UNRIAA, 1952; *Biloune v. Ghana*, UNCITRAL, Award on Jurisdiction and Liability of 27 October 1989, 95 ILR 222 (1994); *Guyana Boundary Arbitration (Brazil v. Great Britain)*, Award of 6 June 1904, 11 UNRIAA 22; *Continental Shelf, Application by Malta for Permission to Intervene (Tunisia v. Libya)*, ICJ Rep (1981), 20. However, see Ottolenghi, Prows, Pace International Law Review (2009), 50 and ss., who stated that the ICJ *Genocide* case represents a more

also in light of the wording of international rules allegedly referring only to the *res judicata* effect on the parties (such as Art. 59 of the ICJ Statute and Art. 53(1) of the ICSID Convention).[166] Such a strict application has been mainly justified on the basis of the principle of due process, according to which all parties shall have a full and fair opportunity to present their case with regard to every single legal question they want to discuss before a judge.[167] This means that, even if the parties, the object and the legal ground of a process are substantially identical, they are not considered able to satisfy the triple identity test if they are not perfectly identical also from the formal point of view.

The formal approach based on a strict application of the triple identity test is perfectly expressed by the decisions in the *Lauder*[168] and *CME*[169] cases. In the former case, Ronald S. Lauder, the ultimate controlling shareholder of a group of companies holding an investment in Czech Republic, initiated an UNCITRAL arbitration in London against the host State under the US-Czech BIT, on the basis of the violation of several standards of protection contained in such BIT, namely fair and equitable treatment, full protection and security, the prohibition to impair investments by arbitrary and discriminatory measures and the prohibition of indirect expropriation.[170] In the latter case, arising from the exactly same facts (i.e. an alleged expropriation of the investment), CME – a Dutch company and group subsidiary holding the shares in a Czech company which actually made the investment – started another UNCITRAL arbitration, this time in Stockholm, on the basis of the Dutch-Czech BIT, which contained substantially identical standards of treatment. Both the tribunals upheld their jurisdiction, but they reached contradictory findings on the existence of an expropriation. The London arbitration was concluded in favour of Czech Republic; arbitrators did not find violations of the relevant BIT. The Stockholm Tribunal concluded that the Czech Republic violated its obligations under the Dutch-Czech BIT;

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flexible application of the triple identity test, to be welcomed in light of the very rigid previous case law of the ICJ.

[166] Art. 59 of the ICJ Statute says that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case". Similarly, Art. 53(1) of the ICSID Convention says that "[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention". With regard to Art. 59 of the ICJ Statute, it should be noted that it has been interpreted by some scholars as an exclusion o the applicability of the *stare decisis* rule, rather than a limitation of the scope of application of *res judicata*. See *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, paras. 7.6 and 7.7, referring, *inter alia*, to the work of Prof. Shabtai Rosenne and Judge Manley O. Hudson.

[167] See Brekoulakis, The American Review of International Arbitration (2005), 9. Concerning the principle of due process, see Schwebel, Lahne, *Comparative Arbitration Practice and Public Policy in Arbitration, ICCA Congress Series Vol. 3* (1987), 205 and ss., Kurkela, Journal of International Arbitration (2004), 221 and ss., Pörnbacher, Dolgorukow, Annal FLB - Belgrade Law Review 50 (2013), 50 and ss., Wirtz, *The Arbitrator and the Parties, Proceedings of the Eleventh Annual Meeting of the National Academy of Arbitrators* (1958), 1 and ss.

[168] *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001.

[169] *CME v. Czech Republic*, UNCITRAL, Final Award 14 March 2003.

[170] A detailed description of the factual background may be found in Hober (2013) (n. 64), 345-348.

the Tribunal, at par. 432, expressly stated that "the parties in the London Arbitration differ from the parties in this arbitration" and that "the two arbitrations are based on differing bilateral investment treaties, which grant comparable investment protection, which, however, is not identical". Furthermore, the Tribunal, at par. 412, stated that "there will be two awards on the same subject which may be consistent with each other or may differ. Should two different Treaties grant remedies to the respective claimants deriving from the same facts and circumstances, this does not deprive one of the claimants of jurisdiction, if jurisdiction is granted under the respective treaty". This award was further challenged before the SVEA Court of Appeal in Stockholm[171] (the competent court at the seat), but the court upheld the award and refused to accept the allegations related to *lis pendens* and *res judicata* in investment arbitration filed by the Czech Republic on the basis of a rigid application of the triple identity test.

The result of the two parallel proceedings in the *Lauder* and *CME* cases is the antithesis of legal certainty and finality, as well as the full negation of the goals of an arbitral process (and of any form of dispute settlement) aimed at finally settling a dispute and stabilizing a legal relationship. Indeed, August Reinisch has talked about "*the ultimate fiasco in investment arbitration*" (emphasis added).[172]

The prevalence of formalities on substance has also attracted severe criticism from scholars,[173] some of them in fact arrived also to put in discussion the same legitimacy of investment arbitration.[174]

Having said the above, for the sake of completeness it is worth noting that, in addition to the triple identity test it has very often been required that, for the application of *res judicata*, the two competing decisions must arise from the same legal order, i.e. it is not possible for a national judgment to be *res judicata* in international proceedings and vice versa.[175]

The next paragraphs will analyse cases and opinions related to a broader application of the triple identity test and try to find a legal justification for such a broader approach.[176] We will start dealing with the objective prong of res judicata (i.e. *petitum* and *causa petendi*) and then move to an analysis of the requirement of the same parties. Finally, we will also briefly analyse whether the identity of legal order is actually required in order to *res judicata* apply.

3.6.3 *The requirements of petitum and causa petendi and the call for a more flexible approach. The Southern Bluefin Tuna case*

[171] Case T 8735-01, judgment, 15 May 2003.
[172] Reinisch, *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (2008), 116.
[173] See, in particular, Carver, Journal of World Investment and Trade (2004), 23 and ss., who has talked about a "totally unacceptable result".
[174] See Van Harten, Malysheuski, Osgoode Legal Studies Research Paper No. 14 (2016), 5 and ss.
[175] See Hober (2013) (n. 64), 311 and ss.
[176] A call for a broader approach may be found in Brown, (2011) (n. 139), 5-6.

As we have seen in the previous Paragraph, the strict application of the required objective identity (i.e. *petitum* and *causa petendi*) of two parallel arbitrations may involve the risk of claim splitting. The claimant might want to avoid "the *res judicata* effect of a prior award by seeking a different sort of relief or by raising new grounds in support of the same claim for relief".[177]

However, as noted by Schreuer and Reinisch,[178] "[i]nternational tribunals have also been aware of the risk that if they use too restrictive criteria of identity of "object" and "grounds, the doctrine of res judicata would rarely apply; if only an exactly identical relief sought (object) based on exactly the same legal arguments (grounds) in a second case would be precluded as a result of *res judicata*, then litigants could easily evade this by slightly modifying either the relief requested or the grounds relied upon. (…) This would be the case, for instance, if in a typical investment dispute, involving allegations of acts amounting to expropriation, the investor first sought *restitutio in integrum* as relief from the host State and in a later litigation changed the "object" of his case to requesting compensation". Indeed, the already mentioned policy arguments (i.e. finality, reliability of the system of justice and judicial economy) strongly militate against claim splitting.

There are several international decisions that apply a less strict approach to the requirement of identity of *petitum* and *causa petendi*.

Starting from the first of such requirements, it is, first of all, worth mentioning the *Delgado* and *Machado* cases.[179] In the former of them,[180] a claim for damages against Spain for seizure of property in Cuba was brought before a US-Spanish Claims Commission. An umpire denied such a request. The same dispute was then re-filed under the label of "claim for the value of the property seized". The defendant State asked to dismiss the claim on grounds of *res judicata*, arguing that "the test of identity [is] not whether the measure of relief demanded, but whether the injury that formed the foundation of the claim [is] the same in both cases". The umpire stated that the identity of object was to be analysed on the basis of "whether new tights are asserted in [the second] claim and then stated that "[e]ven if the claimant did not at the time of the former case ask indemnity of the commission of the value of the lands, the claimant had the same power to do so as other claimants in other cases where it has been done, and he can not have relief by a new claim before a new umpire". Similarly, in the *Machado* case,[181] in a first arbitration damages arising from the seizure of a house were claimed and, in a second arbitration, restoration of the house as well as

[177] Dodge, Hastings International & Comparative Law Review (2000), 366.
[178] (2002) (n. 153), 16.
[179] The factual description of these cases is based on what has been written by Schreuer, Reinisch (2002) (n. 153), 17-18.
[180] *Delgado* Case, in Moore, *International Arbitrations to which the United States Has Been a Party* 2196 (Spanish – US Claims Commission 1881).
[181] *Machado* Case, in Moore, *International Arbitrations to which the United States Has Been a Party* 2193 (Spanish – US Claims Commission 1881).

rent and damages for its detention were claimed. The Umpire dismissed the second claim on the basis of *res judicata*, stating that "the question whether this claim No. 129 is a new one, or the same as No. 3, does not depend upon whether the items included be the same in both claims, but that the test is whether both claims are founded on the same injury; that the only injury on which claim No. 129 is founded is the seizure of a certain house; that this same injury was alleged as one of the foundations for claim No. 3, and that in consequence claim No. 129, as being part of an old claim, can not be presented as a new claim under a new number".

Such an approach, aimed at defining the object of the claim functionally rather than analytically, has been fostered in common law legal systems[182] and, also, by civil law courts, such as the Italian *Corte di Cassazione*, according to which in cases of international conflicts of jurisdiction the rule of identity of *petitum* shall be seen from the perspective of the *identity of the practical results* which the claimant aim to reach and not from the limited perspective of the rule which is allegedly violated by the defendant.[183]

Moving to the requirement of the identity of *causa petendi*, such a requirement could be used in order to split claims, "for example, when a party seeks compensation for expropriation, in one case, under customary international law, in another, under a BIT, or where a party bases its claim, in one case, on a multilateral agreement, in another on a bilateral one or on two different BITS such as in the [*CME* and *Lauder*] case[s]. Technically speaking in such a situation the "cause", "ground" or "*causa petendi*" is non-identical which would seem to exclude application of the *res judicata* principle. It is evident, however, that this is a *highly artificial distinction* since in all cases mentioned the legal grounds for the compensation sought would be a rule of international law calling for compensation for expropriation contained in custom or expressed in a treaty. *It is far more appropriate to look at the specific rules and to examine how far they are substantively identical or different*. If it is the same rule reflected in different legal instruments this should not cast any doubt on the identity of the "cause" and thus of the subject matter of the disputes. Under modern international law, it is common that acts and omissions of States (or other international actors) may be subject to more than one treaty instrument, and therefore more than one dispute settlement mechanism. (...) Consequently, adoption of the position that parallel sets of litigation based on substantially identical provisions found in different instruments do not compete with each other, would tend

[182] Casad, Clermont (2001) (n. 98), 66. See also Scott, Harvard Law Review (1942), 24. A clear example of flexible approach to identity of *causae petendi* in common law is *Davis v. US Steel Supply*, 688 F.2d 166, 171 (3d Cir. 1982), in which the Court stated that *res judicata* requires "essential similarity [in] the underlying events giving rise to the various legal claims", even if the claims arise from different statutory or common law grounds.

[183] See Italian *Corte di Cassazione*, Plenary Session, 12208/2012. See also Corte di Cassazione 11532/2009 and 11185/2007. In this last decision, the Corte di Cassazione has stated that *all disputes arising from the same juridical relationship* are to be considered as having the same cause of action.

to promote multiplicity of proceedings, and might also result in conflicting decisions concerning the State's international rights and obligations" (emphasis added).[184]

Such an approach, that has been defined as "substantive-transactional",[185] has been applied by the International Tribunal for the Law of the Sea in the *Southern Bluefin Tuna* Case,[186] in which the Tribunal had to determine whether a dispute on the Japanese fishing practices was to be settled according to the Convention for the Conservation of Southern Bluefin Tune (CCSBT) or according to the United Nations Convention on the Law of the Sea (UNCLOS). The Tribunal held that "the Parties to this dispute (...) are the same Parties grappling not with two separate disputes but with what in fact is a single dispute arising under both Conventions. To find that, in this case, there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the CCHBT would be artificial". As a consequence " a dispute may be considered as a single identical dispute based on identical grounds where claims are based on two fairly different treaties as long as they all relate to the same factual background. *Argumento a minore*, this principle applies even more where two separate treaties contain essentially identical provisions".[187] This approach, which is accepted by several scholars,[188] is confirmed also by certain human rights organs, which have considered that the same *causa petendi* has to be *substantially* (and not formally) analysed on the basis of the *same events and facts* and not on the basis of the rule whose application is recalled by the claimant.[189] In all these cases of substantially identical claims, the second action has been declared *inadmissible* by the second Court or Tribunal, even if such a Court or Tribunal had a validly conferred jurisdiction.

All the above is very relevant in investment arbitration. Taking as a point of reference the *CME* and *Lauder* cases, it should be noted that in both these cases, arising from the same facts, the substantially same standards of protection have been invoked, in the latter case according to the Dutch-Czech BIT and in the former according to the US-Czech BIT. Schreuer and Reinisch have defined these BITs as virtually identical with regard to the standard of protection that they involve (such as the definition of investment, the MFN and national treatment clauses, the prohibition

[184] Schreuer, Reinisch (2002) (n. 153), 18-19.

[185] See Martinez-Fraga, Samra, Northwestern Journal of International Law and Business (2012), 438 and ss.

[186] *(Australia and New Zealand v. Japan)*, Award on Jurisdiction and Admissibility, 4 August 2000, 39 ILM 1359 (2000). See Virzo, *Il regolamento delle controversie nel diritto del mare: rapporti tra procedimenti* (2008), 243-244.

[187] See Schreuer, Reinisch (2002) (n. 153), 20.

[188] See, inter alia, Lowe (1999) (n. 132), 202.

[189] See *Glaziou v. France*, UN Human Rights Commission 452/1991, Decision of 18 July 1994, CCPR/C/51/D/452/1991, 6. See also *Trébutien v. France*, UN Human Rights Commission 421/1990, Decision of 18 July 1994, CCPR/C/51/D/421/1990, 7. In both cases the UN Human Rights Committee declared the complaints inadmissible because it found that the same issue had already been brought before the European Commission of Human Rights. See also UN Human Rights Commission, *Rogl v. Germany*, 808/1998, Decision of 25 October 2000, CCPR/C/70/D/808/1998. The same approach has been assumed by the European Commission of Human Rights, Application 16717/90, *Pauger v. Austria*, Decision on Admissibility, 9 January 1995.

of expropriations not executed according to international law standards, fair and equitable treatment and full protection and security) and, as a consequence, would have allowed an application of *res judicata* to bar the second claim.[190]

Indeed, the argument of the substantial equivalence of the standards of protection in the BITs is fostered by the considerations that such standards are usually drafted in a very generic way[191] and that, therefore, they have assumed an autonomous standing in international investment law[192] and are to be considered detached them from the wording of the single BIT. It is very difficult (i.e. almost impossible) to find an investment arbitration tribunal referring to "the fair and equitable treatment *as set forth in BIT X*" and not only to the "fair and equitable treatment of foreign investment". This is because, as it has been demonstrated,[193] we have today a general principle of international investment law, namely the "fair and equitable treatment of foreign investment", which is applied autonomously and usually regardless of the wording of the single BIT. The same could be said with regard to the other standards of treatment of foreign investments. Indeed, as stated by Schill[194] (and confirmed by Pellet),[195] "the core legal concepts of international investment law (…) only assume a more concretized meaning over time because of the interpretation investment treaty tribunals give to them in their decisions".

The above approach is confirmed by the approach that has been applied by the Court of Justice of the European Union, which, according to the provision of Art. 29 of EU Regulation 1215/2012, has had to ascertain whether formally different, but substantially identical, claims had the same *cause of action* (i.e. both *petitum* and *causa petendi*). In *Gubisch Maschinenfabrik v. Palumbo*,[196] the Court had to state whether two actions, one asking to enforce a contract and the second seeking the rescission of the same contract, were based on the same cause of action. The Court stated that "it is apparent that the action to enforce the contract is aimed at giving effect to it, and that the action for its rescission or discharge is aimed precisely at depriving it of any effect. The question whether the contract is binding therefore lies at the heart of the two actions. (…) In those procedural circumstances it must be held

[190] Schreuer and Reinisch (2002) (n. 153), 31-32.

[191] Let us take, as an example, the provisions of the already mentioned US-Czech BIT and Dutch-Czech BIT. The former, at Art. II, para 2(a), states that "[i]nvestment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorder treatment less than that required by international law". The latter, at Art. 3, states that "[e]ach Contracting Party shall ensure fair and equitable treatment to the investors of the other Contracting Party (…) each Contracting Party shall accord to such investments full security and protection (…) If (…) obligations under international law existing at present or established hereafter (…) contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement".

[192] See Palombino (2012) (n. 60), 58 and ss. See also Di Benedetto, (2013) (n.61), 17 and 36-37 and 103 and ss.

[193] Palombino (2012) (n. 60), 58 and ss.

[194] Schill, German Law Journal (2011), 1092.

[195] Pellet, ICSID Review FILJ (2013), 228.

[196] Case C-144/86, [1987] ECR 4861.

that the two actions have the same subject-matter, for that concept cannot be restricted so as to mean two claims which are entirely identical".[197] This has been further confirmed in the *Overseas* case, in which the CJEU stated that the rule on identity of subject matter shall be interpreted broadly, in order to encompass the broader possible spectrum of situations.[198] Such an approach has been base on the *éffét utile* doctrine, according to which a rule has to be interpreted in a way which allows to reach the scope for which such rule has been drafted.[199]

Similarly, in the US, a so-called "pragmatic standard" has been adopted and it is now usually required an identity of "transaction" rather than "cause of action".[200]

It seems, in conclusion, completely unreasonable to consider two claims as having different *causae petendi* only because the sources under which the same standard is invoked are formally different.[201]

3.6.4 *The requirement of identical parties: the effects of international awards on related third parties*

The traditional approach, according to which *res judicata* has effect only between the formal parties of a process, fails to keep into account the circumstance that a dispute, if seen in its integrity, is often more complex than how it is filed before a Tribunal. For example, if we consider a dispute involving a company (which is part of a group) and a State, it is strongly arguable that such a dispute actually involves, on the one side, the whole group – to be intended as a centre of interests – (and not only the single company who filed the claim) and, on the other side, the State. Furthermore, the traditional approach fails to consider that a legal relationship is often part of a bundle of legal relationships which influence each other; it is actually impossible to say that a legal relationship is not conditioned by the other legal relationships with which it is inextricably interrelated.[202] As stated by Rudolf von Jhering, the legal world behaves like the biological world: when a certain circumstance (e.g. an award) modifies a legal relationship, it (voluntarily or involuntarily) has effects on other legal relationships, i.e. on the rights of certain third parties, whose legal sphere will be directly or indirectly modified.[203] This very simple cause-effect relationship, which is dictated first of all by rules of logic, is essential to ensure legal certainty and coherence in legal relationships.

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[197] Paras. 16-17.

[198] *Overseas Union Insurance Ltd and Deutsche Ruck Uk Reinsurance Ltd and Pine Top Insurance Company Ltd v New Hampshire Insurance Company*, Case C-351/89 [1991] ECR I-03317. See also Salerno, *Giurisdizione ed efficacia delle decisioni straniere nel Regolamento (UE) n. 1215/2012 (rifusione)* (2015), 265 and ss.

[199] See Dumbrovsky, *Effet Utile* (2014), 93 and ss.

[200] See Volpino (2007) (n. 91), 119 and ss. and 173.

[201] This approach (only with regard to causa petendi) is accepted also by Wehland (2013) (n. 78), 192.

[202] Liebman, *Efficacia ed autorità della sentenza* (1983), 56 and ss.

[203] von Jhering, *Die ReflexWirkungen oder die Ruckwirkung rechtlicher Tatsachen auf dritte Personen*, in Liebman (1983) (n. 202), 61.

These assumptions should lead us to re-think the requirement of identity of the parties in investment arbitration. Indeed, the effects of the strict application of the triple identity test, that we have seen in the *CME* and *Lauder* decisions, is the perfect antithesis of what we have just said.

It is possible to identify two kind of interrelation between two legal relationships (i.e. a legal relationship and the rights of one or more third parties):[204] (i) one of the two relationships is subordinated to the other, i.e. the third party's (or parties') rights are subordinated to a legal relationship because they are part of (i.e. involved in) such relationship. Indeed, we could also say that the third party is an ostensible third party, which in fact is a party to the process.[205] Thus, in this case, the modification of the first relationship involves a necessary modification of the subordinated relationship(s);[206] and (ii) the two legal relationships are independent but concurrent/parallel, i.e. due to the very high degree of identification of the two relationships (which might be indeed called analogous), the satisfaction of one of them is equalized to the satisfaction of all of them. In this last case, if for example there is an award involving one of the concurrent/parallel relationships, such an award imposes that all the concurring legal relationships comply with it.[207]

In these cases, both as a matter of logic and as a consequence of the principle of legal certainty, a decision of the first relationship should absorb a discussion on the second (subordinated or concurrent) relationship. The logical and implied consequence of the above discussion is that a judicial decision (both issued by a national judge and by an international court or tribunal) may have certain effects, that have been called "the reflected effects of *res judicata*",[208] on certain third parties.[209]

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[204] Allorio (1935) (n. 157), 47 and ss. and 118 and ss.

[205] Carnelutti, Studi di diritto processuale (1925), 443.

[206] Allorio (1935) (n. 157), 68.

[207] Allorio (1935) (n. 157), 120.

[208] Carnelutti, (1956) (n. 157), 79; Allorio (1935) (n. 157), 121. It is worth noting that the Author has distinguished between the reflected effects of *res judicata*, arising when one of the two relationships is subordinated to the other, and the enlargement of *res judicata*, which arises when the two relationships are concurrent. In Allorio's opinion, while the reflected effects are *ipso facto* deducible by the law, the same cannot be said with regard to the enlargement of res judicata, which should be expressly authorized by the law. In the opinion of the present Author, such distinction is extremely technical and perhaps artificial for the aim of the present book, due to the lack of any legal reference to both of such effects in international law. Hence, in order to avoid any confusion, we will only talk about the reflected effects of *res judicata*. Several decisions of the Italian Corte di Cassazione have referred to the reflected effects (to be intended according to Allorio's definition) of *res judicata*. These decisions, which anyway represent a minority, have motivated this approach on the basis of the fact that every judicial decision shall be intended as an objective affirmation of the truth and therefore the legal effects a decision cannot be put in discussion by a subsequent decision. See decisions no. 2137/2014, 10989/2013, 19946/2004.

[209] The idea of the effects of *res judicata* on third parties was firstly developed by Betti, *Trattato dei limiti soggettivi della cosa giudicata in diritto romano*, 8 and ss., and has further been the object of a huge discussion between Italian scholars. See inter alia, Luiso, *Principio del contraddittorio ed efficacia della sentenza verso terzi* (1981), 63 and ss., Proto Pisani, *Opposizione di terzo ordinaria* (1965), 35 and ss. There have been several points of discussion. In particular, certain Authors have distinguished between the effects of the decision and the effects of the *res judicata*, while others have said that the effects on third parties are only *de facto* and not *de jure*. See, in general terms, Chizzini, *L'intervento adesivo, vol. 2*

The common law world refers to such third parties as "privies", i.e. "people who were non parties to an action but who in certain circumstances are nevertheless subject to generally the same rules of *res judicata* as are the former parties, the basis for this treatment being some sort of representational relationship between a former party and the non party".[210] A distinction is usually made between substantive privity and procedural privity. In the former case, "privies include persons who have or had any one of a wide variety of substantive legal relationships with a party, when that relationship in a sense created a representative role";[211] in order to address the existence of substantive privity, i.e. an identity of interests, a factual and concrete determination is required.[212] Procedural privity regards "persons who were actually represented in the litigation by a party, thus including beneficiaries represented by a trustee".[213] In this book we will refer only to substantive privity.

What we have just stated is perfectly compliant with the function of the process: if the process is the instrument to settle a dispute and to stabilize one or more aspect(s) of a legal relationship (to be intended in its integrity), the effects of a judicial decision shall necessarily have a scope of application which is broader than the single process and extend to the entire legal relationship, i.e. referring also to privies.[214] Such third party effects been already (partially) confirmed with regard to ICJ decisions, which have been considered by some Authors as having effects on third parties.[215]

It is here submitted that arbitral awards may have effects on privies also in international investment arbitration, regardless of the principle of party autonomy:

(1991), 581 and ss., and Zucconi Galli Fonseca, *La convenzione arbitrale rispetto ai terzi* (2004), 686 and ss. See *contra* the above mentioned approach Balena, Il giusto processo civile (2009), 35 and ss., Cavallini, Rivista di diritto processuale (2007), 1221 and ss. The German position regarding the extension of *res judicata* on third parties has been analysed by Trocker, Rivista di diritto processuale (1989), 36 and ss.

[210] Casad, Clermont (2001) (n. 98), 149. The term has been also defined by Vestal, Iowa Law Review (1968), 2, saying that "there is (...) a long history of decisions where a plaintiff, not a party to one suit, has been held precluded in an action against a party to the first suit. Very early in the development of res judicata it was held that a plaintiff, under some circumstances, would not be allowed to recover because of an earlier suit in which another plaintiff was defeated. The courts, in reaching this conclusion, relied on a significant relationship between the losing plaintiff in Suit I and the plaintiff attempting recovery in Suit II. Privity was the label attached to this relationship".

[211] Casad, Clermont (2001) (n. 98), 153.

[212] See *Battle v. Cherry*, 339 F. Supp. 186 (N.D. Ga. 1972), and *Crane Boom Life Guard Co. v. Saf-T-Boom Corp.*, 362 F.2d 317 (8th Cir. 1966). See also Vestal, Southern California Law Review (1974), 361, Morris, California Law Review (1968), 1101.

[213] Casad, Clermont (2001) (n. 98), 159.

[214] Carnelutti, (1956) (n. 157), 79.

[215] See Forlati, Rivista di diritto internazionale (2002), 105 and ss. The Author also recalls what has been stated by Nigeria in the Cameroon v. Nigeria Case, ICJ Rep 1998, 323, par. 113: "by virtue of article 59 of the Statute, third States are not formally bound by decisions of the Court; (...) nevertheless (...) Article 59 of the Statute gives insufficient protection, since in specific situations, in spite of that Article, decisions of the Court may have clear and direct legal and practical effects on third States". See also Forlati, *The International Court of Justice: An Arbitral Tribunal or a Judicial Body* (2014), 200-201, Palchetti, Max Planck UNYB (2002), 140, Bonafè (2014) (n. 158), 15 and 59-60, and Al-Qahtani, The Law and Practice of International Courts and Tribunals (2003), 273 and ss.

the effects of an award are *de jure* and *de facto* extensible to all subordinated and concurrent relationships. This idea has been already supported in the case law[216] and by some Authors, who have noted that, once the award is issued, all the other legal relationship which in some way depend from such award shall comply with it;[217] it has been said that, if such an approach is not followed, an arbitral award would be equalized to a legal opinion[218] or to a contract.[219] Indeed, it is undeniable that, from the perspective of its function, arbitration is aimed at settling a dispute (as a whole) and to giving stability to legal relationships which it decides. Arbitration is therefore (and obviously) at the disposal of the parties, but the effects of the award are to be necessarily intended as going beyond the intention of the parties: otherwise arbitration could be also intentionally used by the parties to abuse of their procedural rights, as it happened in the *CME* and *Lauder* cases.

Indeed, such an approach, that Schreuer and Reinisch have defined "economic approach",[220] has found several applications in international law, EU law and (even if only indirectly) in investment arbitration.[221]

With regard to international law, it is worth mentioning the *Martin v. Spain* case,[222] in which the European Commission of Human Rights has supported the idea that "a claim by 23 Union activists, presented in their personal capacity, which was identical in its object and scope to a previous claim brought before the ILO Committee on Freedom of Association by the trade organization to which the applicants belonged, was precluded" by virtue of Art. 35(2)(b) of the ECHR. Another statement providing for third parties effect of *res judicata* can be found in the ICJ *Lighthouses* case, where – in a case regarding the interpretation of a multilateral treaty – the

[216] See French Cour de Cassation, *Prodim v. Distribution Casino France*, 23 January 2007, in Revue de l'Arbitrage (2007), 135. Other cases are mentioned in Gunes, Transnational Dispute Management (2015), 18, footnote 174.

[217] Ricci, Rivista di diritto processuale (1989), 666. *Id.*, Rivista trimestrale di diritto e procedura civile (2003), 517-518. Such an approach has been also approved by Ruffini, Rivista dell'arbitrato (1995), 648. See also Fazzalari, Rivista dell'arbitrato (1995), 619-620, See Zucconi Galli Fonseca (2004) (n. 209), 681 and ss. The issue has been generally analysed by Lotbiniére McDougall, Transnational Dispute Management (2012), 1 and ss.

[218] Ricci, Rivista di diritto processuale (1989) (n. 217), 669.

[219] The equalization of arbitral awards to contract is not new in scholars' opinion. See Schell, UCLA Law Review (1988), 662 and ss., Motomura, Tulane Law Review (1988), 80 and ss. See also *Vandenberg v. Superior Court*, 982 P.2d 229 (Cal. 1999). Such a decision has been criticized by Cromwell, Journal of Dispute Resolution (2000), 425 and ss.

[220] Schreuer, Reinisch (2002) (n. 153), 10 and ss. Many of the cases reported below have been read by the present author in such legal opinion.

[221] With regard to international commercial arbitration, we have already mentioned, in Chapter 2, the so-called "group of companies doctrine", according to which if a number of companies represent a single economic unit, they can be considered as all bound by the jurisdiction of the arbitral tribunal even if only one of them has signed the arbitration clause. According to Schreuer and Reinisch (2002) (n. 153), 10, such a doctrine could be seen also from the perspective of the arbitral award: in presence of a group of companies, an award regarding only one of them extends also to the other companies of the group.

[222] European Commission of Human Rights, Application 16358/90, Decision on Admissibility, 12 October 1992.

judges stated that "[t]he res judicata extends (...) beyond the strict limits of the case decided".[223]

In EU law, the opinion that "the fact that a subsidiary has a separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company" has firstly been pointed out in the *Dyestuffs* Case,[224] in which it was said that, if the subsidiary "does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company", such a parent company can be considered involved in the transaction and, therefore, bound by the subsequent award. The same approach has been assumed in the *Continental Can* case.[225]

Finally, with regard to investment arbitration, as we have already observed in Chapter 1, Paragraph [-], arbitral tribunals have several times extended their jurisdiction to other companies of the same group, by stating that this was necessary in order to protect the investor. This is clearly represented by one of the very first ICSID decisions, the *Amco v. Indonesia* Decision on Jurisdiction,[226] in which the Tribunal stated that "the foreign investor was Amco Asia [i.e. the parent company]: PT Amco [i.e. the subsidiary through which the investment was made] was but an instrumentality through which Amco Asia [realized] the investment. *Now, the goal of the arbitration clause was to protect the investor. How could such protection be ensured, if Amco Asia would be refused the benefit of the clause?*" (emphasis added).

It is not understandable why a similar approach has not been assumed with regard to *res judicata*. Indeed, it could be said that the goal of investment arbitration is to ensure that certain standards of protection are granted to investors. Such standards can be violated only once by the same facts. How could abuses be avoided if the principle of *res judicata* is not interpreted in the same broad way in which tribunals have interpreted arbitration clauses contained in BITs?

As already said, the main reason which should allegedly justify such a formal approach is the respect of the principle of due process. However, it is submitted that the respect/violation of the principle of due process shall be ascertained on a case-by-case basis and it is not possible to exclude *a priori* the possibility of an extension of *res judicata* on third parties. Indeed, if it is ascertained that a party, to be intended as a single centre of interest, has had the full and fair opportunity to present its case, we cannot see why such a party should have the possibility to do so a second time just by changing the label of the legal entity who files the claim.[227] This is the approach taken

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[223] *Lighthouses (France v. Greece)*, 23 ILR (1956), 86-87. See Al-Qahtani, (2003) (n. 215), 273 and ss.

[224] Case C-48/69, *ICI v. Commission (Dyestuffs Case)* [1972] ECR 619, par. 133.

[225] Case C-6/72, *Europemballage and Continental Can v. Commission* [1973] ECR 215, par. 15.

[226] ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, p. 400.

[227] See Casad, Clermont (2001) (n. 98), 150, stating that "due process allows binding many more non-parties than most persons assume. After all, the loose demands of due process explain how the legislature and administrators can bind people and their property, when those people have received representation only in the loosest sense. Analogously, a court's judgment could bind, among others, all similarly situated persons whose interests received adequate representation, binding them not only

by the Restatement 2nd of Judgments, par. 39 of which states that "[a] person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party", provided that he had the full and fair opportunity to present its claim.[228] Hence, it is possible to say that it is true that each substantive party shall have the full and fair opportunity to present its case, but the concept of "party" shall be intended in the substantial sense and, therefore, the respect of due process shall be ascertained *in concreto* and not only *in abstracto*.[229]

This approach has been also confirmed by the US Supreme Court, which stated that the controlling question is whether it can be said that "the procedure adopted fairly insures the protection of the interests of absent parties who are to be bound by it".[230] In conclusion, if there is a strict relationship between one of the parties and a third party so that such a third party (privy) may be considered represented during the process, the third party will be precluded to newly file the same claim and, in the event it should nevertheless file it, such a claim shall be declared inadmissible.[231] It would, indeed, be "unjust to permit one who has had his day in court to reopen identical issues by merely switching adversaries".[232]

Such an approach, supported by several authoritative scholars,[233] would have lead to consider as identical parties Mr. Lauder and CME in the *Lauder* and *CME* cases, considering that all the decisions regarding CME were taken by its controlling and ultimate shareholder, Mr. Lauder.

3.6.5 *The same legal order (in brief)*

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through the flexible doctrine of *stare decisis* as it does but also through the strictures of *res judicata* as it could".

[228] The idea that the "community of interest" is the necessary requirement in order to extend *res judicata* on third parties has been expressed also by Brekoulakis (2005) (n. 167), 11. According to this Author, when the rights of third parties are inextricably intertwined with the rights of one of the real party, the third party is in fact a false third party which will be affected by the arbitral award. Brekoulakis talks about "arbitral effect". Such an approach has been strongly approved by Gunes (2015) (n. 216), 18 and ss.

[229] An even more extreme position against due process has been taken by Bone, New York University Law Review (1992), 195 and ss., according to whom "the day in the court is often invoked in talismanic fashion to oppose non-party preclusion without any explanation of why the values underlying the ideal support the result". According to Bone, if a third party is virtually represented in the process (even if not in privity with one of the parties), such a third party is precluded to start a new claim on the same dispute. However, the theory of virtual representation has been rejected in 2008 by the Supreme Court in *Taylor v. Sturgell*, 553 US 880.

[230] *Hansberry v. Lee*, 311 US 32, 42 (1940). See also Vestal, Michigan Law Review (1963), 49-51.

[231] See *McFadden v. McFadden*, 239 Ore. 76, 396 P.2d 202 (1964), 204, where the Court stated that it was "satisfied that the first litigation provided *substantial protection of the rights and interests of the person sought to be bound*" (emphasis added).

[232] *Bernhard v. Bank of America Nat.Trust & Savings Assn.*, 122 P. 2d 892 (S.C. Cal. 1942), 894. See also Watson (1990) (n. 162), 629-630.

[233] See, *inter alia*, Reinisch (2004) (n. 64), 44 and ss., and Shany, ssrn.com (2007), 13-14, who expressly stated that the privity of interest test is more suitable to regulate cases of jurisdictional competition between international arbitration tribunals. See also Spoorenberg, Vinuales, The Law and Practice of International Courts and Tribunals (2009), 99, Radicati di Brozolo, ssrn.com (2011), 10.

As already clarified, this book does not deal with cases of parallel proceedings between national courts and international arbitration tribunals, but only with parallel proceedings involving two arbitration panels. For this reason, the identity of legal order, which is often posed as a requirement for the application of *res judicata*, should not be dealt with in this book, in light of the fact that it is assumed that two investment arbitration tribunals are part of the same legal order, namely international law.

However, the Award in the *Helnan v. Egypt* case[234] requires us to deal with such a question, even if very briefly. In this case, prior to refer to ICSID arbitration, the parties litigated before an arbitral tribunal sitting in Cairo. After the Cairo arbitration was concluded and the award enforced in Cairo (according to the 1958 New York Convention), Helnan started another claim before ICSID. Egypt objected the admissibility of the claim stating that the Cairo award was *res judicata* with regard to all the matters that have been already decided. The ICSID Tribunal recognized the *res judicata* force of the Cairo award, but also stated that the *res judicata* effect could only extend within the legal order where the award was enforced, i.e. the Egyptian legal system. Hence, the Tribunal refused to recognize, in the framework of international law, the *res judicata* effect of the Cairo award. The Tribunal reasoning was *not* based on the circumstance that "an international tribunal is considered to be hierarchically superior to any national court or private arbitral tribunal"[235] but on the fact that "although the subject matter may be substantially the same, the causes of action are different".[236] Indeed, even if the Cairo award had *res judicata* within the legal order where it belongs, it cannot have such an effect in another legal order, namely international law. Hence, the ICSID Tribunal considered itself bound by the Cairo Award with regard to the matter concerning Egyptian Law, but not with regard the issues of international law.[237]

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[234] ICSID Case No. ARB/05/19, Award, 3 July 2008, paras. 121 and ss.

[235] ILA, *Final Report on Lis Pendens and Arbitration*, Toronto Conference, 2006, 13. This idea is also fostered by Wehland (2013) (n. 78), 136-137.

[236] *Helnan* Award, par. 124.

[237] A similar approach has been approved also by Cremades in his dissenting opinion in *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, Dissenting Opinion of Bernardo Cremades, 16 August 2007, 26 and in *GAMI Investments v. Mexico*, UNCITRAL, Award, 15 November 2004, par. 41. This is not the only approach followed by Tribunals in analysing the relationship between national and international proceedings. As noted by Wehland (2013) (n. 78), 148 and ss., there are several international Tribunals which have considered national decisions as mere facts and have therefore fully reviewed the national decisions, such as *Empresas Lucchetti SA and Lucchetti Peru SA v. The Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, 5 September 2007, par. 87, and *EDF International SA, Saur International SA and Leòn Participationes Argentinas SA v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, par. 1131. Finally, in other cases, the review of domestic decisions by international Tribunals has been considered to be limited to circumstance in which a denial of justice realized. See *Robert Azinan, Kenneth Davitian & Ellen Baca v. The United Mexican State*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, paras. 4-24 and 96-97 and Mondev International Ltd v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, par. 126.

The award poses us two questions, particularly relevant for the case of parallel contract and treaty claims: (i) is it correct to consider that there is no hierarchy between national courts (and by non-ICSID arbitration panels) and international tribunals? And (ii) is it correct to state that there is no interrelation between a national decision (or an arbitration award to be enforced according to the New York Convention) and an investment arbitration decision?

With regard to the first question, it is here submitted that the approach assumed by the *Helnan* Tribunal is the correct one. Indeed, in lack of any normative reference, the present author shares the view of who stated that a national and an international proceeding are, in principle, *indifferent* to each other.[238] If there is a validly conferred jurisdiction they could indeed proceed in parallel: their exercise of jurisdiction is not precluded. However, it is worth noting that it could well happen that, *by way of admissibility*, the arbitral tribunal or the national court considers itself precluded from hearing a question that has been already decided by, respectively, a national court (or commercial arbitration panel) or an international tribunal.

Concerning the second question, i.e. whether a national decision can(not) have any international influence and *vice versa*, the present Author shares the view expressed by Yuval Shany. [239] This Author starts from the assumption of the rejection of what he calls the disintegrationist approach, according to which parallel claims arising in national and international legal systems cannot overlap, and looks for an integrationist approach, which seeks to harmonize overlapping norms and procedures and to effectively regulate related claims. In light of this approach, Shany militates in favour of a broad construction of the requirements for *res judicata* and in favour of the possible international *res judicata* effects of national decisions (or arbitral decision enforced according to the New York Convention).[240]

From this perspective, and also in light of the hybrid nature of investment arbitration (which involves both elements of international and national law),[241] it is arguable that – prior to say that a national decision (or an award issued by a another arbitration panel) may not preclude an action before an ICSID tribunal – a tribunal should be verified whether, *in concreto*, the parties, the *petitum* and the *causa petendi* substantially coincide. If there is such a substantial coincidence, it is arguable that the second judge could consider the second claim precluded by way of a declaration of inadmissibility of the same claim.[242]

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[238] See Palombino, *Gli effetti della sentenza internazionale nei giudizi interni* (2008), 20. However, the same Author, has demonstrated, at 151 and ss., that, *in concreto*, the international decision may influence in various ways the national proceedings.

[239] Shany (2006) (n. 73), 10 and ss., *id.* (2007) (n. 233), 16 and ss.

[240] See Palombino (2008) (n. 238), 151 and ss., who has demonstrated how and why an international decision could influence a national judge.

[241] See Douglas (2003) (n. 55), 151 and ss.

[242] See Dodge (2000) (n. 177), 359. This Author bases his opinion that national decisions (or arbitration awards to be enforced according to the New York Convention) do not have *res judicata* effects in international proceedings on the circumstance that otherwise the rule of prior exhaustion of local remedies would loose its efficacy. It could be easily answered that the prior exhaustion of local

The above opinion is confirmed by another circumstance. As already reported, the *Helnan* Tribunal did not recognize the effects of the Cairo award on the basis of the fact that, having been such an award enforced according to the provisions of the 1958 New York Convention, it was to be considered as part of the Egyptian legal order. If such an approach is confirmed, this would lead to the absurd result that even a non-ICSID investment decision (for example an UNCITRAL decision), to be enforced according to the New York Convention, could be bypassed by a subsequent ICSID decision just because, having been enforced according to the New York Convention, it has to be considered as part of a national legal order. This is what happened in *Bywater Gauff v. Tanzania*,[243] where a contract claim was brought before an UNCITRAL Tribunal and, then, a treaty claim before the ICSID Tribunal. The ICSID Tribunal refused to decline jurisdiction stating that it was not influenced by the contract claim, *but nevertheless stated that the interpretation and application of the investment contract represented an essential element in the perspective of its finding of BIT breaches*. This position militates against legal certainty and coherence and shall therefore be fully refused.[244]

The proposed approach finds support in the *RSM* and *Grynberg* ICSID Award,[245] which will be deeply examined in the following Paragraph, where the Tribunal considered that a previous decision by another investment Tribunal of certain contract claims may be evaluated as a collateral estoppel in a subsequent treaty arbitration, provided that there is substantial identity between the two claims. The Tribunal expressly rejected[246] the Claimant's assertion that "breach of contract issues do[es] not dispose of BIT issues because a party may be in compliance with an international contract but still run afoul of a BIT".[247]

The only exception to what stated above is the case in which the same treaty text provides for the prior exhaustion of the local remedies. In this case, it is the same treaty that allows the parties to bring a claim, already discussed before national courts, before an international tribunal, therefore excluding *a priori* the *res judicata* effect of the national decision.

3.7 *Collateral estoppel (issue preclusion)*

3.7.1 *Development and requirements of collateral estoppel: A broader concept of privity and the necessity to respect due process*

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remedies can be interpreted as an exception to the general rule which envisages the possibility of preclusion in case the parties, the object and the legal grounds are substantially the same.

[243] ICSID Case No. ARB/05/22, Award, 24 July 2008.

[244] The *Bywater Gauff* decision has been, indeed, criticized by Savarese, www.federalismi.it (2009), 8 and 12.

[245] *Rachel S Grynberg, Stephen M Grynberg, Miriam Z Grynberg, and RSM Production Corporation v Grenada*, ICSID Case No ARB/10/6, 10 December 2010.

[246] See par. 7.1.3 of the Award.

[247] See par. 5.3.3 of the Award.

Collateral estoppel is a doctrine developed and applied in the common law world,[248] whose goals are the same of *res judicata*.[249] In 1897, the US Supreme Court described issue preclusion in this way: "a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction (...) cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them".[250]

This very old definition is still very actual and responds to the already mentioned public function of any process, i.e. to definitely settle disputes (or, in this case, issues), regardless of the formalities and labels of every single case. Indeed, regardless of the cause of action of the two succeeding proceedings, "the doctrine of collateral estoppel precludes a party or its privy from relitigating any factual [and legal] issue that has been "actually litigated" in a prior action and that have been necessary to the resolution of that action. (...) The estopped party, however, may oppose preclusion if it was not given a "full and fair" opportunity to litigate the particular issue in the original action".[251]

The following are the requirements for the application of collateral estoppel: (i) the issue whose discussion is precluded shall be *the same* in the two processes; (ii) such an issue shall have been *actually litigated*; (iii) such issue has been *essential* to the resolution of the prior case; (iv) the *parties* shall be the same or, at least, in privity with the parties of the prior judgment (even if, as we will see below, this requirement has been questioned); and (v) the precluded party shall have had a *full and fair opportunity* to litigate the precluded issue.

Prior to move to the analysis of such requirements, three preliminary remarks are necessary.

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[248] Both in England and in the US. See Gunes (2015) (n. 216), 4-5.

[249] For an historical analysis of collateral estoppel see Millar, Illinois Law Review of Northwestern University (1940), 41 and ss. With regard to the cost saving aspects of collateral estoppel see also Spurr, International Review of Law and Economics (1991), 47 and ss.

[250] *S. Pac. R.R. v. United States*, 168 U.S. 1, 48-49 (1897). See Nesin, New York University Law Review (2001), 879.

[251] Bain, Journal of Dispute Resolution (1990), 190. The applicability of collateral estoppel to both issues of fact and issues of law has been explained by Vestal, Washington University Law Quarterly (1965), 171 and ss.

Firstly, it is worth noting that the applicability of collateral estoppel is to be based on a flexible approach and is the result of a balancing test between, on the one side, the public interests of finality, judicial economy, legal certainty and coherence and, on the other side, the private (and, to a certain extent, public) interest to ensure that the precluded party has had the full and fair opportunity to present its case. As a consequence, the applicability of collateral estoppel is something that shall be ascertained *in concreto* and keeping into consideration the factual framework of any dispute.

Secondly, it is worth noting that – while, initially, collateral estoppel has been considered applicable only when the entire claim including the precluded issue was finally decided – in a second phase and with the aim of saving time and costs, judges (in particular in the US) have adopted a more pragmatic approach and have consented the application of collateral estoppel even if the issue was finally decided but the entire claim was still pending. The only requirement for such an application is that the issue has been duly discussed in the first process and the second judge considers plausible that the resolution of such an issue is definitive and will not be changed in the final decision.[252] This approach has been endorsed in the second *Restatement of Judgments*, at par. 13.

Thirdly, notwithstanding some contrary voices in the past,[253] it is today broadly accepted that the collateral estoppel effect may derive also by issues decided by an arbitration panel.[254] Therefore, both a second international tribunal and a national court should be bound by previous arbitral decisions on issues provided that the requirements for the application of collateral estoppel set forth above are met.[255]

Moving to the analysis of the first requirement, i.e. *identity of issues*, it is worth noting that "[w]hether a matter to be presented in subsequent action constitutes the same issue as a matter presented in the initial action is a pragmatic question, turning on such factors as the degree of overlap between the factual evidence and legal

[252] Volpino (2007) (n. 91), 95-99. In this regard see *Lummus Co. v. Commonwealth Oil Ref. Co.*, 297 F.2d (2d Cir. 1961), 80 and ss.

[253] Sanders, Law and Policy of International Business (1992), 118-119, Motomura (1988) (n. 219), 32 and ss.

[254] In general terms see Gunes (2015) (n. 216), 21 and ss. and Bernal-Fandiño, Rojas-Quiñones, Revista Colombiana de Derecho Internacional (2010), 455 and ss. Concerning the US see Hulbert, International Tax and Business Lawyer (1989), 159 and ss., Cromwell (2000) (n. 219), 425 and ss., Collings, Los Angeles Lawyer (2005), 20 and ss., Westerlind, Fox, Mealey's Litigation Report (2010), 1 and ss. With regard to the UK see *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1965] 1 Lloyd's Rep 13 (CA), where Lord Diplock said "[i]ssue estoppel applies to arbitration as it does to litigation. The parties, having chosen the tribunal to determine the disputes between them as to their legal rights and duties, are bound by the determination of that tribunal on any issue which is relevant to the decision of any dispute referred to that tribunal." See also *Associated Electric and Gas Insurance Services Ltd (Aegis) v European Reinsurance Co. of Zurich (European Re)* [2002] UKPC 1129, [2003] 1 WLR 1041 (on appeal from the Court of Bermuda). Finally see International Law Association, *Interim Report: "Res Judicata" and Arbitration*, Berlin Conference, 2004, 7 and ss.

[255] The collateral estoppel effect has been also recognized by English Courts and with regard to foreign decisions. A recent decision applying such an approach is *Yukos Capital S.a.r.L. v. OJSC Rosneft Oil Company*, [2011] EWHC 1461 (Comm). See also Casad, Iowa Law Review (1984), 53 and ss.

argument advanced with respect to the matter in the initial action and that to be advanced with respect to the matter in the subsequent action".[256] It is, therefore, a task of the judge to understand whether there is *substantial identity* of the litigated issues, regardless of the label of the various claims.

With regard to the requirement of the prior *actual litigation* of the precluded issue, what is essential is that "the parties to be bound and benefited must have submitted the issue for decision, and the adjudicator must have decided the issue. Thus, issue preclusion does not result from a default, admission, or stipulation".[257] Furthermore, contrary to *res judicata*, collateral estoppel does not apply to "issues which might have been raised in the prior litigation, but were not".[258]

Moving to the requirement that the issue has been *essential for the prior judgment*, it shall be determined *in concreto* whether the determination of that issue has been necessary to reaching the court ultimate result. As explained by Casad and Clermont, "[t]he idea behind this requirement is that such a determination in the nature of dicta may not have been unavailable or unmotivated".[259] However, in this regard it is worth noting that the application of this requirement will be attenuate in cases of application of collateral estoppel prior to the issuance of the final decision, due to the fact that sometimes it could be difficult to understand whether the decided issue will be essential for the final decision. Indeed, the second judge will be only in the possibility to make a prognostic evaluation of whether the decided issue will be essential for the final decision in the prior judgment.

Concerning the fourth requirement, i.e. *identity of the parties*, "collateral estoppel (…) requires that the parties to the second action be the same as, or in privity with, the parties to the first action. This requirement is generally denominated as the rule of mutuality".[260] The concept of privity and the related requirement of commonality of interests, to be ascertained *in concreto*, have been already examined in Paragraph 3.6 above.[261] It is here worth noting that, with regard to the applicability of collateral estoppel, "courts have often manipulated the notion of privity to permit non-parties to preclude the relitigation of issues that earlier law suits have determined. At times the privity concept has assumed wondrous attributes of flexibility as courts attempt to apply their subjective sense of fairness to situations that do not fit neatly within the traditional requirement for [issue] preclusion".[262] This

[256] Casad, Clermont (2001) (n. 98), 116.
[257] *Id.*, 123-124.
[258] Polasky (1954) (n. 106), 222.
[259] Casad, Clermont (2001) (n. 98), 127.
[260] Cunningham, Missouri Law Review (1976), 521-522. See also Moore, Currier, Tulane Law Review (1961), 301 and ss., Semmel, Columbia Law Review (1968), 1457 and ss., See Morris, California Law Review (1988), 1105, *The Mutuality Requirement in Res Judicata and Estoppel by Record*, Note in 2 Washington and Lee Law Review 233 (1941).
[261] See Vestal (1974) (n. 212), 361-362, Semmel (1968) (n. 260), 1460. See also *Crockett v. Harrison*, 26 Ill. App. 2d 9, 13, 167 N.E.2d 428, 430 (1960), where it has been stated that "[u]nder the term parties in this connection, the law includes all who are directly interested in the subject matter, and had a right to make a defense or to control the proceedings and to appeal from the judgment".
[262] Watson (1990) (n. 162), 627-628.

tendency has lead some US courts (not UK courts) to abandon the rule of mutuality; the reason for such an abandonment has been that "[t]here does not appear to be a constitutional prohibition against allowing a prior judgment to be subsequently pleaded by a non-party to the initial action" (so-called *Bernhard doctrine*).[263]

However, the abandonment of mutuality has been criticized by Prof. Currie, as well as by Casad and Clermont,[264] due to the necessity to respect the requirement of due process, i.e. the possibility for each party to have a full and fair opportunity to present its case.[265] Indeed, the respect of *due process* is the last requirement in order to apply collateral estoppel. As we have seen above with regard to *res judicata*, the respect of due process is something that shall be ascertained on a case-by-case basis and cannot be described *a priori*. It is, indeed, necessary to ascertain that such a party (or privy, or, if one should accept the abandonment of mutuality, stranger) has had concretely the opportunity to present its claim.[266] It is, in conclusion, impossible to take *in abstracto* a position on the correctness of the Bernhard doctrine. Even if it could seem very difficult that a stranger's interests are fully represented in a judgment (and, therefore, due process is respected) between two other parties, the prevalent approach in the US seems to require an ascertainment of the concrete representation of a non-party in the previous judgment.[267]

Having introduced the main features and requirements of the doctrine of collateral estoppel, it is now necessary to ascertain whether and how such a doctrine applies in international law.

3.7.2 *Collateral estoppel in international investment law: The RSM and Apotex cases, the call for a more flexible approach and the source of judges' power to apply such an approach*

There is very few literature[268] regarding the applicability of collateral estoppel in international investment law and, more generally, in international law. However, there are some international authorities that could be taken into account as a starting

[263] Cunningham (1976) (n. 260), 527. See *Bernhard v. Bank of America Nat.Trust & Savings Assn.*, 122 P. 2d 892 (S.C. Cal. 1942), 894-895, in which the Court allowed a non-party plaintiff to benefit of the results of a prior judgment in favour of another plaintiff (offensive use of collateral estoppel). In *Blonder-Tongue Labs. Inc. v. University of Illinois Foundation* 402 U.S. 313, collateral estoppel has been used by a non-party defendant in order to preclude an action by a plaintiff who already did not succeed in the same action against another defendant who was in the same substantive and factual situation of the second defendant. In this regard, Cunningham, at 530, stated that "[a]bsent extraordinary circumstances, there is little reason to allow the plaintiff the opportunity to pick and choose among the possible defendants and sue each separately in hopes of eventually finding a kindly or confused jury". See also Waggoner, The Review of Litigation (1993), 392 and ss., Ellis, Indiana Law Review (1980), 563 and ss.

[264] Casad, Clermont (2001) (n. 98), 184.

[265] Currie, Stanford Law Review (1957), 281 and ss.

[266] *Hansberry v. Lee*, 311 US 32, 42 (1940). See also Vestal, Michigan Law Review (1963), 49-51.

[267] Casad, Clermont (2001) (n. 98), 184.

[268] See Kotuby, Egerton-Vernon, ICSID Review FILJ (2015), 486 and ss., Bowett, British Yearbook of International Law (1957), 178-189, Andritoi, Acta Universitatis Danubius (2011), 47 and ss.

point in order to try to understand whether and how collateral estoppel may be useful in order to prevent parallel proceedings in investment arbitration.

The first case that, even if without mentioning it, applied collateral estoppel is the already mentioned *Delgado* case.[269] In this case, as already stated, there have been two subsequent processes regarding the seizure of a property, one for damages and another for the value of the property. As noted by Bowett,[270] while applying *res judicata*, the Umpire of the second arbitration allowed to proceed a part of the second claim which was not brought before the first Umpire. Such a "partial *res judicata*" has been considered by the same Bowett as "scarcely reconcilable wit the complete preclusion of the *res judicata* doctrine" and is, indeed, an application of collateral estoppel.[271]

A reference to collateral estoppel in international law may be found in the *Company General of the Orinoco Case*[272], in which the Arbitral Tribunal expressly quoted the United States Supreme Court *dictum* in *Southern Pacific Railroad Co. v. United States*,[273] according to which "[t]he general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies, and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified".

The same *dictum* has been then reaffirmed by a Tribunal chaired by Prof. Higgins in the *Amco II*[274] case.

Another, and probably the most important, case where collateral estoppel has been applied in international law is *S Grynberg, Stephen M Grynberg, Miriam Z Grynberg, and RSM Production Corporation v Grenada*.[275] This case regarded an investment treaty arbitration (under the USA-Grenada BIT) that was commenced before ICSID by the company RSM Production and its three shareholders, who collectively, in equal shares, owned 100% of the outstanding capital of RSM (we will tall, in this regard, of the "treaty arbitration"). However, the treaty breaches claimed in this arbitration arose from the breach of an investment contract, signed by RSM and Grenada, which contained itself an ICSID arbitration clause. Such a contract had

[269] *Delgado* Case, in Moore, *International Arbitrations to which the United States Has Been a Party* 2196 (Spanish – US Claims Commission 1881).
[270] Bowett (1957) (n. 268), 179.
[271] The same Bowett (1957) (n. 268), 179, refers to the *Haya de la Torre (Colombia v. Peru)* case, ICJ Rep, 1951, 71, in which the court expressly stated that a certain issue (i.e. whether or not there was a legal obligation to surrender a refugee) was not decided in the previous *Asylum (Colombia v. Peru)* case, ICJ Rep 1950, 266, and therefore the discussion of *that* issue was not precluded.
[272] Award of 31 July 1905, available at http://legal.un.org/riaa/cases/vol_X/184-285.pdf.
[273] 168 U.S. 1, 48-49 (1897).
[274] *Amco Asia Corporation v. Republic of Indonesia* (ICSID Case No. ARB/81/1(, Resubmitted Case, Decision on Jurisdiction, 10 May 1988, par. 30. See also Gunes (2015) (n. 216), 13.
[275] ICSID Case No ARB/10/6, 10 December 2010.

already given rise to an investment arbitration before the same ICSID, *RSM Production Corporation v. Grenada*,[276] this time only for claims arising from the contract (this arbitration will be referred to as the "contract arbitration"). In the contract arbitration a final award was rendered on 13 March 2009 in favour of Grenada, stating that Grenada did not breach any of its contractual obligations. RSM, then, applied for annulment and – at the time of the commencement of the treaty arbitration – such an application was still outstanding.[277] The case, therefore, can be classified as a case of parallel contract and treaty claims, where the contract claims was started only by the investor company, while the treaty claim was started by the same company and its shareholders.

During the treaty arbitration, Grenada contended that all the legal and factual arguments raised by the claimants had been already litigated in the contract arbitration and, therefore, the treaty arbitration was started in violation of Art. 53 of the ICSID Convention, according to which awards are final, binding and not subject to appeal or review. Grenada asked for an application of the principle of collateral estoppel and, based on the fact that the three shareholders were privies of RSM, for the dismissal of the proceedings on the basis of the inherent powers of the Tribunal to protect the integrity of its own process (par. 4.6.16).

The claimants replied that the triple identity test was not met and that to dismiss the process would have been an "obscuration" of the independent interests that the three individual claimants possessed under the Treaty, i.e. a violation of due process (par. 5.3.6).

The Tribunal started its reasoning by saying that "[i]t is (…) not disputed that the doctrine of *collateral estoppel is now well established as a general principle of law applicable in the international courts and tribunals such as this one*" (emphasis added) (par. 7.1.2). The Tribunal also recognized that the shareholders were privies of RSM at the time of the contract arbitration and, therefore, were bound by those factual and other determinations regarding questions and rights arising out or relating to the agreement (par. 7.1.5). The tribunal stated that "[o]f course, RSM is a juridical entity with a legal personality separate from its three shareholders. But this does not alter the analysis. (…) *It is true that shareholders, under many systems of law, may undertake litigation to pursue or defend rights belonging to the corporation. However, shareholders cannot use such opportunities as both a sword and shield*. If they wish to claim standing on the basis of their indirect interest in corporate assets, they must be subject to defences that would be available against the corporation – including collateral estoppel" (emphasis added) (paras. 7.1.6 and 7.1.7). Hence, the tribunal declared that the claims were manifestly without legal merit and dismissed all the claims.

[276] ICSID Case No. ARB/05/14.

[277] However, the *ad hoc* Committee discontinued the annulment proceedings in a decision of 28 April 2011.

The reasoning of the *RSM* treaty arbitration has been applied also by the Tribunal in *Apotex Holdings Inc. and Apotex Inc. v. United States of America*.[278] In this case the Claimants made claims for breach by the Respondent of several of its obligations under NAFTA and the Jamaica-USA BIT both for themselves and also (by Apotex-Holdings) for Apotex-US (we will refer to this arbitration as the "second arbitration"). However, Apotex Inc. had already started a NAFTA arbitration against the USA according to the UNCITRAL Arbitration Rules, in which many of the issues claimed in the second arbitration had been already decided (this arbitration will be referred to as the "first arbitration").[279] The first arbitration was not concluded when the second arbitration was started. However, when the award in the second arbitration was rendered, an award on jurisdiction and admissibility in the first arbitration was rendered and denied jurisdiction on the basis of the non-existence of an investment according to the NAFTA.

US asked for an application of collateral estoppel with regard to all the issues already discussed and decided in the first arbitration, i.e. the lack of an investment according to the NAFTA wording (actually, the US asked for an application of the principle of *res judicata* but only with regard to issues already discussed by the first tribunal. It is therefore possible to conclude that the US asked for an application of collateral estoppel and that the references to *res judicata* in the Award should be actually intended as references to collateral estoppel).

The claimants contended that "notions of issue estoppel found in common law systems are not found in civil law systems, which typically limit *res judicata* effects to matters addressed in the *dispositif* of an award or judgment" (par. 7.22). For this reason the Claimants stated that collateral estoppel cannot be said to be an aspect of *res judicata* as a general principle of law recognised by civil nations. Furthermore, the claimants argued that – even if the Tribunal should have considered collateral estoppel applicable to the case at hand – the triple identity test was not met, in particular because the parties were different.

The Tribunal recognized the historical differences between civil and common law systems, but also stated that there is a general tendency, even in civil law countries, to recognize *res judicata* effects to the reasoning of awards and decisions. According to the Tribunal, this approach renders civil and common law systems more similar and allows an international tribunal to give *res judicata* effects to the issues decided within a previous award/decision on the same dispute, which can therefore be the legal basis to apply collateral estoppel.[280] The Tribunal also extensively referred to

[278] ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014.

[279] See the award on jurisdiction and admissibility of 14 June 2013 made by the NAFTA Tribunal (Toby T. Landau, Clifford M. Davidson, Fern M. Smith) in the UNCITRAL Arbitration between Apotex Inc. and the Respondent.

[280] The Tribunal, at par. 7.24-7.29 cited several Authorities supporting its view that the reasoning of international Awards has the force of *res judicata* and can therefore be the basis for the application of collateral estoppel. In particular, it cited the *Pious Fund Arbitration (United States of America v. Mexico)*, Award, 14 October 1902, the *Polish Postal Service in Danzig, Advisory Opinion*, 1925 PCIJ (Ser. B) No. 11, 16 May 1925, par. 86, the *Case Concerning the Delimitation of the Continental Shelf (UK v. France)*, 18

the abovementioned *RSM* treaty arbitration (as well as to the *Orinoco* and *Amco II* cases) in order to give a legal foundation to the applicability of collateral estoppel in international law.

Given the above, the Tribunal also recognized that privies are bound by decisions to which they did not formally took part. The Tribunal, at par. 7.38, stated that "[t]he two named Claimants in this arbitration stand in similar shoes as regards the effect of *res judicata* resulting from the [first arbitration], notwithstanding the fact that only one of them was a named party to the [first arbitration]". Apotex-Holdings was therefore considered a privy of Apotex Inc. and both the parties were therefore bound by re-discuss the matters already decided in the first arbitration.

All the awards described above are of extreme importance for policy reasons. Indeed, they followed a substantive/transactional approach which allows to safeguard all the policy considerations outlined in Chapter 1 above and, as a consequence, is essential for ensuring the legitimacy of investment arbitration. Indeed, the *RSM* and *Apotex* awards have been warmly welcome by scholars.[281] These Authors have even talked about an emerging trend based on the adoption of a substantive/transactional test for the determination of *res judicata* issues in international investment law.

It is maybe too early to arrive to such a conclusion (which, however, if confirmed, should be warmly welcome). Similarly, the scarcity of the case law does not allow us to state that collateral estoppel has assumed the standing of a general principle of international law, as some Tribunals have stated.

However, what is important for the sake of the present book is that these cases prove that arbitral tribunals do have the inherent powers to dismiss a claim on the basis of the application of the doctrine of collateral estoppel. Such an approach, as already said, is strongly desirable[282] and, if confirmed in the future, would surely raise the legitimacy of international investment arbitration.

3.8 *Concrete applications of the proposed solutions in investment arbitration*

It is now time to check how the proposed tools may concretely apply in order to prevent and limit parallel proceedings in international investment arbitration.

RIAA 272, 14 March 1978, 295, par. 28, the Request for Interpretation of the Judgment of 20 November 1950 in the *Asylum Case (Colombia v. Peru)*, Judgment of 27 November 1950, ICJ Rep. 1950, 395, the *Corfù Channel Case*, Judgment of 9 April 1949, ICJ Rep 1949, 4, the *Request for Interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment of 11 November 2013 (ICJ). The Tribunal also mentioned the CJEU cases *Asteris & Greece v. Commission*, [1988] ECR 2181, par. 27, and *Commission of the European Communities v. BASF AG & Others*, [1994] ECR I-2555, par. 67.

[281] See Kotuby, Egerton-Vernon (2015) (n. 268), 486 and ss. It is worth noting that, even in 1957 Bowett (1957) (n. 268), 170 stated that collateral estoppel "is a notion which international tribunals might usefully adopt".

[282] Bowett (1957) (n. 268), 180 stated that "much might be gained by a clear recognition by international courts of this distinction between the total bar of *res judicata* and partial bar of collateral estoppel or issue estoppel".

It is, first of all, necessary to understand whether such tools are all applicable in cases of subsequent proceedings and in cases of concurring proceedings (i.e. which run in parallel). In this regard it is worth noting that while abuse of process and collateral estoppel may apply in both the described situations, as we have seen in Paragraph 3.6.1 above, *res judicata* is based on the assumption that the first claim has been finally decided. For this reason in case of concurring proceedings arbitrators may have the possibility to rely only on the more flexible doctrines of abuse of process and collateral estoppel.

We will now analyse how any of the proposed criteria apply to the various sources of parallel proceedings, namely a) contract and treaty claims; b) chain of companies of the same group; c) majority and minority shareholders (or company and its shareholders); and d) claims started under the same treaty.

a) Contract and treaty claims

In case of contract and treaty claims, as we have seen, the main problem (in particular concerning the applicability of *res judicata* and collateral estoppel) regards the abstract possibility to suppose the existence of a conflict of jurisdiction between two proceedings which allegedly arise from different legal orders. However, as demonstrated in paragraph 3.6.5 above, the better approach (i.e. the one applied in the *RSM* second arbitration) is to ascertain whether the two parallel contract and treaty claims are substantially identical and if they constitute a way to circumvent the correct application of the principles of finality and judicial economy, as well as the credibility of investment arbitration as a dispute settlement mechanism.

If the above approach is accepted, it is submitted that all the proposed tools are applicable to the case of contract and treaty claims (with the obvious limit that *res judicata* requires the prior conclusion of the first arbitration).

If only some of the claims filed in the first arbitration are proposed also in the second arbitration, as we have seen in the *Apotex* case, collateral estoppel may be a very useful tool in order to avoid the re-discussion of the already settled issues.

Due to the substantial identity of the parties, we cannot see any due process problem in this case.

b) Chain of companies of the same group

The *CME* and *Lauder* cases are the paradigm of this scenario. Taking into account what happened in such cases, it is submitted that all the proposed tools are applicable by arbitrators in order to avoid parallel proceedings that are formally different but substantially identical.

In this case, if the parallel claims are all arising from violation of treaty obligations, the degree of identity between the two proceedings will be probably very high, mainly due to the already discussed circumstances that BITs usually contain very poor formulation of standards of treatment and such standards are now considered to have an autonomous content and standing in international investment law.

However, also in this case, if only certain claims are present in the two parallel claims, the application of collateral estoppel is the suggested alternative.

Also in this case, finally, due to the substantial identity of the party, there seems not to exist any due process concern.

c) Majority and minority shareholders (or company and its shareholders)

This is the most problematic case, due to the circumstance that the privity relationship between the various shareholders of the company (or between the company and its shareholders) shall be necessarily ascertained on a case-by-case basis.

It is here necessary to make some distinctions.

In case an unsuccessful claim is brought against a State, by a shareholder or by the company, and such a shareholder (or company) it considered to be *in concreto* representing the interests of the other shareholders (or of the entire company), i.e. in privity with them, we cannot see reasons to not apply the proposed tools in case the claim fails and the State's defences prevail. Indeed, it seems unfair to oblige the State to have to defend its position in several substantially identical claims. The State will be then entitled to ask for an application of abuse of process, *res judicata* (if applicable) and collateral estoppel.

If the State looses the first arbitration, it is necessary to distinguish: (i) if one of several shareholders is successful *pro rata* (i.e. for an amount of claim proportional to its shares), and the allegedly violated standards of treatment are substantially identical, the other shareholders should be entitled to rely on the previous decision and to make an offensive use of collateral estoppel (i.e. an application of the Bernhard doctrine); (ii) if the first claim is brought by the entire company, it is likely that the company, representing all its shareholders,[283] will be awarded an amount which encompasses also the rights of the shareholders. Therefore, once the State has lost the first arbitration against the company, it should be entitled to invoke all the proposed tools in subsequent claims started by the shareholders (otherwise the State would run the risk to be condemned more than one time for the same damage). If when the claim of the shareholders is started the company's claim is still pending, the State will be obviously able to rely only on collateral estoppel (if some issues have been decided) and abuse of process.

However, if a commonality of interest is not present *in concreto*, it is submitted that serious due process concerns may arise. In this case, the only possible remedy seems to be the development of a form of intervention by way of amendment of the relevant arbitration rules. Such a tool will be analysed in Paragraph 3.9 below.

d) Claims started under the same treaty.

[283] This subject has been studied by Gottlieb, California Law Review (1978), 1093-1094.

As we have discussed in Chapter 1, this case is of mere academic interest. However, it is obvious that in this case, due the formal and substantial identity of both parties and cause of action, all the proposed tools are applicable.

3.9 *A solution de jure condendo in order to preserve due process in case of multiple claims by shareholders: the possible third parties' right to be informed and to intervene in the proceedings*

As we have seen in the preceding Paragraph, in case of parallel proceedings started by various shareholders it is possible that the various claimants are not considered to be in privity and, as a consequence, the proposed solutions cannot properly work, because they would amount to an unduly violation of the principle of due process.

If a situation like this arises before a national court, the solution would be very simple. All procedural laws provide for compulsory joinder of third parties: in this case, in order to safeguard the canon of judicial economy, the third party shareholder would be subject to a compulsory joinder.

Would this be possible in international investment arbitration? The straight answer seems to be no, due to the necessity to respect the principle of party autonomy in arbitration. From the perspective of a third party, the arbitration agreement is *res inter alios acta* and he cannot be forced to join a process that he does not want to join (also in light that the pre-existing parties might not want an involvement of the third party). However, this answer is very simplistic because it completely ignores the circumstance that, as we have already demonstrated, regardless of its willingness the third party may suffer the effects of the decision rendered between other parties. There is, therefore, a conflict of values: on the one side, party autonomy and, on the other side, the necessity to protect the rights of the third party which may be subject to the effect of an arbitral award without having participated to the issuance of the same award. As it has been noted, this situation reveals the "intrinsic weakness of arbitration. (…) [indeed] the lack of adequate compulsory powers for arbitrators reveals the fragility of arbitration when facing external obstacles".[284]

One could therefore wonder whether there could be a solution to such a situation of *impasse*. Several scholars have recognized that "[w]here an award may be, or has been made against the interests of the third party, it is reasonable to allow access to the arbitral chamber".[285] However, it is difficult to give a legal foundation to such a power to intervene or to be compulsorily joined in the arbitration. One Author has tried to found such a possibility on the inherent powers of the arbitral tribunals,

[284] Piergrossi, *Studi in onore di Enrico Tullio Liebman* (1979), 2572.

[285] Olatawura, The American Review of International Arbitration (2005), 440. See also Gradi, Rivista dell'arbitrato (2010), 301, Ruffini (1995) (n. 217), 648 and ss., Consolo, Rivista di diritto processuale (2013), 1413, Fazzalari (1995) (n. 217), 619 and ss., Zucconi Galli Fonseca (2004) (n. 209), 728 and ss. *Contra* see Tarzia, Rivista di diritto processuale (2004), 350.

stating that "the fact that the arbitration statute does not expressly provide such power does not establish that it is forbidden to a tribunal. (…) An arbitral tribunal acts not only on the application of a party to the arbitration, but also on its own initiative. The principle of arbitral effectiveness makes it imperative for the arbitral tribunal to join parties where necessary or desirable or to allow a third party to commence claims under an arbitration agreement".[286] Such a solution does not seem feasible because, in applying it, the arbitral tribunal would unduly extend its jurisdiction beyond what has been expressly agreed by the parties.

However, a solution could be found by way of amending the relevant arbitration rules (e.g. the ICSID Arbitration Rules or the UNCITRAL Rules) in order to offer a form of protection for the interests of third parties.[287]

Indeed, as it has been duly noted,[288] several rules regulating international dispute settlement proceedings do provide a form of intervention in order to offer protection to the rights of third parties. In this regard, it is possible to refer to the Statute of the ICJ,[289] the Statute of the ITLOS,[290] and the DSU of the WTO.[291]

The proposed amendment to arbitration rules could be made providing for the following proceedings:

1) the request to join the third party should be made by only a party (and not both of them), i.e., in our case, the respondent State. The fact that the request shall not come from both the parties is based on the circumstance that, if the request should come from both of the parties, the claimant would not probably give its consent to such a request;[292]

2) upon request of a party, the arbitral tribunal will have to make a second request to the third party in order to ask whether if such a third party is willing to intervene in the arbitration;

3) if the third party refuses to intervene in the arbitration, it will be then be estopped[293] to claim that the award does not have a *res judicata* (or collateral estoppel) effect on it;[294]

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[286] Olatawura (2005) (n. 285), 451-452.

[287] This way of extending the possibility to intervene to third parties was already proposed by Piergrossi (1979) (n. 284), 2591.

[288] Bonafè (2014) (n. 158), 16.

[289] See Art. 62 and 63 of the ICJ Statute, on which see Wolfrum, Liber Amicorum Günther Jaenicke (1998), 427 and ss., Bonafè (2014) (n. 158), 18 and ss., Palchetti (2002) (n. 215), 139 and ss., Forlati (2002) (n. 215), 99 and ss.

[290] See Art. 31 and 32 of the ITLOS Statute, on which see Wolfrum (1998) (n. 289), 439 and ss.

[291] See Art. 10(2) of the DSU.

[292] This has been stated by Gradi (2010) (n. 285), 304.

[293] The principle of estoppel, expressed by the Latin maxim *non venire contra factum proprium*, has been largely recognized in international law. See Cottier, Müller, *Max Planck Encyclopedia of International Law* (2007), Bowett (1957) (n. 268), 176 and ss. McGibbon, International and Comparative Law Quarterly (1958), 468 and ss., Wagner, California Law Review (1986), 1777 and ss., Ovchar, Bond Law Review (2009), 1 and ss. According to such a principle, if a party in a process expresses its willingness in a certain sense, such a party will be estopped to claim something contrary to the declaration that it made before.

4) if the third party accepts to intervene in the proceedings, it will be entitled to file its defences and will be bound by the award as if it is a party.[295]

However, this last case leaves us with the problem of the appointment of the arbitral tribunal. Is it fair to consider that the joined third party will be subject to the tribunal selected by the other two parties? As a matter of principle, even if from a merely psychological point of view the third party might feel prejudiced by the impossibility to choose its arbitrator,[296] it does not seem that this circumstance corresponds to an actual prejudice. Indeed, as it has been noted,[297] arbitrators have a general duty of independence and impartiality. Arbitrators shall act as impartial judges and treat equally all the parties, regardless of the fact that they have been appointed by a certain party. The joined third party, as a consequence, should not suffer a prejudice by the fact that it did not concur in the appointment of the tribunal.

However, if one only accepts that *all* the parties shall have equal rights in the appointment of the Tribunal, the only possible solution seems to be that – after the joinder – the original tribunal (or the sole arbitrator) is replaced by another one, chosen and appointed by an appointing authority. Such authority could be the relevant arbitral institution or a person such as the President of the Tribunal of the seat of arbitration (in case of *ad hoc* arbitration). This solution, which seems equally fair, is based on the assumption that the principle of equality of the parties does not mean that any party shall appoint its own arbitrator, but that all the parties shall have the same rights regarding the appointment of the tribunal. If a neutral authority appoints the tribunal, the principle of equality is not impaired.[298]

3.10 *Conclusions*

The present Chapter has analysed whether arbitral tribunals have the inherent power to not exercise their jurisdiction at the admissibility stage in case of parallel proceedings in investment arbitration. Such powers should find their legitimacy in the circumstance that the continuance of duplicative litigation constitutes a threat to the integrity of the judicial process and a violation of the principle of good administration of justice. It is arguable that arbitrators do have such a power and that they should exercise it if the continuance of the proceedings runs against general principles of international law.

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[294] This has been stated by Fazzalari (1995) (n. 217), 658, according to whom once the third party has had the opportunity to join the arbitration and has refused such an opportunity, he will be subject to *res judicata*.

[295] A similar provision is now set forth by Art. 45(8) of the new Russian Arbitration Law, enacted on 29 December 2015. See, in this regard, the comment by Karimullin at www.kluwerarbitrationblog.com, posted on 11 February 2016.

[296] Chiu, Journal of International Arbitration (1990), 58.

[297] Tizi, Rivista dell'arbitrato (2008), 486 and ss. This Author has explained that there is a duty of impartiality both for the tribunal as a whole and for arbitrators as single professionals.

[298] *Id.*, 488.

There are, indeed, certain general principles, namely good faith and *ne bis in idem*, whose concrete application seems to preclude the continuance of duplicative arbitrations.

In fact the concrete application of good faith in procedural matters generates the doctrine of abuse of process, which imposes to the parties to not make recourse to investment arbitration with the aim of getting unfair advantages and/or to harass the other party. If procedural rights are not exercised for their proper scope, it is arguable that a claim does not deserve the protection of the law and that such a claim should be declared inadmissible.

Turning on the concrete application of *ne bis in idem*, it can lead to an application of claim preclusion (*res judicata*) and issue preclusion (collateral estoppel), two doctrines which are aimed at ensuring finality of judicial decisions (respectively on entire claims or single issues), coherence and stability. After having analysed the various possible applications of such doctrines, it has been demonstrated that the *res judicata* and collateral estoppel effects of arbitral decisions are *ipso facto* extensible on third parties who are in privity with one of the parties of the first claim. If a third party's interests have been adequately represented by the claimant in the first action, such a third party will be therefore precluded to start a second claim which is substantially identical to what has been already decided. In such a case, the second claim should be declared inadmissible. Therefore, if broadly interpreted, *res judicata* and collateral estoppel can be very useful in order to prevent parallel proceedings and conflicting decisions.

Having ascertained that arbitrators have the power to apply these doctrines in order to prevent parallel proceedings, the Chapter has moved to analyse whether and how they are applicable in the various scenarios of parallel proceedings outlined in Chapter 1, as well as, how they can be reconciled with the principle of due process.

The Chapter has been finally concluded with a proposal of amendment of arbitration rules in order to simplify the involvement of third parties (which would anyway suffer the effects of arbitration awards) in arbitration proceedings.

Chapter 4

Post-award remedies

This concluding Chapter will regard the possible (if any) remedies to parallel proceedings at the post-award phase of investment arbitration.

As a preliminary remark, it should be noted that if the problem of parallel proceedings comes to this stage, it is often too late to find a solution to it (in particular, as we will see below, in case one would try to preclude enforcement of a duplicative ICSID award). For this reason, it is arguable that a solution to parallel proceedings shall be found at prior stages.

The analysis of post award remedies to parallel proceedings requires that a clear distinction is made between the post award remedies in ICSID arbitration and in non-ICSID arbitration.[1] The main difference stays in the fact that ICSID is considered to be a "self-contained system of arbitration, fully autonomous and independent of any national systems, including the system prevailing at the place of an arbitration conducted under the [1965 Washington] Convention. This self-contained regulation covers all aspects of the arbitral proceedings and extends to the challenge of the awards, the latter being regulated only by the Convention, without any interference by national courts or other national authorities, no room for the application of the New York Convention being made regarding enforcement of an ICSID award".[2] Hence, when an ICSID award is issued, the only available remedies to limit the efficacy or the validity of such an award are set forth in the Washington Convention. The award is final and binding for the courts of all the contracting States and shall be recognized as a national decision having *res judicata* effects.

On the contrary, non-ICSID awards may be either challenged at the place of the seat of the arbitration[3] or, if one of the grounds set forth in Art. V of the New York Convention 1958, the courts of the State where such enforcement is required may refuse their enforcement.[4]

In light of the different regulations of the post award stage, the analysis of possible post-award remedies aimed at avoiding the existence of two awards arising from two parallel proceedings shall be conducted separately on the basis of whether the second (duplicative) award is issued within the ICSID framework or not. We will firstly examine the remedies available within the ICSID self-contained system, and then examine: (i) whether the enforcement of an award resulting from a duplicative proceeding may be refused according to the provisions of the New York Convention;

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[1] Bernardini, http://www.arbitration-icca.org/media/0/12970223709030/bernardini_icsid-vs-non-icsid-investent.pdf (2009), 4 and ss.

[2] *Id.*, 5.

[3] See Lew, Mistelis, Kroll, *International and Comparative Commercial Arbitration* (2003), 663 and ss., Blackaby, Partasides, Redfern, Hunter, *Redfern and Hunter on International Arbitration* (2015), 569 and ss., Rubino-Sammartano, *International Arbitration Law and Practice* (2014), 1273 and ss.

[4] See Lew, Mistelis, Kroll (2003) (n. 3), 687 and ss., Blackaby, Partasides, Redfern, Hunter (2015) (n. 3), 605 and ss., Rubino-Sammartano (2014) (n. 3), 1351 and ss.

or (ii) in brief, whether the same award may be set aside at the place of the seat of the arbitration.

4.1 *ICSID arbitration as a self contained regime and the necessity to find a solution to parallel proceedings within its boundaries*

The ICSID Convention provides for several possible remedies after an award has been rendered, namely supplementation and rectification of awards (Art. 49), interpretation (Art. 50), revision (Art. 51) and annulment (Art. 52). As already stated, an ICSID award is not subject to any other appeal or remedy (Art. 53).[5]

Among the abovementioned remedies, annulment is the only one that might bring to set aside an award issued within the ICSID framework. "Annulment results in the legal destruction of the original decision without replacing it".[6] Such a destruction (which may regard only awards or any part thereof and not preliminary decisions) is operated by an *ad hoc* committee composed of three people, appointed by the Chairman of ICSID and chosen from the panel of ICSID arbitrators. In this regard, it is worth noting that "[a]n *ad hoc* committee acting under the ICSID Convention may not amend or replace the award by its own decision on the merits",[7] i.e. annulment is not a form of appeal.

According to Art. 52(1), annulment may derive only from limited grounds and namely that:

(a) the Tribunal was not properly constituted;

(b) the Tribunal has manifestly exceeded its powers;[8]

(c) there was corruption on the part of a member of the Tribunal;

(d) there has been a serious departure from a fundamental rule of procedure; or

(e) the award has failed to state the reasons on which it is based.[9]

It is questionable whether, among these grounds, there could be one that is helpful in order to seek for the annulment of an award regarding a dispute that has been already settled by a previous (either ICSID or non-ICSID) award. In this regard, due to the fact that the present book has proposed a solution to parallel proceedings based on the application of certain rules of international law, the possible ground for

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[5] For an analysis of all these remedies, see Wang Dong, *Post-Award Remedies*, *UNCTAD Course on Dispute Settlement in International Trade, Investment and Intellectual Property* (2003), 7 and ss. With regard to finality and enforceability of awards, see Wang Dong, *Binding Force and Enforcement*, *UNCTAD Course on Dispute Settlement in International Trade, Investment and Intellectual Property* (2003).

[6] Wang Dong, *Post Award Remedies* (2003) (n. 5), 13.

[7] *Ibid*.

[8] Schreuer (*et al.*), *The ICSID Convention: A Commentary* (2009), 938 and ss., have clearly explained that the meaning of the word "manifest" shall be intended as "plain", "clear", "obvious", "evident". "Therefore the manifest nature of an excess of powers is not necessarily an indication of its gravity. Rather, it relates to the ease with which it is perceived".

[9] A detailed analysis of any of these grounds may be found in Schreuer (*et al.*) (2009) (n. 8), 890 and ss. See also Wang Dong, *Post Award Remedies* (2003) (n. 5), 17 and ss.

annulment of an ICSID decision resulting from proceedings that are duplicative of other proceedings shall be related to a failure in the application of the proper law (namely, the general principles of good faith and *ne bis in idem*).

In this regard, it is worth noting that "[a]lthough the Washington Convention does not provide for a specific ground for annulment of arbitral awards regarding the issue of applicable law, ICSID case law has admitted that a tribunal's failure to apply the proper law – as opposed to a mere mistake in the application of the law – is subject to review under the manifest excess of powers standard of Article 52(1)(b) of the Washington Convention".[10] It emerges that the failure to apply the proper law (i.e. the issuance of a decision that does not keep into account the law applicable to the dispute according to Art. 42 of the Convention) may bring to a decision of annulment, while an incorrect application of the proper law (i.e. a mere error) is not considered to be a ground for annulment.[11]

Given the above, Prof. Schreuer (*et al.*) have stated that "[a] general failure to apply international law, if it is part of the applicable law, would amount to an excess of powers exposing the award to annulment. A mere error in the application of international law would not have this effect. (…) [A] non-application of individual provisions of international law would not, in principle, furnish a ground for annulment. However, a case can be made that certain fundamental rules of international law do by themselves form an appropriate and necessary standard for review of awards. These fundamental rules may be described as the public policy of the international community. They would include peremptory rules of international law [i.e. *jus cogens*]. (…) It is an open question whether a non-application of other important rules of international law should be seen as an excess of powers for failure to apply the proper law. Examples are the principles of *pacta sunt servanda*, prohibition of bad faith and denial of justice, the international minimum standard for the treatment of foreigners and the rules on state responsibility. It may be argued that at least some of these principles are so basic to the structure of international law that their disregard amounts to a non-application of international law as a whole. On the other hand, it must be admitted that such an approach runs the risk of blurring the line between a non-application of international law and its erroneous application".[12]

In light of the above it is self-evident that it is very uncertain (i.e. actually unlikely) that the failure to apply general principles of international law such as good faith and *ne bis in idem* can be the basis for the existence of manifest excess of powers and of the issuance of a consequent declaration of annulment.

Such uncertainties increase also in light of the very doubtful function of annulment in the ICSID framework. In this regard, it is usually said that "Art. 52 constitutes a *very limited exception* to the principle of the finality of awards".[13] It is also

[10] Gaillard, *Annulment of ICSID Awards* (2004), 236.
[11] Caron, World Arbitration & Mediation Review (2012), 183.
[12] Schreuer (*et al.*) (2009) (n. 8), 975-976.
[13] Wang Dong, *Post Award Remedies* (2003) (n. 5), 13.

said that annulment is not a form of appeal and shall be limited to an analysis of the legitimacy of the framework of the arbitral process.[14] Annulment is not concerned with the correctness of the decision reached within that framework.[15] For these reasons, "[a] number of recent annulment decisions have been sharply criticized by scholars (and others not associated with a particular case) as overly intrusive and undisciplined".[16] In this regard, it is worth noting that *ad hoc* committees have not assumed a constant approach. It is in fact possible to identify four generations of annulment proceedings,[17] each of them has been characterized by a different approach to the question of the limits of review of *ad hoc* committees:

- the first generation, represented by the *Klockner v. Cameroon (I)*[18] and *Amco v. Indonesia (I)*[19] *ad hoc* committees' decisions has adopted a very broad approach. Indeed, *ad hoc* committees have in fact re-examined the merits of the dispute brought before the Tribunals;
- the second generation, mainly represented by the decision of the *ad hoc* committee in *MINE v. Guinea*[20] has adopted a more cautious approach, stating that it is not for *ad hoc* committees to examine the adequacy of tribunals' reasoning;
- the third generation, represented by *ad hoc* committees' decisions in *Wena Hotels v. Egypt*,[21] *Vivendi v. Argentina (I)*[22] and *CMS v. Argentina*,[23] has been welcomed for its more balanced approach. These ad hoc committees specified that they would have intervened

[14] Indeed, as stated by Gaillard (2004) (n. 10), 241, "an *ad hoc* committee constituted under Article 52 of the Washington Convention should be extremely mindful of the thin line between what constitutes an annulment and what constitutes an appeal, and limit its control to the "manifest" nature of any excess of powers". See also Schreuer, The Law and Practice of International Courts and Tribunals (2011), 211 and ss.

[15] Caron (2012) (n. 11), 183.

[16] *Id.*, 173. Cheng, Berkeley Journal of International Law (2013), 236 and ss. has stated that annulment proceedings should be driven by justice and not only by finality. For this reason this Author seems to foster a less strict approach to annulment.

[17] Nair, Ludwig, www.lexology.com (2011). This article follows the article written by Schreuer, Annulment of ICSID Awards (2004), 17 and ss., which identified the first three generations of annulment and the article written by Marboe, *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009), 200 and ss., which has examined the case law between 2005 and 2009. See also, in this regard, Friedland, Brumpton, American University International Law Review (2012), 727 and ss.

[18] *Klockner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Ad Hoc Committee Decision on Annullment, 3 May 1985.

[19] *Amco Asia Corporation and Others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Ad hoc Committee Decision on the Application for Annulment, 16 May 1986.

[20] *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision of the Ad hoc Annulment Committee, 22 December 1989.

[21] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002.

[22] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award, 3 July 2007.

[23] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007.

only in serious and important cases and could not anyway re-examine the merits;

- finally, the fourth generation, represented by the *ad hoc* committee's decisions in *Sempra v. Argentina*,[24] *Enron v. Argentina*[25] and *Helnan v. Egypt*,[26] has generated some concerns because have lowered the threshold of review in annulment proceedings and have, one more time, in fact re-examined the merits of the dispute.

In light of the above, it is self-evident that, until it will be not clarified how deep can be the margin of review of *ad hoc* committees in ICSID annulment proceedings, it will not be possible to understand whether *ad hoc* committees could play a role in limiting the effects of parallel proceedings.[27] In the present legal framework, the answer seems to be negative.

4.2 *Non-ICSID investment arbitration and possible remedies to parallel proceedings at the enforcement and set aside stages of arbitral awards*

4.2.1 *The regime of the 1958 New York Convention and the possible applicability of the public policy exception to avoid the enforcement of duplicative awards*

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is one of the most successful treaties in the world; indeed, as of today, it has been enforced by 156 States. The New York Convention is probably one of the main reasons of the popularity of international arbitration as a method of dispute settlement and has created a pro enforcement regime, according to which enforcement of arbitral awards "should be refused only in exceptional circumstances".[28] Indeed, as set forth in Art. III of the Convention, the basic obligation arising from the Treaty is the following: "[e]ach Contracting State *shall recognize arbitral awards as binding and enforce them* in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. *There shall not be imposed substantially more onerous conditions* or higher fees or charges on the recognition or enforcement of arbitral awards to which

[24] *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award 29 June 2010.
[25] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010.
[26] *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the Ad Hoc Committee, 14 June 2010.
[27] Indeed, the lack of consistency and the unforeseeability of the decisions of *ad hoc* committees is one of the reasons why some commentators have proposed to reform the whole ICSID system. The criticisms and the proposals of reform may be found in Schreuer, http://www.univie.ac.at/intlaw/wordpress/pdf/99_rev_invest_awards.pdf (2009), 1 and ss. and in Tams, http://telc.jura.uni-halle.de/sites/default/files/altbestand/Heft57.pdf (2006), 1 and ss.
[28] International Law Association, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, New Delhi Conference* (2002), Recommendation 1(a).

this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards" (emphasis added).

The only exceptions to such an obligation are set forth in Art. V of the Convention, according to which:

> 1. *Recognition and enforcement of the award may be refused*, at the request of the party against whom it is invoked, *only* if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
>
> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
>
> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country (emphasis added).

From a reading of Art. V, and as confirmed from an analysis of the preparatory

works,[29] it emerges that the drafters of the Convention did not analyse the issue of parallel proceedings. There is no express ground for refusing the enforcement of awards that are in fact duplicative of an already existing enforced award.

The only possible solution is, therefore, to refer to the general clause of Art. V(2)(b), namely the public policy exception. However, it is well known that public policy has "unclear boundaries and [is] subject to different interpretations in different jurisdictions".[30] In *Richardson v. Mellish*,[31] public policy has been defined as "a very unruly horse, and once you get astride it you never know where it will carry you. It may lead you from sound law". Similarly, Arfazadeh has defined public policy as a "chameleon".[32]

The most convincing definition of public policy has been provided by Lew,[33] according to whom public policy represents "the fundamental economic, legal, moral, political, religious and social standards of every state or extra-national community. Naturally, public policy differs according to the character and structure of the state or community to which it appertains, and covers those principles and standards which are so sacrosanct as to require their maintenance at all costs and without exception". As a consequence, "public policy consists in acting as *a limit* (...) to the recognition of foreign judgments and awards" (emphasis in original).[34] In this regard, it is worth clarifying that, when referring to the public policy exception in the New York Convention, we refer to the concept of international public policy, i.e. "issues of domestic public policy that the country feels so strongly about as to insist that [international] transactions or awards that have a connection with the country must conform with".[35]

This concept is more restricted than the concept of domestic public policy (i.e. the most important social, legal and political values that have to be respected in internal transactions); this is due to the circumstance that international public policy is related to the needs of international commerce and, therefore, shall lead to non-enforcement only in exceptional circumstances. However, international public policy is a different concept also with regard to the so-called transnational (or truly international) public policy, the scope of application of which is even stricter.[36] This concept has been developed mainly by Prof. Pierre Lalive and refers to "certain superior and fundamental norms or principles essential in the law of international

[29] Published in Gaja, *International Commercial Arbitration – New York Convention*, Oceana, 1978-96.
[30] Lo, Contemporary Asia Arbitration Journal (2008), 70.
[31] 1824 WL 2555 (CCP), (1824) 2 Bing. 229, [1824] All E.R. Rep. 258, 130 E.R. 294.
[32] Arfazadeh, The American Review of International Arbitration (2003), 43.
[33] Lew, *Applicable Law in International Commercial Arbitration* (1978), 532. See also Lew, Mistelis, Kroll, International and Comparative Commercial Arbitration (2003), 422 and ss.
[34] Rubino-Sammartano, *International Arbitration Law and Practice* (2014), 721. See also Feraci, *L'ordine pubblico nel diritto dell'Unione europea* (2012), 7 and ss.
[35] Okekeifere, International Arbitration Law Review (1999), 71. See, in this regard, Atteritano, *L'enforcement delle sentenze arbitrali del commercio internazionale* (2009), 329 and ss., Blackaby, Partasides, Redfern, Hunter (2015) (n. 3), 641 and ss., Lew, Mistelis, Kroll (2003) (n. 3), 720 and ss.
[36] See Lo (2008) (n. 30), 84 and ss.

trade".[37] Such principles and norms (such as, the rules against corruption, privacy, slavery and violation of human rights, as well as general principles as good faith, *pacta sunt servanda* and the prohibition of discriminations)[38] should be, according to the scholars who accept the existence of transnational public policy, always applied by international arbitrators and should be the main parameter in order to apply Art. V(2)(b) of the New York Convention.

For the sake of the present book, it is interestingly to understand whether the principles of good faith (and abuse of process) and finality (i.e. *ne bis in idem*) may be considered, in general terms, as part of the international public policy of States. It is obviously impossible to give a complete picture of public policy in all States; however, we will refer, firstly, to the ILA Recommendations on *International Public Policy*[39] and on *Lis Pendens and Res Judicata and Arbitration*[40] and, then, to some significant legal systems. In particular we will make reference to the concept of public policy in the European Union and in some exemplary common and civil law systems. Finally, for the sake of completeness, we will try to ascertain whether good faith and finality might be considered as part of transnational public policy.

ILA Recommendations

Starting from the ILA Recommendations, as a preliminary remark, it should be noted that they are not anyway binding for national judges or arbitrators. They are, indeed, an authoritative soft-law tool aimed at offering guidance to practitioners and decision makers.

With regard to good faith it is worth noting that Recommendation 1(e) of the *Recommendations on International Public Policy* expressly states that "[a]n example of a substantive fundamental principles is prohibition of abuse of rights". Considering that, as already explained in Chapter 3, abuse of rights is an expression of the general principle of good faith, it seems possible to say that good faith is – in ILA's view – a rule of public policy. Due to the obvious links between good faith, abuse of rights and abuse of process, it might be concluded that – in the ILA's view – the enforcement an award which is the result of an abuse of process, being such an award also an abuse of rights, could be refused.

Moving to the principle of *ne bis in idem*, it is quite surprising to find that Recommendation N. 7 of the *Final Report on Res Judicata and Arbitration* states that "[t]he preclusive effects of an arbitral award *need not be raised on its own motion by an arbitral tribunal*. If not waived, such preclusive effects should be raised as soon as possible by a party" (emphasis added). Even if such a recommendation refers to

[37] Lalive, ICCA Congress Series No. 3 (1986), 286. The concept of transnational public policy has been often criticized for its murky boundaries. See Feraci (2012) (n. 34), 24, according to whom it is not easy to understand which principles and rules should be considered as part of transnational public policy.
[38] See Feraci (2012) (n. 34), 25.
[39] See *supra* footnote 28.
[40] International Law Association, *Final Report on Lis Pendens and Res Judicata and Arbitration*, Toronto Conference (2006). See also *Interim Report: "Res Judicata" and Arbitration*, Berlin Conference (2004).

arbitrators (and not to national courts), keeping into account that Art. V(2)(b) of the New York Convention provides that public policy exceptions can be raised *ex officio* by national courts, it seems that the ILA has not treated finality as a rule of public policy. However, as already stated by other Authors,[41] from a deeper analysis it is possible to say that such a conclusion is not convincing and that the ILA Recommendations provide for a different solution. Indeed, Recommendation 1(d) of the Recommendations on International Public Policy states that "[t]he international public policy of any State includes: (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social or economic interests of the State (…)". In this regard, it has been noted that finality is an essential value in order to preserve justice and to serve essential social and economic interests of a State. This is further confirmed by the *Interim Report on Res Judicata*, where the same ILA stated that "*res judicata* (…) pertains both to public policy and to private justice".[42] In light of the above, "one would assume that the interests of arbitral finality and justice would also qualify as public policy".[43] Hence, it would seem that the ILA Recommendations, if applied, would suggest a national judge to refuse the enforcement of a duplicative arbitration award by applying the public policy exception.

European Union

It has been recently demonstrated that the concept of public policy has acquired autonomous standing and meaning within the framework of European Union law.[44] This is confirmed by a Communication of the Commission of 14 July 1998, entitled "Towards an Area of Freedom Security and Justice" in which it was stated that "[i]t is in the framework of the consolidation of an area of freedom, security and justice that the concept of public order appears as a common denominator in a society based on democracy and the rule of law. With the entry into force of the Amsterdam Treaty, this concept which has hitherto been determined principally by each individual Member State will also have to be assessed in terms of the new European area. *Independently of the responsibilities of Member States for maintaining public order, we will gradually have to shape a "European public order" based on an assessment of shared fundamental interests*" (emphasis added).[45] The concept of European public order (i.e. European public policy) is functional to reach the goals of the European Union, which involve, *inter alia*, for what is of interest in this book, harmony and coherence of judicial decisions.

[41] See, *inter alia*, Ma, Contemporary Asia Arbitration Journal (2009), 70 and ss.
[42] See ILA (2004) (n. 40), 25.
[43] See Ma (2009) (n. 41), 71.
[44] Feraci (2012) (n. 34), 78 and ss.
[45] The whole communication is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1998:0459:FIN:EN:PDF. Feraci (2012) (n. 34), 79 has perfectly explained that the concept of European public order shall be intended as a synonym of European public policy.

In the well-known *EcoSwiss* decision,[46] the Court of Justice of the European Union has clarified that, even when enforcing foreign arbitral awards according to the New York Convention, Member States have to respect European public policy. *This means that national judges of the member States, when enforcing an international arbitral award, have to ascertain that such an award does not run against the public policy of the European Union, due to the fact that European Union Law is part of national law of the Member States*. The content of European public policy may be found out both by the European treaties (and other written sources of law) and by general principles set forth in relevant decisions of the Court of Justice.

With regard to good faith, it has been demonstrated that, both on the basis of legal sources and on the basis of the case law of the Court of Justice of the European Union, the prohibition of abuse of right has gradually emerged as a general principle of European Union law.[47] However, it does not seem possible to say that in EU law a principle of public policy militates against the enforcement of arbitral awards which are the result of an abuse of process. Such a conclusion is due to two main reasons: first of all, in general terms, it has never been stated that the prohibition of abuse of rights is a principle of public policy of EU law; and, secondly, because there is no case law or scholars' work suggesting such a conclusion. Hence, it seems that the enforcement of a duplicative arbitration award cannot be refused on the basis of an alleged public policy providing for the prohibition of abuse of rights/process.

Moving to the principle of finality, it is worth noting that in *Italian Leather* the Court of Justice of the European Union has expressly stated that "as stated in the Jenard Report on the Brussels Convention (OJ 1979 C 59, p. 1, at p. 45), *'there can be no doubt that the rule of law in a State would be disturbed if it were possible to take advantage of two conflicting judgments*'" (emphasis added).[48] This has been further confirmed by other decisions and by scholars' opinion.[49]

Thus, it seems possible to conclude that the principle of *ne bis in idem* – being a principle ensuring consistency and legal certainty, as well as harmony between decisions in various Member States – might be considered as a principle of European public policy. This has been expressly confirmed by the Court of Justice by the already mentioned *EcoSwiss* case.[50] In this regard, it is worth noting that European law, case law and scholars only refer to the principle of claim preclusion and never to collateral estoppel. The latter, being a principle applied only in common law countries, has not been – as of today – taken into consideration in European Union law.

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[46] *EcoSwiss China Time Ltd v Benetton International NV*, Case C-126/97, Rep. 1999 I-03055, Judgment of 1 June 1999. See, in particular, par. 38 of the decision. The approach fostered in *EcoSwiss* has been then applied in a number of national judgments mentioned in Feraci (2012) (n. 34), 185.

[47] See Gestri, *Abuso del diritto e frode alla legge nell'ordinamento comunitario* (2003), 197 and ss., Losurdo, *Il divieto dell'abuso del diritto nell'ordinamento europeo* (2011), 123 and ss.

[48] *Italian Leather SpA v WECO Polstermöbel GmbH & Co.*, Case C-80/00, Rep. 2002 I-04995, Judgment of 6 June 2002, par. 48.

[49] See Tonolo, Rivista di diritto processuale (2008), 1277 and ss.

[50] See the abovementioned EcoSwiss decision, par. 43 and ss. (and in particular par. 48). See also Muroni, Rivista dell'arbitrato (2000), 761.

In conclusion, in light of what has been stated in *EcoSwiss*, the enforcement of a duplicative arbitration award might be refused by a national judge on the basis of *res judicata*, being this principle part of the European concept of international public policy.

Common law systems

"The principle of abuse of rights is not so readily apparent in common law systems".[51]

In English law this is traditionally due to the circumstance that there was no general recognition of the principle according to which rights have to be exercised in good faith.[52] However, it has been noted that today things have gradually changed, so that some Authors have said that English courts are now often applying doctrines which are, in their content, analogous to the principle of abuse of rights.[53] Similarly, as we have already seen, English courts usually apply the doctrine of abuse of process.[54] However, it is not possible to say that a general principle prohibiting abuse of rights (and/or abuse of process) has emerged in English law.[55]

Similarly, with regard to US law, Prosser wrote that "[i]n all but a few jurisdictions, it is now settled that where the defendant acts out of pure malice or spite, as by erecting a fence for the sole purpose of shutting off the plaintiff's view, or drilling a well to cut off the plaintiff's underground water [...] such conduct is indefensible from a social point of view, and there is liability for nuisance".[56] Hence, it is commonly said that also US law recognizes some forms of abuse of rights (namely nuisance) but, in light of the available case law, it is not possible to say that a general principle emerged in this regard.[57]

It follows that, due to the uncertainty in the application of the notions of good faith and abuse of rights in common law systems, it is obviously impossible to say that such principles (as well as the related doctrine of abuse of process) may constitute part of the international public policy of these countries.

Moving to the principle of finality (that, in common law systems, shall be intended both as claim and issue preclusion), the situation is different.

With regard to English common law, it is usually stated that finality may be considered as part of international public policy. Such a conclusion is supported both by Authors and by the case law.[58] As a consequence, according to such an approach,

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[51] Byers, McGill Law Journal (2002), 395.
[52] Gestri (2003) (n. 47), 46.
[53] See Byers (2002) (n. 51), 395, Gestri (2003) (n. 47), 47 and ss., Losurdo (2011) (n. 47), 33 and ss.
[54] See Paragraph 3.5 above. See also ILA Interim Report (2004) (n. 40), 8.
[55] Losurdo (2011) (n. 47), 33.
[56] Prosser, *Law of Torts* (1964), 618-19.
[57] Australia has recognized a doctrine of abuse of process but the principle of abuse of rights has never been directly employed. See, in this regard, Byers (2002) (n. 51), 396.
[58] See ILA Interim Report (2004) (n. 40), 7, and He, Hong Kong Law Journal (2013), 1055. See also *Varvaeke v. Smith*, [1983] 1 AC 145; *ED & F Man (Sugar) Ltd. v. Haryanto (No. 2)*, [1991] 1 Lloyd's Rep 429.

national courts would be entitled also to raise ex officio the *res judicata* defence as part of the public policy exception set forth in Art. V(2)(b) of the New York Convention.

Concerning US common law it seems possible to gather a similar conclusion. Indeed, the First Restatement on Judgments, at par. 1, already talked about "the public policy of putting an end to litigation";[59] in this regard, it has been also stated that "if a judgment [is] not conclusive as to what it actually determined, the adjudicative process would fail to serve its social function of resolving disputes".[60] A claimant shall no have more than a full and fair opportunity for judicial resolution of the same dispute.[61] Indeed, the US Supreme Court has clarified that *res judicata* (i.e. both claim preclusion and issue preclusion) may be raised *ex officio* by a court of competent jurisdiction.[62] Hence, also in US law, the enforcement of a duplicative arbitral award may be refused by applying the public policy exception provided in the New York Convention.

The same has been also said with regard to the Indian system[63] and it seems that a similar conclusion has been recently reached also in Hong Kong.[64]

Civil law systems

Civil law systems largely recognize the principle of good faith and the related doctrine of abuse of rights. Several national laws expressly recognize the existence of good faith and/or abuse of rights, namely Germany,[65] Greece,[66] Portugal,[67] Spain[68] and The Netherlands.[69] In other systems, such as France, Belgium and Italy, these principles have been recognized by way of judicial decisions.[70] However, the present author has not been able to find any statement declaring that such principles (as well as the related doctrine of abuse of process) are to be considered part of such Countries' international public policy. It is therefore not possible to say that the enforcement of a duplicative arbitral award might be refused according to Art. V(2)(b) of the New York Convention by applying the abuse of process doctrine. The only

[59] See also Gottlieb, California Law Review (1978), 1099.
[60] Currie, The University of Chicago Law Review (1978), 325.
[61] See *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 328 (1971).
[62] See *Arizona v. California*, 530 U.S. 392, 412 (2000). See also Martinez-Fraga, Samra, Northwestern Journal of International Law of Business (2012), 428-429.
[63] See He (2013) (n. 58), 1055. See also *Renusagar Power Co. Ltd. v. General Electric Co.*, AIR 1994 SC 860.
[64] See *Astro Nusantara International B.V. v. PT First Media TBK* HCCT 45/2010.
[65] See par. 242 of the BGB.
[66] See Art. 281 of the Greek Civil Code.
[67] See Art. 334 of the Portuguese Civil Code.
[68] See Art. 7 of the *Título Preliminar* to the Spanish Civil Code. See also the decision of the *Tribunal Supremo* issued on 14 February 1944 (R. 293).
[69] See Art. 13 of the third book of the Dutch Civil Code.
[70] See Gestri (2003) (n. 47), 40 and ss., Losurdo (2011) (n. 47), 25 and ss. With regard to Italy it is possible to say that the case law has gradually applied also the doctrine abuse of process. See Scarselli, Rivista di diritto processuale (2012), 1450 and ss., Comoglio, Rivista di diritto processuale (2008), 319 and ss., Cordopatri, Rivista di diritto processuale (2012), 874 and ss.

exception to what has been just stated seems to be Switzerland. As reported by Einhorn,[71] the Swiss Supreme Court has stated that "an award is contrary to substantive public policy when it violates fundamental principles of law to the point of not being reconcilable with a juridical order of basic values, including principles such as sanctity of contract, *respect for the principle of good faith, forbidding l'abuse de droit*, prohibiting discriminatory or exploitative measures, and protecting vulnerable persons" (emphasis added).[72] This would seem to allow to include good faith and abuse of rights (and process) within the Swiss concept of international public policy.

Moving to the principle of finality, that in civil law countries shall be intended only as claim preclusion (due to the inapplicability of collateral estoppel these systems), it is possible to say that several civil law systems consider *res judicata* as part of their public policy. This can be said with certainty with regard to the German,[73] Swiss,[74] Egyptian[75] and Hungarian[76] system. It seems that a similar conclusion can be drawn, today, also with regard to France[77] and Italy.[78] On the contrary, in Belgium and

[71] See Einhorn, Yearbook of Private International Law (2010), 50.

[72] *X SpA v. Y Srl*, BGE 132 III, 389, 8 March 2006, mentioned in Einhorn (2010) (n. 71), 50.

[73] Koch, Diedrich, *Civil Procedure in Germany* (1998), 70. See also ILA Interim Report (2004) (n. 40), 15.

[74] See Swiss Federal Supreme Court, 3 April 2002, ATF 128 III 191; see also Swiss Federal Supreme Court, 27 May 2015, 4A_374/2014; *Club Atlético de Madrid SAD v. Sport Lisboa E Benfica and Fédération Internationale de Football Association (FIFA)*, Tribunal Federal, 23 April 2010, 4A_490/2009. Finally see the well-known case of the Swiss Federal Supreme Court *Fomento de Construcciones y Contratas S.A. v. Colon Container Terminal S.A.*, DSFSC 127 (2001) III at 279. In this regard see also Söderlund, Journal of International Arbitration (2007), 311-312.

[75] See Art. 58(2)(a) of the Law Concerning Arbitration in Civil and Commercial Matters.

[76] See Legefelsöbb Bíróság (LB) [Supreme Court] BH.2010.191, mentioned in Walters, Journal of International Arbitration (2012), 669.

[77] Traditionally *res judicata* was not considered as part of public policy in France. See ILA Interim Report (2004) (n. 40), 15. A different conclusion may be, however, drawn by reading the decision *Marriott Int'l Hotels, Inc. v. J.N.A.H. Dev. S.A.*, no. 09/13559, *Cour d'appel de Paris*, 9 September 2010, where it has been stated that res judicata could create a basis to annul or refuse enforcement of an award under section 1502(5) of the French Code of Civil Procedure, which provides for annulment of an award that is contrary to international public policy. The court expressly explained that such a situation would arise if a second arbitral award contradicts a previous arbitral award that is enforceable in France. See in this regard, Walters (2012) (n. 76), 665-666. In this regard, it is worth noting that since January 2005 Art. 125 of the French Code of Civil Procedure has been modified, on the basis of considerations of procedural economy and efficiency, and it now allows courts to consider *res judicata* issues *ex officio*. There is no, however, obligations for national courts to do so.
The enforcement of a duplicative arbitration award contrary to the principle of *res judicata* has taken place also in the well-known *Hilmarton* case. See *Société OTV v. Société Hilmarton*, Cour de Cassation, 10 June 1997, in 6 Rivista dell'arbitrato (1997), 385 and ss.

[78] See Italian *Corte di Cassazione* 13475/2014 and 26482/2007 in which it has been expressly stated that res judicata may be raised *ex officio* by judges. Considering that *res judicata* is already a ground for refusing the execution of foreign decisions according to Art. 64 of Italian law 218 of 1995 on private international law, it seems possible to say that Italian judges may raise *ex officio* the *res judicata* exception (as part of Italian international public policy) when enforcing a foreign arbitral award according to the New York Convention. Such a conclusion could seem to be denied by the decision *Tema-Frugoli S.p.a. c. Hubei Space Quarry Industry Co. Ltd.* of 2 July 1999 of the Court of Appeal of Milan, in 9 Rivista dell'arbitrato (2000), 753 and ss. However, in this case, the party opposing the enforcement of the duplicative award did not raise the public policy exception; for this reason it is not possible to say that this award runs against the opinion fostered by the present author. See, in this regard, Muroni (2000) (n. 50), 755 and ss., who – at 761 – has expressly stated that in Italy courts shall *ex officio* refuse enforcement of duplicative arbitral awards, which shall be considered contrary to

The Netherlands *res judicata* shall be raised by a party and not by a court on its own motion and this has lead some commentators to refuse the idea that *res judicata* may be part of international public policy.[79]

It seems, in conclusion, that *res judicata* may be considered as part of international public policy of several civil law systems. In such systems, therefore, national courts may refuse the enforcement of a duplicative arbitration award by applying the public policy exception set forth in Art. V(2)(b) of the New York Convention.[80]

Transnational public policy

It is finally interesting to understand whether good faith and finality could be considered as part of public policy in case a judge would apply the already discussed concept of transnational public policy.

In this regard, it is worth noting that, in his seminal work on the subject (which has inspired all the subsequent works *in subiecta materia*), Pierre Lalive has stated that good faith and abuse of rights are to be considered as part of transnational public policy, but he never mentioned the largely more recognized principle of finality.[81] This seems surprising, due to the very high importance that the principle of finality may have in ensuring legal certainty in an ideal system of transnational commerce.

However, it is worth noting that – as of today – transnational public policy has been a concept of academic rather than practical interest (and application). As a consequence, the above classification is not very helpful in offering guidelines to national courts facing the situation of two duplicative arbitral awards.

4.2.2 *Concrete application of the proposed solution*

In order to understand how could the public policy exception operate in concrete in order to prevent the enforcement of duplicative arbitration awards, it is necessary to proceed on a case-by-case basis. We will, first of all, distinguish between cases in which only one (of two or more) parallel arbitrations has been concluded and cases in which there are two (or more) validly rendered awards. Within this second category, it will be then necessary to identify several other sub-categories.

Hypothesis 1: one award and one pending process

If there is an award and a pending proceeding (perhaps commenced earlier

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international public policy. Indeed, according to this Author, *ne bis in idem* is to be considered part of international public policy in the Italian law system.

[79] Concerning Belgium and The Netherlands see ILA Interim Report (2004) (n. 40), 15.

[80] However, it is worth remembering that in all systems which are part of the European Union the enforcement of a duplicative arbitration award may be refused on the basis of the European concept of international public policy; with regard to these countries, it is therefore irrelevant whether the national laws consider (or not) finality as part of their international public policy.

[81] See Lalive (1986) (n. 37), 305.

than the process which lead to the rendered award), the question is whether a national court may refuse enforcement of the already rendered award due to the existence of another process on the same dispute. The answer, in the majority of the cases, seems quite straight: no. Has it has been stated, "parallel proceedings do not obstruct the enforcement of a divergent judgment. Therefore judges (…) will generally enforce a judgments despite the existence of parallel proceedings in a third country".[82] This is due to the fact that it is unlikely that a country would include the *lis pendens* rule within its international public policy. A recourse to abuse of process as part of international public policy of a country is, as we have already demonstrated, quite limited (i.e., as we have seen, it seems that only in Switzerland an application of the doctrine as part of international public policy is allowed). Similarly, the application of collateral estoppel might at most regard the issues that have already been decided (by means of an interlocutory award) in the pending arbitration; however, such an approach seems applicable only in the US, where – as we have seen in Chapter 3 – collateral estoppel is applicable even in lack of a final judgment on the main claim.

As it has been noted, "[t]his legalistic standpoint is unsatisfactory".[83] However, it does not seem that the current legal framework offers different solution.

Hypothesis 2: two validly issued awards

In case there are two validly issued awards, the public policy exception may fully operate. Obviously, the applicability of such exception will depend on whether every single State considers *res judicata*, collateral estoppel and abuse of process as part of its public policy and, with regard to the applicability of *res judicata* and collateral estoppel, on how broadly the triple identity test is applied in a country. The broader is the application of the triple identity test in a country, the greater will be the possibility that the enforcement of a duplicative award is refused on the basis of *res judicata* and collateral estoppel.

Some sub-categorizations are required. We will first of all distinguish the cases in which the first award is an ICSID award and the cases in which the first award shall be enforced according to the 1958 New York Convention. Within this last category, we will distinguish the cases in which the first award has been recognized, enforced or confirmed at the State of the seat, from the cases in which the first award has not been recognized, enforced or confirmed. A final distinction shall be made for the cases in which the first award has been recognized, enforced or confirmed: there are differences on the basis of whether the first award has been recognized, enforced or confirmed in the same country where the enforcement of the second award is sought, or the first award has been enforced (or confirmed) in a country that is different from the one where enforcement of the second award is sought. Finally, the hypothetical case in which the first non-ICSID award has been annulled in the country of the seat will be analysed.

[82] See Balkanyi-Nordmann, *AAA Handbook on International Arbitration and ADR* (2010), 179.
[83] *Ibid.*

Hypothesis 2.1: the first issued award is an ICSID award

If the first issued award is an ICSID award, according to Art. 54 of the 1965 Washington Convention "[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State". This means an ICSID award is fully effective and enforceable in all States which are parties of the ICSID Convention. As a consequence, the enforcement of a second (non-ICSID) award may be refused in all these States on the basis of the public policy exception, provided that such States recognize one or more of the *res judicata*, collateral estoppel and/or abuse of process doctrines as part of their international public policy.

Hypothesis 2.2: the first issued award is not an ICSID award

As already stated, this hypothesis requires a further distinction, on the basis of whether the first award has been recognized, enforced or confirmed or not.

Hypotesis 2.2.1: the first non-ICSID award has been recognized, enforced or confirmed

If the first non-ICSID award is enforced, recognized or confirmed in the same country where the enforcement of the second award is sought, in this case the first award will be probably considered as merged in the judgment that recognized/enforced/confirmed it. This means that the award will be considered as a state judgment, which can preclude a second discussion on claims/issues already discussed in the first arbitration and decided in the first award. For this reason (and also by applying an analogy with national rules on recognition and enforcement of foreign judgments) it seems likely that in all States where *res judicata*, collateral estoppel and/or abuse of process are considered as part of international public policy, the enforcement of the second duplicative award will be precluded.

If the first non-ICSID award is recognized, enforced or confirmed in a country that is different from the one where the enforcement of the second award is sought, the situation appears more complex. When the enforcement of the second award is sought, the opposing party may try to oppose the circumstance that there already exists an award on the same dispute and that such award has been merged in a foreign judgment (i.e. the judgment recognizing, enforcing and/or confirming the award in another country) on the same dispute. At this point, the second national court may, on the basis of its rules on recognition and enforcement of foreign judgments, as well as on the basis of considerations of comity, recognize the foreign judgment (recognizing, enforcing or confirming the first award) and give it preclusive effects.[84] However, it should be noted that such a possibility, that has been called

[84] In this regard it is worth noting that the EU Regulation 1215/2012 regarding, *inter alia*, enforcement of foreign judgments within the EU does not apply to matters related to arbitration, i.e. also to the

"judgment route" of arbitral awards, is contested by some Authors on the basis of the fact that a national judgment based on an arbitral award has only an ancillary nature and should not be entitled to circulate.[85]

Hypotesis 2.2.2: the first non-ICSID award has not been recognized, enforced or confirmed

If the first award has not been recognized, enforced or confirmed, it seems unlikely that the second national court may give preclusive effects to the first award (thus refusing enforcement on the basis of public policy, if applicable) in order to preserve coherence and harmony of decisions on an international level. What seems more likely is that the second court will enforce the second issued award.

Hypothesis 2.3: the first non-ICSID award has been annulled by the Court of the seat

This hypothesis is one of the most discussed topics in international arbitration scholarship. This is not the place where to reconstruct the entire debate on this matter. However, as this author has already stated elsewhere,[86] it appears that the New York Convention, which has created a pro-enforcement regime, authorizes national courts to enforce arbitral awards which have been enforced at the place of the seat. This means that, even if the first award has been annulled, the award creditor will be still entitled to seek enforcement elsewhere. At this point, on the basis of whether it is earlier enforced the first (annulled) award or the second award, we will fall back in one of the situations described above.

4.3 *Challenging non-ICSID awards arising from duplicative proceedings at the seat of arbitration (in brief)*

The last possibility that the award debtor of the second duplicative award has

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recognition and enforcement of national judgments which are based on arbitral awards. On the scope of the arbitration exclusion see Zarra, www.giustiziacivile.com (2014), 1 and ss.

[85] The matter has been extensively dealt with by Scherer, Journal of International Dispute Settlement (2013), 587 and ss. This Author is extremely critic with regard to the judgment route. On the contrary, Mosk, Nelson, Journal of International Arbitration (2001), 469 and ss., seems to endorse the approach in order to favour considerations of finality. See also, on the topic, DeWitt, Texas International Law Journal (2015), 495 and ss., Hill, Journal of Private International Law (2012), 159 and ss., Nazzini, Contemporary Asia Arbitration Journal (2014), 139 and ss., Einhorn (2010) (n. 71), 43 and ss., Anon, University of Pennsylvania Law Review (1974), 223 and ss., Silberman, King's Law Journal (2008), 235 and ss. It seems, however, that – as of today – the judgment route is the preferred approach by national courts. See, in this regard, for England *Chantiers de l'Atlantique SA v. Gaztransport & Tachnigaz SAS* [2011] EWHC 3383 (Comm); *Diag Human SE v. Czech Republic*, [2014] EWHC 1639 (Comm), *Yukos Capital Sarl v. OJSC Rosneft Oil Company*, [2011] EWHC 1461 (Comm). For the US, see the *Restatement of the Law (Third), The US Law on International Commercial Arbitration, Tentative Draft No. 2* (April 2012) and *Belmont Partners LLC v. Mina Mar Group Inc.* 741 FSupp. 2d 743 (WDVa 2010). Scherer, mentioned in this note, at 600 and ss., has demonstrated that the approach is also followed in Australia, India, Israel, Germany and Switzerland.

[86] See, also for an extensive bibliography on the topic, Zarra, Rivista dell'arbitrato (2015), 574 and ss.

in order to avoid the enforcement of such an award is to try to challenge it at the courts of the place of the seat of arbitration.

It is largely recognized that the reasons for challenging an award usually mirror the reasons which entitle a court to refuse enforcement under the New York Convention.[87] It is therefore useless to recall all the above debate: in case a State (which is the seat of a duplicative arbitration) recognizes *res judicata*, collateral estoppel and/or abuse of process as part of its international public policy, national courts will be entitled to annul the second duplicative award on the basis of a violation of their State's international public policy.

The case law in this regard is very limited. The only decision on the challenge of an arbitral award in the court of the seat has been the SVEA Court of Appeal decision in the *CME* case, the factual background of which has been already discussed in Chapter 3 above.[88] By applying Swedish law, which does not recognize both *res judicata* and abuse of process as part of its public policy, the Court refused to annul the *CME* award, issued in Stockholm, that was duplicative of the *Lauder* award, issued in London.[89] In this regard, it is worth noting that the Czech Republic argued that *res judicata* was part of Swedish public policy and that the requirement of the same

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[87] See Lew, Mistelis, Kroll (2003) (n. 3), 673 and ss. See also Blackaby, Partasides, Redfern, Hunter (2015) (n. 3), 581 and ss., Bernardini (2009) (n. 1), 26 and ss. For example, Art. 34(2) and (3) of the UNCITRAL Model Law state that:

"(2) An arbitral award may be set aside by the court specified in article 6 [i.e. the court of the seat] only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the sub- mission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal".

[88] *The Czech Republic v. CME Czech Republic B.V.*, SVEA Court of Appeal, Department 16, Case No. T8735-01, available at http://opil.ouplaw.com/view/10.1093/law:iic/63-2003.case.1/IIC063(2003)D.pdf. The decision is commented in Gallagher, *Pervasive Problems in International Arbitration* (2006), 342 and ss.

[89] P. 95 and ss.

parties was to be interpreted broadly, on the basis of the already discussed concept of privity (according to which CME and Mr. Lauder should have been considered representing the same interests and therefore substantially identical parties). Both these arguments were refused. The Court of Appeal declined the idea that *res judicata* was part of public policy on the basis of the fact that in Sweden *res judicata* exception may not be raised *ex officio*. Furthermore, the Court said that in Sweden formal identity between the parties is required and therefore it is not possible to apply the concept of privity developed in common law systems.

This decision, which does not keep into account the policy considerations endorsed in this book, is anyway an isolated precedent (to be strongly criticized for its extremely formal reasoning). Only with the emergence of further case law it will be possible to understand whether and to what extent considerations related to abuse of process, *res judicata* and collateral estoppel may play a role in the challenge of arbitral awards at the courts of the seat (and in allowing to refuse the enforcement of international arbitral awards).

Conclusions

This book has tried to give some solutions to the problem of parallel proceedings in investment arbitration.

After having demonstrated, in the introduction to Section 1, that a dissertation on parallel proceedings in investment arbitration is very necessary, Chapter 1 has given a definition of the problem and has provided the reader with an analysis of the taxonomy of parallel proceedings. In this regard, it has been demonstrated that – as investment arbitration is today configured – it is quite inevitable to have (at least the risk of) parallel/multiple proceedings related to the same claim. Secondly, and mainly, Chapter 1 has demonstrated why parallel proceedings shall be avoided, namely for protecting values such as finality, coherence, legal certainty, as well as saving costs and efficiency. As a consequence, it is possible to say that parallel proceedings have not only procedural implications, but involve also substantive implications on the rights of the parties involved in the dispute from which parallel proceedings arise. In light of these reasons, Chapter 1 has demonstrated why a policy-oriented analysis of the solutions to parallel proceedings is highly desirable.

Chapter 2 has demonstrated that the legal instruments aimed at avoiding parallel proceedings that are applicable at the jurisdictional phase of investment arbitration proceedings are not well fitted to offer such a remedy in international arbitration. The main reason for which such tools are unsuitable for the aim of our research is that they are always based on consent, i.e. on an expression of autonomy of the same parties that commenced the parallel proceedings.

Indeed, there is a strong contrast between the consensual paradigm of international arbitration, which is the "*grundnorm*" of international arbitration, and the necessity that arbitration – having *de facto* become the natural judge for disputes related to international commerce and in particular to international investments – adapts to the substantial needs of modern transactions. The formalism related to consent, indeed, often does not allow arbitration to adapt to the substantive reality of complex disputes, thus generating an "artificial discrepancy between the substantive and the procedural aspect of the same multiparty relationship".[1] This situation generates the paradox that "[e]conomy and efficiency may be frustrated by a number of dilatory factors before, during and after the arbitration. Ironically, many of these potential causes of delay are rooted in those characteristics of arbitration that distinguish it from traditional adjudication processes. Nowhere is this paradox more evident that in disputes involving multiple parties".[2]

In light of the above, remedies such as consolidation and joinder cannot be considered as general solutions to the problem of parallel proceedings, due to the fact that it is highly probable that one of the parties will not give its consent to these form of coordination. Furthermore – and most importantly – ICSID Convention and Rules

[1] Brekoulakis, Penn State Law Review (2009), 1182.
[2] Stipanowich, Iowa Law Review (1987), 475.

are completely silent on the possibility to coordinate parallel/multiple proceedings or to join third parties. This means that the only plausible solution is quasi-consolidation, i.e. the appointment of the same arbitrators for two parallel disputes (that, indeed, seems the only one that has been applied in a certain number of cases). Due to the fact that the majority of investment arbitrations are held in the ICSID framework, we are today stuck in a situation of total lack of rules providing for coordination of proceedings and/or possible involvement of third parties. Other forms of arbitration are even more based on consent and therefore still strictly anchored to the impossibility to extend the proceedings to third parties without consent by all of them.

However, as we have seen in Chapter 3, this cannot be the end of the story. The already mentioned policy considerations (i.e. reliability and legitimacy of arbitration as an adjudication process, judicial economy, efficiency and finality) impose to avoid and limit parallel proceedings. If such policy considerations cannot find a place when arbitrators consider their jurisdiction, this does not mean that they cannot be kept into account at a later stage in the proceedings, i.e. the admissibility phase.

Chapter 3 has started with an analysis of the distinction between jurisdiction and admissibility in investment arbitration and of the possible sources of such distinction. Having identified the legal basis of such distinction, the research has analysed the law applicable in investment arbitration and, in particular, the applicability of general principles of international law. It has been demonstrated that, at the admissibility phase, arbitrators have the inherent power to preclude the continuation of proceedings that run against general principles of international law.

The analysis has then turned to the specific general principles of international law whose violation may be at the basis of a declaration of inadmissibility, namely good faith and *ne bis in idem*. As we have seen, both of these principles may be applied differently and may be specified in other more specific principles or rules. In particular, the principle of good faith can give rise to the doctrine of abuse of process, while the *ne bis in idem* principle has generated the principles of claim preclusion and issue preclusion.

The assumption at the basis of Chapter 3 has been that arbitral awards, as any judicial decisions, may have effect on all third parties that are substantially connected to the parties involved in the proceedings. Indeed, it has been demonstrated that the effects of arbitral decisions are *ipso facto* extensible on third parties who are in privity with one of the parties of the first claim. If a third party's interests have been adequately represented by the claimant in the first action, such a third party will be therefore precluded to start a second claim which is substantially identical to what has been already decided. In such a case, the second claim should be declared inadmissible.

Given the above, Chapter 3 has been demonstrated that abuse of process, issue estoppel and, if interpreted broadly, *res judicata* are valuable tools in order to avoid, or at least limit, the effects of parallel proceedings.

The doctrine of abuse of process imposes to the parties to not make recourse to investment arbitration with the aim of getting unfair advantages and/or to harass the other party. If procedural rights are not exercised for their proper scope, it is arguable that a claim does not deserve the protection of the law and that such a claim should be declared inadmissible.

Claim preclusion (*res judicata*) and issue preclusion (collateral estoppel) are two doctrines which are aimed at ensuring finality of judicial decisions (respectively on entire claims or single issues), coherence and stability. After having analysed the various possible applications of such doctrines we have demonstrated that, if broadly interpreted, *res judicata* and collateral estoppel can be very useful in order to prevent parallel proceedings and conflicting decisions.

However, prior to apply all such doctrines, it is essential to make, on a case-by-case basis, a coordination of any of them with the principle of due process.

Finally, and keeping into account all the above discussion, Chapter 3 has introduced a proposal to amend investment arbitration rules in order to render them more effective and policy oriented will be made; such a proposal is based on a form of intervention of third parties subject to the award on the basis of an invitation of the arbitrators. If such third parties should refuse to intervene, they will then be estopped to claim that they are not subject to the effects of the award.

Chapter 4 has regarded the remedies to parallel proceedings at the post-award phase of investment arbitration. Such an analysis has required to make a clear distinction between the post award remedies in ICSID arbitration and in non-ICSID arbitration. The main difference stays in the fact that ICSID is considered to be a self-contained system of arbitration, fully autonomous and independent of any national systems, which covers all aspects of the arbitral proceedings and extends to the challenge of the awards, the latter being regulated only by the Convention, without any interference by national courts or other national authorities, no room for the application of the New York Convention being made regarding enforcement of an ICSID award. Thus, we have examined the possibility to preclude the existence of two duplicative proceedings in light of the ground for annulment given by the manifest excess of powers of arbitrators. In this regard, we have concluded that it is very unlikely that a remedy to parallel proceedings may be found at the annulment stage of ICSID proceedings.

With regard to non-ICSID awards, they may be either challenged at the place of the seat of the arbitration or, if one of the grounds set forth in Art. V of the New York Convention 1958, the courts of the State where such enforcement is required may refuse their enforcement. The only ground for refusing enforcement on the basis of the existence of duplicative awards is the public policy exception set forth in Art. V(2)(b) of the New York Convention. For this reason, we have tried to demonstrate

whether abuse of process, *res judicata* and collateral estoppel may be part of international public policy in several different legal systems and, thereafter, we have tried to see how this remedy could operate in concrete.

In conclusion, this book has tried to propose an approach to parallel proceedings that goes beyond the formalities of the dispute and is based on the very strong substantial implications that exist between all the parties of an economical transaction, regardless of the way in which a certain dispute is brought before arbitrators. Such an approach, which finds legal basis both in international law and in municipal law systems, is today highly desirable in order to ensure the credibility of investment arbitration and to safeguard the interests of respondent States.

This book has not covered the analysis and the possible solutions to parallel proceedings between national courts and investment arbitration tribunals and between investment arbitration tribunals and other international *fora*. While the former of these topics has found some analysis in other works (mentioned in the text), the latter would need some new detailed studies, even in light of the clear emergence of the problem in disputes such as the ones of the *Yukos* and *Chevron* sagas. It could maybe be the subject of another book...

Selected Bibliography

1. Abi-Saab, *Cours Général de Droit International Public*, 207 Recueil des Cours 9 (1996)
2. Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 New York University Journal of International Law and Politics 919 (1999)
3. Aghenitei, Flamanzeanu, *Universal Jurisdiction and the principle of ne bis in idem*, in 4 Challenges of the Knowledge Society 131 (2011).
4. Aiken, *Consolidation of separate arbitration proceedings*, available at http://www.ashrlaw.com/dox/SKA-arb-consolidation.pdf (2009)
5. Al-Qahtani, *The Status of Would-Be Intervening States Before the International Court of Justice and the Application of Res Judicata*, 2 The Law and Practice of International Courts and Tribunals 269 (2003)
6. Alexandrov, *Breaches of Contract and Breaches of Treaty*, 5 Journal of World Investment and Trade 555 (2004).
7. Alexandrov, *The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals Shareholders as "Investors" under Investment Treaties*, 6 Journal of World Investment and Trade 387 (2006)
8. Alexeyev, Voitovich, *Tokios Tokeles Vector: Jurisdictional Issues in ICSID Case Tokios Tokeles v. Ukraine*, 9 Journal of World Investment and Trade 519 (2008)
9. Ali, Nesbitt, Wessel, *Anti-suit Injunctions in Support of International Arbitration in the United States and the United Kingdom*, International Arbitration Law Review 12 (2008)
10. Allorio, *La cosa giudicata rispetto ai terzi*, Giuffrè (1935 reprinted in 1992)
11. Alvarez, *Arbitration under the North American Free Trade Agreement*, 16 Arbitration International 393 (2000)
12. Alvarez, *Implications for the Future of International Investment Law*, in Sauvant (ed.) Appeals Mechanism in International Investment Disputes 29, Oxford (2008)
13. Alvarez, The Public International Law Regime Governing International Investment, 344 Recueil des Cours (2009), 193-544
14. Alvarez-Jimenez, *The WTO Appellate Body's Exercise of Judicial Economy*, 12 Journal of International Economic Law 393 (2009)
15. Amerasinghe, *International Arbitral Jurisdiction*, Brill (2011)
16. Amerasinghe, *Local Remedies in International Law*, Cambridge University Press (2004)
17. Amerasinghe, *State responsibility for injury to aliens*, Oxford (1967)
18. Andritoi, *The "Collateral Estoppel" Theory in International Law*, 7 Acta Universitatis Danubius 47 (2011)
19. Anon, *Foreign Judgments Based on Foreign Arbitral Awards: The Applicability of Res Judicata*, 124 University of Pennsylvania Law Review 223 (1975)
20. Arbour, *The Louisiana Concept of Res Judicata*, 34 Louisiana Law Review 763 (1974)
21. Arfazadeh, *In the Shadow of the Unruly Horse: International Arbitration and the Public Policy Exception*, 13 The American Review of International Arbitration 43 (2003)
22. Ascensio, *Abuse of Process in International Investment Ar*bitration, 13 Chinese Journal of International Law 763 (2014)
23. Atteritano, *Anti-suit injunctions in ambito arbitrale: provvedimenti illeciti o semplicemente odiosi?*, 19 Rivista dell'arbitrato 441 (2010)
24. Atteritano, *L'enforcement delle sentenze arbitrali del commercio internazionale*, Giuffré (2009)
25. Aust, *Handbook of International Law*, Cambridge University Press (2010)
26. Bachand, *Kompetenz-Kompetenz, Canadian Style*, 25 Arbitration International 431 (2009)

27. Bagner, *How to Avoid Conflicting Awards: The Lauder and CME Cases*, 5 *Journal of World Investment and Trade* 31 (2004)
28. Bain, *Bridging the Procedural Gap: Arbitration Decisions as a Basis for Collateral Estoppel – Benjamin v. Traffic Executive Association Eastern Railroads*, 1990 Journal of Dispute Resolution 189 (1990)
29. Balena, *Sentenza contro società di persone ed effetti per il socio*, 4 Il giusto processo civile 36 (2009)
30. Balkanyi-Nordmann, *The Perils of Parallel Proceedings: Is an Arbitration Award Enforceable if the Same Case is Pending Elsewhere?*, AAA *Handbook on International Arbitration & ADR. second edition* 169 (2010)
31. Balladore Pallieri, *I "principi generali del diritto riconosciuti dale nazioni civili nell'art. 38 dello statuto della Corte permanente di Giustizia internazionale*, Memorie dell'Istituto giuridico della R. Università di Torino (1931)
32. Bamforth, *Joining non-signatories to an arbitration recent developments*, 2 Dispute Resolution 9 www.practicallaw.com/6-275-4952 (2007/08)
33. Bamforth, Maidment, *"All join in" or not? How well does international arbitration cater for disputes involving multiple parties or related claims?*, 27 ASA Bulletin 3 (2009)
34. Barcelò, *Anti-Foreign-Suit Injunctions to Enforce Arbitration Agreements*, Cornell Law Faculty Publication, Paper 87 (2007)
35. Barin, *Non-signatories in International Arbitration: Some Thoughts from Canada*, in van den Berg (ed.) International Arbitration 2006: Back to Basics?, 13 ICCA Congress Series 375 (2007)
36. Barron, *Court-ordered Consolidation of Arbitration Proceedings in the United States*, 4 Journal of International Arbitration 81 (1987)
37. Barnett, *Res Judicata, Estoppel, and Foreign Judgements*, Oxford University Press (2001)
38. Bassett, *The Forum Game*, 84 North Carolina Law Review, 333 (2006)
39. Bastin, *The Amicus Curiae in Investor-State Arbitration*, 1 Cambridge Journal of International and Comparative Law 208 (2012)
40. Baumgartner, *Related Actions*, 3 Zeitschrift für Zivilprozeß International 2003 (1998)
41. Begic, *Applicable Law in International Investment Disputes*, eleven international publishing (2005)
42. Bekker, *Recalibrating the Investment Treaty Arbitration System Through Non-Compartimentalized Legal Thinking*, 55 Harvard International Law Journal Online 1 (2013)
43. Bell, *Forum Shopping and Venue in Transnational Litigation*, Oxford University Press (2003)
44. Belohlavek, Cerny, *Law applicable to claims asserted in international investment disputes*, 54 International Journal of Law and Management 443 (2012)
45. Benedettelli, *Le anti-suit injunctions nell'arbitrato internazionale: questioni di legittimità e opportunità*, 24 Rivista dell'Arbitrato 701 (2014)
46. Beniassadi, *Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration?*, 10 International Tax and Business Lawyer 59 (1992)
47. Bergamini, *Il caso Noble Ventures e "The Umbrella Clause Problem"*, 14 Rivista dell'arbitrato 118 (2005)
48. Bermann, *The Use of Anti-suit Injunctions in Transnational Litigation*, 28 Columbia Journal of Transnational Law 589 (1990)
49. Bernal-Fandiño, Rojas-Quiñones, *La vinculatoriedad de un laudo arbitral frente a terceros en la doctrina del collateral estoppel,* 16 Revista Colombiana de Derecho Internacional 455 (2010).

50. Bernardini, *Icsid versus non Icsid investment treaty arbitration*, http://www.arbitration-icca.org/media/0/12970223709030/bernardini_icsid-vs-non-icsid-investent.pdf (2009)
51. Bernardini, *Investment arbitration under the ICSID convention and BITS*, in Aksen, Bockstiegel, Mustill, Patocchi, Whitesell (eds.), *Global reflections on international law, commerce and dispute resolution – Liber amicorum in honour of Robert Briner*, 89 (2005)
52. Bernardini, *Investment Protection under bilateral investment treaties and investment contracts*, 2 Journal of World Investment 236 (2001)
53. Bernardini, *The law applied by international arbitrators to state contracts*, in Briner, Fortier, Berger, Bredow (eds.), *Law of International Business and Disputes Settlement in the 21st century – Liber Amicorum Karl-Heinz Bockstiegel* 51 (2004)
54. Bernasconi-Osterwalder, Johnson, Marshall, *Arbitrator Independence and Impartiality: Examining the dual role of arbitrator and counsel*, IV Annual Forum for Developing Country Investment Negotiators, New Dehli, 27-29 October 2010, Background Papers (2010)
55. Bernhardt, *Article 59*, in Zimmerman, Tomuschat, Oellers-Frahm, Tams (eds.), *The Statute of the International Court of Justice* 1231, Oxford OUP (2012)
56. Betti, *Trattato dei limiti soggettivi della cosa giudicata in diritto romano*, Macerata (1922)
57. Beyer, *Reevaluating the "Corporate Veil" Metaphor in the Context of International Trade: A Critical Analysis of Hester International Corporation v. Federal Republic of Nigeria*, 14 Maryland Journal of International Law and Trade 233 (1990)
58. Bhala, *The Myth about Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 American University International Law Review 845 (1998)
59. Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 Journal of Transnational Law and Politics 1 (1999)
60. Bigge, *Iura Novit Curia in Investment Treaty Arbitration/ May? Must?*, www.kluwerarbitrationblog.com (2011)
61. Bjorklund, *Investment arbitration*, in Mistelis Berman (eds.), *Mandatory Rules in International Arbitration* 233, Jurish Publishing (2010)
62. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, www.transnational-dispute-management.com (2010)
63. Bjorklund, Nappert, *Beyond Fragmentation*, www.ssrn.com/abstract=1739997 (2011)
64. Blackaby, Partasides, Redfern, Hunter, *Redfern and Hunter on International Arbitration*, Oxford OUP (2015)
65. Blanchard, *State Consent, Temporal Jurisdiction, and the Importation of Continuing Circumstances Analysis Into International Investment Arbitration*, 10 Washington University Global Studies Law Review 419 (2011)
66. Blanke, *ICSID Tribunal declines personal jurisdiction over dual national under Egypt UAE BIT*, www.kluwerarbitrationblog.com (2014)
67. Bleimaier, *The Doctrine of Comity in Private International Law*, 24 Catholic Lawyer 327 (1979)
68. Blyschak, *Access and advantage expanded: Mobil Corporation v Venezuela and other recent arbitration awards on treaty shopping*, 4 Journal of World Energy Law and Business 32 (2011)
69. Blyschak, *State Consent, Investor Interests and the Future of Investment Arbitration: Reanalyzing the Jurisdiction of Investor-State Tribunals in Hard Cases*, works.bepress.com/paul_blyschak/2 (2008)
70. Blyschak, *Yukos Universal v. Russia: Shell Companies and Treaty Shopping in International Energy Disputes*, 10 Richmond Journal of Global Law & Business 179 (2011)

71. Bockstiegel, *An Arbitrator's Perspective of BITs and their Relation to Other International Law Obligations*, Paper given at the Conference 50 Years of Bilateral Investment Treaties – Taking Stock and Look to the Future Frankfurt (2009)
72. Bockstiegel, *Commercial and Investment Arbitration: How Different are they Today?*, 28 Arbitration International 577 (2012)
73. Boddicker, *Whose Dictionary Controls? Recent Challenges to the Term "Investment" in ICSID Arbirtration*, 25 American University International Law Review 1031 (2010)
74. Bonafè, *La Cour, le Tribunal arbitral et le pouvoir de suspendre l'instance*, 3 Ordine internazionale e diritti umani 327 (2014)
75. Bonafè, *La protezione degli interessi di Stati terzi davanti alla Corte internazionale di giustizia*, Editoriale Scientifica, Napoli (2014)
76. Bond, *Dépeçage or Consolidation of the Disputes Resulting from Connected Agreements: The Role of the Arbitrator*, in Schwartz, Hanotiau (eds.), Multiparty Arbitration, Dossiers of the ICC Institute of World Business Law 35 (2010)
77. Bone, *Rethinking the "Day in the Court" Ideal and Nonparty Preclusion*, 67 New York University Law Review 193 (1992)
78. Bonato, *La nozione e gli effetti della sentenza arbitrale nel diritto francese*, 41 Rivista di diritto processuale 669 (2006)
79. Bottini, *Indirect Claims Under the ICSID Convention*, 29 U. Pa. J. Int'l. Law 563 (2008)
80. Bove, *Processo arbitrale e terzi*, 5 Rivista dell'arbitrato 784 (2005)
81. Bowett, *Estoppel Before International Tribunals and Its Relation to Acquiescence*, 33 British Yearbook of International Law 176 (1957)
82. Brekoulakis, *Parties in International Arbitration: Consent v. Commercial Reality*, Conference Materials of the School of International Arbitration 30th Anniversary Conference: "The Evolution and Future of International Arbitration: The Next 30 Years", Unpublished (2015)
83. Brekoulakis, *The Effect of an Arbitral Award and Third Parties in International Arbitration: Res Judicata Revisited*, 16 American Review of International Arbitration 1 (2005)
84. Brekoulakis, *The Relevance of the Interests of Third Parties in Arbitration: Taking a Closer Look at the Elephant in the Room*, 113 Penn State Law Review 1165 (2009)
85. Brekoulakis, *Third Parties in International Commercial Arbitration*, Oxford University Press (2010)
86. Brengesjo, *Lis Alibi Pendens in International Arbitration*, Doctoral Thesis – Stockholm University, http://www.diva-portal.org/smash/get/diva2:661930/FULLTEXT01.pdf (2013)
87. Brierly, *The Basis of Obligation in International Law*, in Brierly (ed.) The Basis of Obligation in International Law 29, Scientia Verlag (1968)
88. Briggs, *Nicaragua v. United States: Jurisdiction and Admissibility*, 79 The American Journal of International Law 373 (1985)
89. Brower, Henin, Kemperink, *Res Judicata*, in Kinnear, Fischer et al. (eds.), *Building International Investment Law: The First 50 Years of ICSID* 55, Kluwer (2015)
90. Brower, Ottolenghi, Prows, *Saga of CMS: Res Judicata, Precedent, and the Legitimacy of Icsid Arbitration*, in Binder, Kriebaum, Reinisch, Wittich (eds.), International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer (2009)
91. Brower, Sharpe, *Multiple and Conflicting International Arbitral Awards*, 4 *Journal of World Investment* 211 (2003)
92. Brower, Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 Chicago Journal of International Law 471 (2009)

93. Brown, *The Relevance of the Doctrine of Abuse of Process in International Adjudication*, 8 Transnational Dispute Management 1 (2011)
94. Brown, *The Ideologies of Forum Shopping – Why Doesn't a Conservative Court Protect Defendants?*, 71 North Carolina Law Review 649 (1993)
95. Brown, *The Inherent Powers of International Courts and Tribunals*, 76 British Yearbook of International Law 195 (2005)
96. Brown, *The Use of Precedents of other International Courts and Tribunals in Investment Treaty Arbitration*, Transnational Dispute Management (2008)
97. Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?*, 14 Leiden Journal of International Law 267 (2001)
98. Buffard, Zemanek, *The "Object and Purpose" of a Treaty: An Enigma?*, 3 Austrian Review of International & European Law 313 (1998)
99. Burgstaller, *Nationality of Corporate Investors and International Claims against the Investor's Own State*, 7 Journal of World Investment and Trade 857 (2006)
100. Busch, Pelc, *The Politics of Judicial Economy at the World Trade Organization*, 64 International Organization 257 (2010)
101. Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 McGill Law Journal 389 (2002)
102. Byrnes, Pollman, *Arbitration, Consent and Contractual Theory: The Implications of EEOC v. Waffle House*, 8 Harvard Negotiation Law Review 289 (2003)
103. Calamandrei, *Istituzioni di diritto processuale civile secondo il nuovo codice*, Lezioni universitarie, Padua (1941)
104. Callen, Kadue, *To Bury Mutuality, Not to Praise It: An Analysis of Collateral Estoppel After Parklane Hosiery Co. v. Shore*, 31 Hastings L. J. 755 (1979-1980)
105. Campbell, Nappert, Nottage, *Assessing Treaty-based Investor-State Dispute Settlement/ Abandon, Retain or Reform?*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2280182 (2013)
106. Cannizzaro, *Interconnecting International Jurisdictions*, 1 European Journal of Legal Studies www.ejls.eu (2007)
107. Carbone, *Promessa e affidamento nel diritto internazionale*, Giuffré (1967)
108. Carlevaris, *L'accertamento del diritto nell'arbitrato internazionale tra principio jura novit curia e onere della prova*, 16 Rivista dell'arbitrato 505 (2007)
109. Carlevaris, *La competenza dei tribunali internazionali tra violazione dei trattati sugli investimenti e violazione delle obbligazioni contrattuali*, 13 Rivista dell'arbitrato 431 (2004)
110. Carlevaris, *La tutela cautelare nell'arbitrato internazionale*, CEDAM (2006)
111. Carlevaris, *The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals*, 9 Journal of World Investment and Trade 35 (2008)
112. Carnelutti, *Istituzioni del processo civile italiano, vol. 1*, V ed., Società Editrice del Foro Italiano, Roma (1956)
113. Carnelutti, *Efficacia diretta e efficacia riflessa della cosa giudicata*, in *Studi di diritto processuale*, CEDAM, Padova (1925)
114. Caron, *Framing the Work of ICSID Annulment Committees*, 6 World Arbitration & Mediation Review 173 (2012)
115. Carpanelli, *General Principles of International Law: Struggling with a Slippery Concept,* in Pineschi (ed.) *General Principles of Law – The Role of the Judiciary* 125, Springer (2015)
116. Carrington, *Collateral Estoppel and Foreign Judgments*, 24 Ohio State Law Journal 381 (1963)
117. Carter, *The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem*, *8* Santa Clara Journal of International Law 1 (2010)
118. Carver, *How to Avoid Conflicting Awards: The Lauder and CME Cases,* 5 Journal

of World Investment and Trade 23 (2004)
119. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 Iowa Law Review 53 (1984)
120. Casad, Clermont, *Res Judicata, An Handbook on Its Theory, Doctrine and Practice*, Carolina Academic Press (2001)
121. Cassese, *Diritto Internazionale* (a cura di Gaeta), Il Mulino (2006)
122. Castaldo, *L'uso distorto del processo: riflessioni in margine ad una recente sentenza della Cassazione*, http://www.consiglionazionaleforense.it/site/home/agenda/documento5237.html (2011)
123. Castro de Figuereido, *Previous Decisions in Investment Arbitration*, www.kluwerarbitrationblog.com (2014)
124. Cavallini, *L'efficacia (riflessa) della sentenza nel pensiero di E. T. Liebman*, 42 Rivista di diritto processuale 1221 (2007)
125. Cerny, *Short Flight of the Phoenix: A Few Thoughts on Good Faith, the Abuse of Rights and Legality in Investment Arbitration*, 3 Czech Yearbook of International Law 183 (2012)
126. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 New York University Journal of International Law and Politics 697 (1999)
127. Chavier, *Equitable Relief – Anti-suit Injunctions*, 14 Suffolk Transnational Law Journal 257 (1990-1991)
128. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge University Press (2006)
129. Cheng, *Precedent and Control in Investment Treaty Arbitration*, www.transnational-dispute-management.com (2008)
130. Cheng, *The Role of Justice in Annulling Investor-State Arbitration Award*, 31 Berkeley Journal of International Law 236 (2013)
131. Chi, *The Fading of Compulsory Consolidation of Arbitration: A Fight between the Principles of Efficiency and Party Autonomy in International Commercial Arbitration*, ssrn.com/abstract=1674281 (2008)
132. Childress, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 University of California Davis 11 (2010)
133. Childress, *Forum Conveniens: The Search for a Convenient Forum in Transnational Cases*, 53 Virginia Journal of International Law 157 (2012)
134. Chillakaru, *The Rule of Competence-Competence: A Comparative Analysis of Indian and English Law*, 6 Contemporary Asian Arbitration Journal 133 (2013)
135. Chiu, *Consolidation of Arbitral Proceedings and International Arbitration*, 7 Journal of International Arbitration 53 (1990)
136. Chukwumerije, *International Law and Article 42 of the ICSID Convention*, 14 Journal of International Arbitration 79 (1997)
137. Chizzini, *L'intervento adesivo*, CEDAM, Padova (1991)
138. Ciurtin, *Beyond the Norm: The Hermeneutic Function of Treaty Preambles in Investment Arbitration and International Law*, 36 Revista Română de Arbitraj 64 (2015)
139. Clermont, Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 Cornell Law Review 1507 (1995)
140. Collings, *Using Collateral Estoppel After Arbitration*, Los Angeles Lawyer, July-August 2005 20 (2005)
141. Commission, *Precedent in Investment Treaty Arbitration*, 24 Journal of International Arbitration 129 (2007)
142. Comoglio, *Abuso del processo e garanzie costituzionali*, 43 Rivista di diritto processuale 319 (2008)
143. Comoglio, *Il principio di economia processuale, vol. 1-2*, CEDAM, Padova (1980)

144. Conejero Roos, *Multi-Party Arbitration and Rule Making: Same Issues, Contrasting Approaches*, in van den Berg (ed.), 50 Years of the New York Convention: ICCA International Arbitration Conference, 14 ICCA Congress Series 343 (2009)
145. Conforti, *Buona fede e diritto internazionale*, in Busnelli (ed.), *Il principio di buona fede* 87, Giuffrè, Milano (1987)
146. Conforti, *Diritto Internazionale IX edizione*, Editoriale Scientifica (2013)
147. Conforti, *Qualche riflessione sul contributo dei giudici internazionale ed interni al diritto internazionale*, Rivista giuridica degli student dell'Università di Macerata, 23-27 (2010)
148. Consolo, *Domande autodeterminate e litisconsorzio necessario nel giudizio arbitrale*, 53 Rivista di diritto processuale 1406 (2013)
149. Consolo, *Profili della litispendenza internazionale*, 91 Rivista di diritto internazionale 5 (1997)
150. Conway, *Ne Bis in Idem in International Law*, 3 Criminal Law Review 217 (2003)
151. Cordopatri, *L'abuso del processo nel diritto positivo italiano*, 47 Rivista di diritto processuale 874 (2012)
152. Cosmas, *Legitimacy crisis in Investor – State International Arbitration System: A Critique on the Suggested Solutions & the Proposal on the Way Forward*, 4 (11) International Journal of Scientific and Research Publications 1 (2014)
153. Cottier, Müller, *Estoppel*, in Bernhard (ed.), *Max Planck Encyclopedia of Public International Law* (online edition) (2007)
154. Courtney, *Binding Non-Signatories to International Arbitration Agreements: Raising Fundamental Concerns in the United States and Abroad*, 8 Richmond Journal of Global Law & Business 581 (2009)
155. Cox, *Dépeçage or Consolidation of Disputes Resulting from Connected Agreements: The Role of the Judge*, in Schwartz, Hanotiau (eds.), Multiparty Arbitration, Dossiers of the ICC Institute of World Business Law 49 (2010)
156. Craig, *Introduction*, in Permanent Court of Arbitration (ed.) Multiple Party in International Arbitration lvii, Oxford University Publishing (2009)
157. Crawford, *Treaty and Contract Claims in Investment Treaty Arbitration*, 24 Arbitration International 351 (2008)
158. Cremades, *Arbitration Under the ECT and Other Investment Protection Treaties: Parallel Arbitration Tribunals and Awards*, www.transnational-dispute-management.com (2005)
159. Cremades, *Good Faith in International Arbitration*, 27 American University Law Review 761 (2012)
160. Cremades, *Has the Proliferation of BITS Gone Too Far? Is it Now Time for a Multilateral Investment Treaty?*, 5 Journal of World Investment and Trade 89 (2004)
161. Cremades, Cairns, *Contract and treaty claims and choice of forum in foreign investment disputes*, in Cremades, Lew (eds.), Parallel States and Arbitral Procedures in International Arbitration, ICC Publication 13 (2005)
162. Cremades, Madalena, *Parallel Proceedings in International Arbitration*, 24 *Arbitration International* 507 (2008)
163. Crespi Reghizzi, *Diritto internazionale e diritto interno nelle controversie sottoposte ad arbitrato ICSID*, 45 Rivista di diritto internazionale privato e processuale 5 (2009)
164. Crivellaro, *Consolidation of Arbitral and Court Proceedings in Investment Disputes*, 4 *The Law and Practice of International Courts and Tribunals* 371 (2005)
165. Cromwell, *Arbitration and Its Collateral Estoppel Effect on Third Parties - Vandenberg v. Superior Court*, 2 Journal of Dispute Resolution 425 (2000)
166. Cuniberti, *Parallel Litigation and Foreign Investment Dispute Settlement*, 21 ICSID Review – FILJ 381 (2006)
167. Cunningham, *Collateral Estoppel: the Changing Role of the Rule of Mutuality*, 41

Missouri Law Review 521 (1976)
168. Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 Stanford Law Review 281 (1957)
169. Currie, *Res Judicata: The Neglected Defense*, 45 University of Chicago Law Review 317 (1978)
170. Curti Gialdino, *Imputazione giuridica e buona fede nella conclusion dei trattati*, 46 Rivista di diritto internazionale 427 (1960)
171. D'Agnone, *I conflitti di giurisdizione tra tribunali ICSID e fori giudiziali nazionali*, Doctoral Thesis, University of Macerata (2013)
172. D'Agostino, *Rescuing International Investment Arbitration: Introducing Derivative Actions, Class Actions and Compulsory Joinder*, 98 Virginia Law Review 177 (2012)
173. Dahlberg, *Fork-in-the-road provisions in investment treaties,* http://www.allenovery.com/publications/en-gb/Pages/Fork-in-the-road-provisions-in-investment-treaties.aspx (2009)
174. Đajić, *Mapping The Good Faith Principle in IInternational Investment Arbitration: Assessment of Its Substantive and Procedural Value*, 46 Proceedings of Novi Sad Faculty of Law 207 (2012)
175. Daly, *Come One, Come All: The New and Developing World of Nonsignatory Arbitration and Class Arbitration*, 62 University of Miami Law Review 95 (2007)
176. dalla Massara, *La domanda frazionata e il suo contrasto con i principi di buona fede e correttezza: il "ripensamento delle Sezioni unite*, 54 Rivista di diritto civile 345 (2008)
177. Das, *Preclusion, Lis Pendens & Stare Decisis: Severity in International Commercial Arbitration*, www.academia.edu, last access 26 April 2015
178. Daujotas, *Non-Signatories and Abuse of Corporate Structure in International Commercial Arbitration*, ssrn.com/abstract=2148900 (2012)
179. Debattista, *Arbitrators Powers to Order Interim Measures (Including Anti-Suit Injunctions)*, http://www.lmaa.org.uk/uploads/documents/C50ArbitratorsPowers.pdf (2008)
180. De Brabandere, *'Good Faith', 'Abuse of Process' and the Initiation of Investment Treaty Claims*, 3 Journal of International Dispute Settlement 609 (2012)
181. De Brabandere, *Investment Treaty Arbitration as Public International Law*, Cambridge University Press (2014)
182. DeCamp, *Consolidation of Separate Arbitration Proceedings: Liberal Construction versus Contractarian Approaches – United Kingdom of Great Britain v. Boeing Co.*, Journal of Dispute Resolution Vol. 1994 113 (1994)
183. de Gramont, *After the Water War: The Battle for Jurisdiction in Aguas Del Tunari, S.A. v. Republic of Bolivia*, www.transnational-dispute-management.com (2006)
184. De La Oliva Santos, *Oggetto del processo civile e cosa giudicata*, Giuffré (2009)
185. de Lotbiniére McDougall, *Res Juricata in International Arbitration: Case Studies and Principles*, 9 Transnational Dispute Management (2012)
186. De Ly, Radicati di Brozolo, Friedman, *ILA Report for the Biennial Conference in Washington D.C. April 2014* (2014)
187. De Ly, Sheppard, *ILA Final Report on Lis Pendens and Arbitration*, 25 Arbitration International 3 (2009)
188. De Ly, Sheppard, *ILA Final Report on Res Judicata and Arbitration*, 25 Arbitration International 35 (2009)
189. de Prada Rodriguez, Munoz Rojo, *El proceso civil ingles*, Editorial Comares (2014)
190. Derains, *Is there A Group of Companies Doctrine?*, in Schwartz, Hanotiau (eds.), Multiparty Arbitration, Dossiers of the ICC Institute of World Business Law 11 (2010)

191. Devolvé, *Multipartism: The Dutco Decision of the French Cour de cassation*, 9 Arbitration International 197 (1993)
192. DeWitt, *A Judgment Without Merits: The Recognition and Enforcement of Foreign Judgments Confirming, Recognizing, or Enforcing Arbitral Awards*, 50 Texas International Law Journal 495 (2015)
193. Di Benedetto, *International Investment Law and the Environment*, Edward Elgar (2013)
194. Dodge, *International Comity in American Law*, 115 Columbia Law Review 1 (2015)
195. Dodge, *National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter Eleven of Nafta*, 23 Hastings International & Comparative Law Review 357 (2000)
196. Dolinger, *World Public Policy: real International Public Policy in the Conflict of Laws*, 17 Texas International Law Journal 167 (1982)
197. Dolzer, Schreuer, *Principles of International Investment Law*, Oxford (2012)
198. Dondi, *Cultura dell'abuso e riforma del processo civile negli Stati Uniti*, 30 Rivista di diritto processuale 787 (1995)
199. Donovan, *Investment Treaty Arbitration*, in Mistelis Berman (eds.), Mandatory Rules in International Arbitration 233, Jurish Publishing (2010)
200. Donziger, Garr, Page, *Rainforest Chernobyl Revisited: The Clash of Human Rights and BIT Investor Claims: Chevron's Abusive Litigation in Ecuador's Amazon*, 17 Human Rights Brief 8 (2010)
201. Douglas, *The Hibryd Foundations of Investment Treaty Arbitration*, 74 British Yearbook of International Law 151 (2003)
202. Douglas, *The international Law of Investment Claims*, Cambridge (2009)
203. Douglas, Pouwelyn, Vinuales, *The foundations of investment treaty law*, Oxford University Press (2014)
204. Drahozal, *Party Autonomy and Interim Measures in International Commercial Arbitration*, in van den Berg (ed.), International Council for Commercial Arbitration, International Commercial Arbitration: Important Contemporary Questions 179 (2003)
205. Dumberry, *The Legal Standing of Shareholders Before Arbitral Tribunals: Has Any Rule of Customary International Law Crystallised?,* 18 Michigan State Journal of International Law 353 (2010)
206. Dumberry, Valasek, *Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Dispute*, 26 ICSID Review – FILJ 34 (2011)
207. Dumbrowski, *Effet Utile as a Unifying Doctrine in a Costitutionally Pluralist Europe*, In L. Tichy, M. Potacs, T. Dumbrovsky (eds), *Effet Utile* 93, Charles University, Prague (2014)
208. Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 New York University Journal of International Law and Politics 791 (1999)
209. Dworkin, *Taking Rights Seriously*, Duckworth, London (1978)
210. Einhorn, *The Recognition and Enforcement of Foreign Judgments on International Commercial Awards*, 12 Yearbook of Private International Law 43 (2010)
211. Ellis, *General Principles and Comparative Law*, 22 European Journal of International Law 949 (2011)
212. Ellis, *Nonmutuality: Taking the Fairness out of Collateral Estoppel*, 13 Indiana Law Review 563 (1980)
213. Erk-Kubat, *Parallel Proceedings in International Arbitration: A Comparative European Perspective*, Kluwer (2014)
214. Etteh, *Conflicting Decision in Investment Arbitration: How Do Inconsistent Decisions Arise and How Can They Be Avoided?*, http://www.dundee.ac.uk/cepmlp/gateway/files.php?file=cepmlp_car14_7_971422207

.pdf (2010)
215. European Federation for Investment Law and Arbitration (EFILA), *A response to the criticism against ISDS*, 17 May 2015 (2015)
216. Fach Gomez, *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest*, 35 Fordham International Law Journal 510 (2012)
217. Fawcett (ed.), *Declining Jurisdiction in Private International Law*, Oxford OUP (1995)
218. Faya-Rodriguez, Joubin Bret, *Most-Favoured-Nation Treatment, in UNCTAD Series on Issues in International Investment Agreements II*, http://unctad.org/en/Docs/diaeia20101_en.pdf (2010)
219. Fazzalari, *Le difese del terzo rispetto al lodo rituale*, 5 Rivista dell'arbitrato 613 (1995)
220. Fellas, *A Fair and Efficient Arbitration Process*, in PLI's Course Handbook, International Arbitration 2007, www.pli.edu/emktg/all_star/intl_arb13.doc. (2007)
221. Fellas, *Comments on Parties in International Arbitration: Consent v. Commercial Reality by Professor Stavros Brekoulakis*, Conference Materials of the School of International Arbitration 30th Anniversary Conference: "The Evolution and Future of International Arbitration: The Next 30 Years", Unpublished (2015)
222. Fenyvesi, *Application of International Law as Applicable Law under the Second Sentence of Art 42(1) in ICSID Arbitration*, 3 Adam Antal PhD tanulmanyok 57 (2005)
223. Feraci, *L'ordine pubblico nel diritto dell'Unione europea*, Giuffrè, Milano (2012)
224. Fernandez-Rozas, *Anti-suit Injunctions Issued by National Courts: Measures addressed to the Parties or to the Arbitrators*, in Gaillard (ed.) Anti-Suit Injunctions in International Arbitration 73 (2005)
225. Ferrari, *Forum Shopping: A Plea for a Broad and Value-Neutral Definition*, ssrn.com/abstract=2474181 (2013)
226. Ferrario, *The Group of Companies Doctrine in International Commercial Arbitration: Is There any Reason for this Doctrine to Exist?*, 26 Journal of International Arbitration 647 (2009)
227. Feuerle, *International Arbitration and Choice of Law Under Article 42 of the Convention on the Settlement of Investment Disputes*, 4 Yale Studies World Public Order 89 (1977)
228. Fietta, *Most Favoured Nation Treatment and Dispute Resolution Under Bilateral Investment Treaties: A Turning Point?*, 2005 International Arbitration Law Review 131 (2005)
229. Fisher, *Anti-suit Injunctions to Restrain Foreign Proceedings in Breach of an Arbitration Agreement*, 22 Bond Law Review 1 (2010)
230. Fitzmaurice, *The Law and Procedure f the International Court of Justice*, vol. 2, (1986)
231. Forlati, *"Interesse di natura giuridica" ed effetti per gli stati terzi delle sentenze della corte internazionale di Giustizia*, 96 Rivista di diritto internazionale 99 (2002)
232. Forlati, *The International Court of Justice: An Arbitral Tribunal or a Judicial Body*, Springer (2014)
233. Fortier, Renault, *Interim Measures: An arbitrator's Provisional Views, Fordham Law School Conference on International Arbitration and Mediation*, http://www.arbitration-icca.org/media/0/12232952989920/1115_001.pdf (2008)
234. Fortier, *The minimum requirements of due process in taking measures against dilatory tactics/ arbitral discretion in international commercial arbitration*, ICCA Congress Series n. 9 396 (1999)
235. Foster, *Striking a Balance Between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration*, 49 Columbia Journal of Transnational Law 201 (2011)

236. Franck S., *Development and Outcomes of Investment Treaty Arbitration*, 50 Harvard International Law Journal, 435 (2009)
237. Franck S., *The Legitimacy Crisis in Investment Traty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 Fordham Law Review 1521 (2005)
238. Franck T., *Legitimacy in the International System*, 81 American Journal of International Law 705 (1988)
239. Freeman Jalet, *The Quest for the General Principles of Law Recognized by Civilized Nations – A Study*, 10 UCLA Law Review 1041 (1963)
240. Friedland, Brumpton, *Rabid Redux: The Second Wave of Abusive ICSID Annulments*, 27 American University International Law Review 727 (2012)
241. Friedman, *The Preclusive Effect of Arbitral Determinations in Subsequent Federal Securities Litigation*, 55 Fordham Law Review 655 (1987)
242. Fumagalli, *Anti-suit injunctions e arbitrato: una tutela troppo invasiva?*, 15 Rivista dell'arbitrato 583 (2005)
243. Gaeta, *Inherent Powers of International Courts and Tribunals*, in Vorah, Pocar, et al. (eds.), *Man's Inhumanity to Man: Essays in Honour of Antonio Cassese* 353, Kluwer (2003)
244. Gaffney, *'Abuse of Process' in Investment Treaty Arbitration*, 11 Journal of World Investment and Trade 515 (2010)
245. Gafni, Res *Judicata, Collateral Estoppel and Arbitration*, 243 The Legal Intelligencer (2011)
246. Gaillard, Anti-suit Injunctions Issued by Arbitrators, in van den Berg (ed.) International Arbitration 2006: Back to Basics?, 13 ICCA Congress Series 235 (2007)
247. Gaillard, *General Principles of Law in International Arbitration – Challenging the Myths*, 5 World Arbitration & Mediation Review 161 (2011)
248. Gaillard, *Legal Theory of International Arbitration*, Martinus Nijhoff (2010)
249. Gaillard, *Reflections on the Use of Anti-suit Injunctions in International Arbitration*, in Mistelis and Lew, *Pervasive Problems in International Arbitration*, The Hague, Kluwer International, 203 (2006)
250. Gaillard, *The Extent of Review of the Applicable Law in Investment Treaty Arbitration*, in Gaillard, Banifatemi (eds.), *Annulment of ICSID Awards, IAI Series on International Arbitration N°1* 223, Juris (2004)
251. Gaillard, *Vivendi and BIT arbitration*, www.transnational-dispute-management.com (2004)
252. Gaillard, Banifatemi, *The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process*, 18 ICSID Review – FILJ 375 (2003)
253. Gaillard, Pinsolle, *Advocacy in Practice: the Use of Parallel Proceedings*, in Bishop, Kehoe (ed.), The Art of Advocacy in International Arbitration – Second Edition 173, Juris (2010)
254. Gaja, *Convenzione di New York sull'arbitrato e anti-suit injunctions*, 103 Rivista di diritto internazionale 503 (2009)
255. Gaja, *General Principles of Law*, in Wolfrum (ed.) *Max Planck Encyclopedia of Public International Law*, on line edition, Oxford University Press (2008)
256. Gaja, *Relationship of the ICJ with Other International Courts and Tribunals*, in Zimmerman, Tomuschat, Oellers-Frahm, Tams (eds.), *The Statute of the International Court of Justice*, Oxford OUP (2012)
257. Gal, *The Commercial Law of Nations and the Law of International Trade*, 6 Cornell Journal of International Law 55 (1972)
258. Gallagher, *Parallel Proceedings, Res Judicata and Lis Pendens: Problems and Possible Solutions*, in Mistelis and Lew, *Pervasive Problems in International Arbitration*, The Hague, Kluwer International, 2006, 329

259. Gallus, *State Enterprises as Organs of the State and BIT Claims*, 7 Journal of World Investment and Trade 761 (2006)
260. Gardiner, *Treaty Interpretation*, Oxford (2008)
261. Gastrell, Le Cannu, *Procedural Requirements of 'Denial of Benefits' Clauses in Investment Treaties: A Review of Arbitral Decisions*, 30 ICSID Review FILJ 78 (2015)
262. Gaukrodger, *Investment treaties as corporate law: Shareholder claims and issues of consistency. A preliminary framework for policy analysis*, OECD Working Papers on International Investment, No. 2013/3, OECD Investment Division, www.oecd.org/investment/working-papers.htm.
263. Gazzini, *General Principles of Law in the Field of Foreign Investment*, 10 Journal of World Investment and Trade 103 (2009)
264. Geiger, *The Multifaceted Nature of International Investment Law*, in Sauvant (ed.) *Appeals Mechanism in International Investment Disputes* 17, Oxford (2008)
265. Georgilas, *Abuse of Rights in modern International Investment Arbitration: The Rule of Law Revisited?*, ILA Regional Conference 2013, Greece (2013)
266. Gestri, *Abuso del diritto e frode alla legge nell'ordinamento comunitario*, Giuffré, Milano (2003)
267. Gestri, *Considerazioni sulla teoria dell'abuso del diritto alla luce della prassi internazionale*, 88 Rivista di diritto internazionale 5 (1994)
268. Ghirga, *La meritevolezza della tutela richiesta*, Giuffré, Milano (2004)
269. Ghosh, *An uncertain shield: res judicata in arbitration*, 31 Arbitration International 661 (2015)
270. Giardina, *International Investment Arbitration: Recent Developments as to the Applicable Law and Unilateral Recourse*, 5 Law and Practice of International Courts and Tribunals 29 (2006)
271. Giardina, *La legge regolatrice dei contratti di investimento nel sistema ICSID*, 23 Rivista di diritto internazionale privato e processuale 677 (1982)
272. Gilchrist, *The Res Judicata Standard of Confirmed Arbitration Awards in Wisconsin*, 1987 Wisconsin Law Review 895 (1987)
273. Gillies, Hymel, *Unifying Competing Dispute Resolution Processes into a One-Stop Arbitration*, 17 Asia Pac. L. Rev. 169 (2009)
274. Giorgetti, *Caratube v. Kazakhstan: For the First Time Two ICSID Arbitrators Uphold Disqualification of Third Arbitrator*, http://www.asil.org/insights/volume/18/issue/22/caratube-v-kazakhstan-first-time-two-icsid-arbitrators-uphold (2014)
275. Giorgetti, *Horizontal and Vertical Relationships of International Courts and Tribunals - How Do We Address Their Competing Jurisdiction?*, 30 ICSID Review – FILJ 98 (2015)
276. Giorgetti, *Mass Tort Claims in International Investment Proceedings: What are the Lessons from the Ecuador-Chevron Dispute?*, 34 Journal of International Law 787 (2013)
277. Godwin, *Dealing with Multi-Party and Multi-Contract Arbitration Issues*, http://www.herbertsmithfreehills.com/-/media/HS/T-060612-18.pdf (2012)
278. Goldhaber, *The Rise of Arbitral Power Over Domestic Courts*, 1 Stanford Journal of Complex Litigation 373 (2013)
279. Gomez Carriòn, *Joinder of third parties: new institutional developments*, 31 Arbitration International 479 (2015)
280. Gordon, *Only One Kick at the Cat: A Contextual Rubric for Evaluating Res Judicata and Collateral Estoppel in International Commercial Arbitration*, 18 Florida Journal of International Law 549 (2006)
281. Gotanda, *An Efficient Method for Determining Jurisdiction in International Arbitrations*, 40 Columbia Journal of Transnational Law 11 (2001)
282. Gottlieb, *Res Judicata and Collateral Estoppel Beneath Corporate Veil*, 66

California Law Review 1093 (1978)
283. Gouiffés, Ordonez, *Jurisdiction and admissibility: are we any closer to a line in the sand?*, 31 Arbitration International 107 (2015)
284. Gradi, *Adesione del litisconsorte necessario pretermesso al collegio arbitrale già costituito e dissenso di uno dei litisconsorti originari: uno "strano caso" di improcedibilità dell'arbitrato*, 37 Giustizia Civile 2863 (2012)
285. Gradi, *Commento all'art. 816 quater*, in Consolo, Comoglio, Sassani (eds.), Commentario del Codice di procedura civile, vol. 7, 366, (2014)
286. Gradi, *L'intervento volontario e la chiamata in causa dei terzi nel processo arbitrale*, 19 Rivista dell'arbitrato 283 (2010)
287. Gribnau, *Legitimacy of the judiciary*, 6 Electronic Journal of Comparative Law 26, http://www.ejcl.org/64/art64-3.pdf (2002)
288. Guglya, *The Interplay of International Dispute Resolution Mechanisms/ the Softwood Lumber Controversy*, 2 Journal of International Dispute Settlement 175 (2011)
289. Guillaume, *The Future of International Judicial Institutions*, 44 International and Comparative Law Quarterly 848 (1995)
290. Gunes, *Res Judicata in International Arbitration: To What Extent Does an Arbitral Award Prevent the Re-Litigation of Issues?*, 12 Transnational Dispute Management (2015)
291. Habegger, *Arbitration and Groups of Companies – The Swiss Practice*, 3 European Business Organization Law Review 517 (2002)
292. Hackman, *The Problem of Arbitration and Multi-Party/Multi-Contract Disputes: Is Court-Ordered Consolidation an Adequate Response?*, http://www.dundee.ac.uk/cepmlp/gateway/files.php?file=cepmlp_car13_5_612306438.pdf (2009)
293. Hale, *Between Interests and Law*, Cambridge University Press (2015)
294. Hahn, *Res Judicata as a Challenge for Arbitral Tribunals*, in Austrian Yearbook on International Arbitration 329 (2014)
295. Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a BIT… and They Could Bite*, ssrn.com/abstract=636541 (2003)
296. Hanotiau, *A new development in Complex Multiparty-Multicontract Proceedings: Classwide Arbitration*, 20 Arbitration International 39 (2004)
297. Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions*, Kluwer Law International (2006)
298. Hanotiau, *Groups of Companies in International Arbitration*, in Mistelis, Lew (eds.), Pervasive Problems in International Arbitration 279, Kluwer Law International (2006)
299. Hanotiau, *Multiple Parties and Multiple Contracts in International Arbitration*, in Permanent Court of Arbitration (ed.) Multiple Party in International Arbitration 1, Oxford University Publishing (2009)
300. Hanotiau, *Non-signatories in International Arbitration: Lessons from Thirty Years of Case Law*, in van den Berg (ed.) International Arbitration 2006: Back to Basics?, 13 ICCA Congress Series 341 (2007)
301. Hanotiau, *Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues – An Analysis*, 18 Journal of International Arbitration 253 (2001)
302. Hansen, *Parallel Proceedings in Investor-State Treaty Arbitration: Responses for Treaty-Drafters, Arbitrators and Parties*, 73 Modern Law Review 523 (2010)
303. Hariharan, *Distinction between Treaty and Contract The Principle of Proportionality in State Contractual Actions in Investment Arbitration*, 14 Journal of World Investment and Trade 1019 (2013)
304. Hart, *The Concept of Law* (2nd ed.), Clarendon Law Series (1994)

305. Hartley, *Comity and the Use of Antisuit Injunctions in International Litigation*, 35 The American Journal of Comparative Law 487 (1987)
306. Hartley, *International Commercial Litigation*, Cambridge University Press (2015)
307. Hascher, *Consolidation of Arbitration by American Courts: Fostering or Hampering International Commercial Arbitration?*, 1 Journal of International Arbitration 127 (1984)
308. Haynes, *The Emergence of a Doctrine of de jure horizontal stare decisis at the Caribbean Court of Justice: Fragmentation or Pluralism of International Law?*, 5 Journal of International Dispute Settlement 498 (2014)
309. He, *Public Policy in Enforcement of Foreign Arbitral Awards in the Supreme People's Court of China*, 43 Hong Kong Law Journal 1037 (2013)
310. Heinsz, *Grieve It Again: of Stare Decisis, Res Judicata and Collateral Estoppel in Labor Arbitration*, 38 Boston College Law Review 275 (1997)
311. Heintzman, *What Is The Effect Of Res Judicata On Arbitration?*, http://www.heintzmanadr.com/arbitaral-award/what-is-the-effect-of-res-judicata-on-arbitration/ (2014)
312. Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56 Kansas Law Review 609 (2008)
313. Heiskanen, *Arbitrating Mass Investor Claims: Lessons of International Claims Commissions*, in Permanent Court of Arbitration (ed.) Multiple Party in International Arbitration 297, Oxford University Publishing (2009)
314. Heiskanen, *Key to Efficiency in International Arbitration*, www.kluwerarbitrationblog.com (2015)
315. Heiskanen, *Menage a trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration*, 28 ICSID Review – FILJ 1 (2013)
316. Henry, *Investment Agreement Claims under the 2004 Model U.S. Bit: A Challenge for State Police Powers*, 31 University of Pennsylvania Journal of International Law 935 (2010)
317. Hicks, *Parallel Litigation in Foreign and Federal Courts: Is Forum Non Conveniens the Answer?*, 28 Review of Litigation 659 (2009)
318. Hill, *The Significance of Foreign Judgments Relating to an Arbitral Award in the Context of an Application to Enforce the Award in England*, 8 Journal of Private International Law 159 (2012)
319. Hill, *Towards Global Convenience, Fairness and Judicial Economy: An Argument in Support of Judicial Forum Non Conveniens Dismissal Before Determining Jurisdiction in United States Federal District Courts*, 41 Vanderbilt Journal of Transnational Law 1177 (2008)
320. Hill, Chong, *International Commercial Disputes*, Hart Publishing (2010)
321. Hirsch, *The Sociology of International Investment Law*, The Hebrew University of Jerusalem Research Paper No. 13-13 (2013)
322. Hober, *Res Judicata and Lis Pendens in International Arbitration*, Recueil de courses vol. 366 103 (2013)
323. Hoellering, *Consolidated Arbitration*, Dispute Resolution Journal 41 (1997)
324. Hoffmann, *The Investor Right to Waive Access to Protection under a Bilateral Investment Treaty*, 22 ICSID Review FILJ 69 (2007)
325. Holloway, *Avoiding Duplicative Litigation about Arbitration Awards within the EU*, 2 Journal of International Dispute Settlement 435 (2011)
326. Horn, *A Matter of Appearances: Arbitrator Independence and Impartiality in ICSID Arbitration*, 11 New York University Journal of Law and Business 349 (2014)
327. Hosking, *The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration/ Doing Justice without Destroying Consent*, 4 Pepperdine

Dispute Resolution Law Jounal 469 (2004)
328. Houde, *Most-Favoured-Nation Treatment in International Investment Law*, OECD Papers on International Investment No. 2004/2, http://www.oecd.org/daf/inv/investment-policy/WP-2004_2.pdf (2004)
329. Hugues Arthur, *The Legal Value of Prior Steps to Arbitration in International Law of Foreign Investment: Two (Different?) Approaches, One Outcome*, 15 Anuario Mexicano de Derecho Internacional 449 (2015)
330. Hulbert, *Arbitral Procedure and the Preclusive Effect of Awards in International Commercial Arbitration*, 7 International Tax and Business Lawyer 155 (1990)
331. Hunter, Conde Silva, *Transnational Public Policy and its Application in Investment Arbitrations*, 4 Journal of World Investment 367 (2003)
332. Iluyomade, *The Scope and Content of a Complaint of Abuse of Right in International Law*, 16 Harvard International Law Journal 47 (1975)
333. Iovane, *Metodo costituzionalistico e ruolo dei giudici nella formulazione dei principi generali del diritto internazionale*, 13 Ars Interpretandi 103 (2008)
334. Jagush, Sinclair, *The Impact of Third Parties in International Arbitration – Issues of Assignment*, in Mistelis, Lew (eds.), Pervasive Problems in International Arbitration 279, Kluwer Law International (2006)
335. Jansen Calamita, *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings*, 27 U. Pa. Journal of International Economic Law 601 (2006)
336. Jeydel, *Consolidation, Joinder, Class Actions*, 57 Dispute Resolution Journal 2 (2004)
337. Juenger, *Forum Shopping, Domestic and International*, 63 Tulane Law Review 553 1988-1989
338. Juillard, *Variation in the Substantive Provisions and Interpretation of International Investment Agreements*, in Sauvant (ed.) Appeals Mechanism in International Investment Disputes 81, Oxford (2008)
339. Juratowitch, *Fora Non Conveniens For Enforcement Of Arbitral Awards Against States*, 63 International and Comparative Law Quarterly 477 (2014)
340. Kabra, *Has Abaclat v Argentina left the ICSID with a 'mass'ive problem?*, 31 Arbitration International 425 (2015)
341. Kahn, *The Law Applicable To Foreign Investments: The Contribution of the World Bank Convention on the Settlement of Investment Disputes*, 44 Indiana Law Journal 1 (1968)
342. Karadelis, *ICSID arbitrator disqualified by co-panelists*, www.globalarbitrationreview.com (2014)
343. Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 Arbitration International 357 (2007)
344. Kaufmann Kohler, *How to Handle Parallel Proceedings: A Practical Approach to Issues such as Competence-Competence and Anti-Suit Injunctions*, 2 *Dispute Resolution International* (2008)
345. Kaufmann-Kohler, *Interpretation of Treaties: How Do Arbitral Tribunals Interpret Dispute Settlement Provisions Embodied in Investment Treaties*, in Mistelis, Lew, *Pervasive Problems in International Arbitration* 257, Kluwer (2006)
346. Kaufmann-Kohler, *Is Consistency a Myth?*, in Gaillard, Banifatemi (eds.) *Precedent in International Arbitration* 136, Juris (2008)
347. Kaufmann-Kohler, *The Arbitrator and the Law: Does He/She Know it? Apply it? How? And a Few More Questions*, 21 Arbitration International 631 (2005)
348. Kaufmann-Kohler, *The Relationship Between International Arbitration and the National Judge: Introduction*, in van den Berg (ed.) ICCA Congress Series 17 399 (2013)
349. Kaufmann-Kohler, Antonietti, *Interim Relief in International Investment Agreement*, in Yannaca-Small (ed.), *Arbitration Under International Investment*

Agreements: A Guide to Key Issues 507, Oxford OUP (2010)

350. Kaufmann-Kohler, Boisson de Chazournes, Bonnin, Mbengue, *Consolidation of Proceedings in Investment Arbitration: How can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?,* 21 ICSID Review FILJ 59 (2006)
351. Kazutake, *Party Autonomy in International Commercial Arbitration: Consolidation of Multiparty and Classwide Arbitration*, 9 Annual Survey of International & Comparative Law 189 (2003)
352. Kelsen, *Introduction to the Problems of Legal Theory*, Oxford (1934 reprinted in 1992)
353. Kerner, *Federal Courts Lack the Power to Consolidate Arbitration Proceedings*, Baesler v. Continental Grain Co., 900 F.2d 1193 (8th Cir. 1990), 69 Washington University Law Quarterly 349 (1991)
354. Kirby, *Efficiency in International Arbitration: Whose Duty Is it?*, 32 Journal of International Arbitration 689 (2015)
355. Kirtley, *The Transfer of Treaty Claims and Treaty-Shopping in Investor-State Disputes*, 10 Journal of World Investment and Trade 427 (2009)
356. Kjos, *Applicable Law in Investor State Arbitration*, Oxford University Press (2013)
357. Klafter, *International Commercial Arbitration As Appellate Review: Nafta's Chapter 11, Exhaustion of Local Remedies and Res Judicata*, 12 University of California, Davis 409 (2006)
358. Klein, *How to Avoid Conflicting Awards: The Lauder and CME Cases,* 5 Journal of World Investment and Trade 19 (2004)
359. Koch, *International Forum Shopping and Transnational Lawsuits*, 31 The Geneva Papers 293 (2006)
360. Koch, Diedrich, *Civil Procedure in Germany*, Beck, Munich (1998)
361. Kolb, *General Principles of Procedural Law*, in Zimmerman, Tomuschat, Oellers-Frahm, Tams (eds.), *The Statute of the International Court of Justice*, Oxford OUP (2012)
362. Kolb, *La maxime de la "bonne administration de la justice" dans la jurisprudence internationale*, 27 L'Observateur des Nations Unies 5 (2009)
363. Kolb, *Principles as Sources of International Law (with Special Reference to Good Faith)*, 53 Netherlands International Law Review 1 (2006)
364. Kotuby, Egerton-Vernon, *Apotex Holdings Inc and Apotex Inc v. The Government of the United States of America: The Adoption by International Tribunals of a Substantive/Transactional Approach to Res Judicata – A New Paradigm in International Dispute Resolution?*, 30 ICSID Review FILJ 486 (2015)
365. Kotzur, *Good Faith (Bona Fide)*, in Wolfrum (ed.) *Max Planck Encyclopedia of Public International Law*, on line edition (2009)
366. Koutoglidou, *Multiple Party Investment Dispute Resolution: Who are the Proper Parties?*, in Permanent Court of Arbitration (ed.) *Multiple Party in International Arbitration* 1, Oxford University Publishing (2009)
367. Kreindler, *Arbitral Forum Shopping*, in Cremades, Lew (eds.), *Parallel States and Arbitral Procedures in International Arbitration*, ICC Publication 153 (2005)
368. Kriebaum, Illegal Investments, in Klausegger, Klein et al. (eds.), *Austrian Arbitration Yearbook 2010* 307, C.H. Beck, Stämpfli & Manz (2010)
369. Kryvoi, *Piercing the Corporate Veil in International Arbitration*, 1 Global Business Law Review 169 (2011)
370. Kuhn, *How to Avoid Conflicting Awards: The Lauder and CME Cases*, 5 *Journal of World Investment and Trade* 17 (2004)
371. Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 European Journal of International Law 907 (2004)
372. Kurkela, *Due Process in Arbitration: A Finnish Perspective*, 21 Journal of

International Arbitration 221 (2004)
373. Kurkela, *'Jura Novit Curia' and the Burden of Education in International Arbitration – A Nordic Perspective*, 21 ASA Bulletin 486 (2003)
374. Kurtz, *Building Legitimacy Through Interpretation in Investor-State Arbitration: On Consistency, Coherence and the Identification of Applicable Law*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2325189 (2013)
375. Lacovara, *Class Action Arbitrations – the Challenge for the Business Community*, 24 Arbitration International 541 (2009)
376. Laitinen, *Multi-Party and Multi-Contract Arbitration Mechanisms in International Commercial Arbitration*, Doctoral thesis – University of Helsinki, https://helda.helsinki.fi/bitstream/handle/10138/44922/klaslaitinenprogradu.pdf?sequence=2 (2013)
377. Lalive, *The First 'World Bank' Arbitration (Holiday Inns v. Morocco) – Some Legal Problems*, 51 British Yearbook of International Law 123 (1980)
378. Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, in Sanders (ed) ICCA Congress Series No. 3 257 (1986)
379. Lamberti Zanardi, *Il procedimento sule eccezioni preliminari nel processo davanti alla corte internazionale di giustizia*, 59 Rivista di diritto internazionale 537 (1965)
380. Lamm, Aqua, *Defining the Party – Who is a Propert Party in an International Arbitration Before the American Arbitration Association and Other International Institutions*, 34 George Washington International Law Review 711 (2002-2003)
381. Lamm, Greenwald, Young, *From World Duty Free to Metal-Tech: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption*, 29 ICSID Review FILJ 328 (2014)
382. Lammers, *General Principles of Law Recognized by Civilized Nation*, in Kalshoven, Kuyper, Lammers (eds.), *Essays on the Development of the International Legal Order in memory of Haro F. van Panhuys*, Sijthoff & Noordhoff (1980)
383. Lauterpacht, *The Development of International Law by the International Court*, Cambridge University Press (1958 reprinted 2010)
384. Lauterpacht, *The Function of Law in The International Community*, Oxford OUP (first published 1933, 2010 edition)
385. Leandro, *Le anti-suit injunctions a supporto dell'arbitrato: da West Tankers a Gazprom*, 110 Rivista di diritto internazionale 815 (2015)
386. Leboulanger, *Multi-Contract Arbitration*, 13 Journal of International Arbitration 43 (1996)
387. Lelieur, *'Transnationalising' Ne Bis In Idem: How the Rule of Ne Bis In Idem Reveals the Principle of Personal Legal Certainty*, 9 Utrecht Law Review 198 (2013)
388. Leo, *L'abuso del processo nella giurisprudenza di legittimità*, 14 Diritto penale e processo 508 (2008)
389. Lettieri, Marini, Merone, *L'abuso del diritto nel dialogo tra corti nazionali ed internazionali*, Edizioni Scientifiche Italiane (2014)
390. Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 Berkeley Journal of International Law 200 (2011)
391. Levy, *Anti-suit Injunctions Issued by Arbitrators*, 2 *IAI International Arbitration Series* 115, (2005)
392. Lew, *Applicable Law in International Commercial Arbitration*, Oceana (1978)
393. Lew, *Concluding Remarks*, in Cremades, Lew (eds.), *Parallel State and Arbitral Procedures in International Arbitration* 358, Juris (2007)
394. Lew, *Iura Novit Curia and Due Process*, ssrn.com/abstract=1733531 (2010)
395. Lew, *The Case for Publication of Arbitration Awards*, in The art of Arbitration, Liber Amicorum Pieter Sanders, Kluwer (1982)

396. Lew, Mistelis, Kroll, *International and Comparative Commercial Arbitration*, Kluwer, The Hague (2003)
397. Liebman, *Efficacia ed autorita della sentenza*, Giuffré, Milano (1983)
398. Lillich, *International law od State responsibility for injury to aliens*, Charlottesville (1983)
399. Linton, Tiba, *The International Judge in an Age of Multiple International Courts and Tribunals*, 9 Chicago Journal of International Law 407 (2009)
400. Litvinoff, *Good Faith*, 71 Tulane Law Review 1645 (1997)
401. Lo, *Principles and Criteria for International and Transnational Public Policies in Commercial Arbitration*, 1 Contemporary Asia Arbitration Journal 67 (2008)
402. Lo, *Relations and Possible Interactions Between State-State Dispute Settlement and Investor-State Arbitration Under BITs*, 6 Contemporary Asia Arbitration Journal 1 (2013)
403. Loong, *Arbitration of Investment Disputes: The Order of the Consolidation Tribunal in the Softwood Lumber Dispute*, 24 Journal of International Arbitration 81 (2007)
404. Losurdo, *Il divieto dell'abuso del diritto nell'ordinamento europeo*, Giappichelli, Torino (2011)
405. Lowe, *Overlapping Jurisdiction in International Tribunals*, 20 Australian Yearbook of International Law 191 (1999)
406. Lowe, *Res Judicata and the Rule of Law in International Arbitration*, 8 African Journal of International & Comparative Law 38 (1996)
407. Lowe, *The Manifold Respondent: Multiparty Issues Involving States in Investor-State Arbitration*, in Permanent Court of Arbitration (ed.) *Multiple Party in International Arbitration* 1, Oxford University Publishing (2009)
408. Lowenfeld, *Alex Genin, Eastern Credit Ltd., and AS Baltoil v the Republic of Estonia - Declaration of Professor Andreas F. Lowenfeld*, www.transnationaldisputemanagement.com (2006)
409. Luiso, *Pluralità di clausole compromissorie e unitarietà del processo arbitrale*, 17 Rivista dell'Arbitrato 604 (2007)
410. Luiso, *Principio del contraddittorio ed efficacia della sentenza verso terzi*, Giuffré, Milano (1981)
411. Luparia, *La litispendenza internazionale*, Giuffré (2012)
412. Luttrell, *ICSID provisional measures 'in the round'*, 31 Arbitration International 393 (2015)
413. Lyons, *Piercing the Corporate Veil in the International Arena*, 33 Syracuse J. Of Int'l & Comp. Law 523 (2005-2006).
414. Ma, *Parallel Proceedings and International Commercial Arbitration: the International Law Association's Recommendations for Arbitrators*, 2 Contemp. Asia Arb. J. 49 (2009)
415. Magnani, *Nuove prospettive sui principi generali nel sistema delle fonti nel diritto internazionale*, Mursia (1997)
416. Maloy, *Forum Shopping? What's wrong with that?,* 24 QLR 25 (2005-2006)
417. Maniruzzaman, *The Concept of Good Faith in International Investment Disputes – The Arbitrator's Dilemma*, 89 Amicus Curiae: Journal of the Society for Advanced Legal Studies 16 (2012)
418. Mann, *Foreigh Affairs in English Courts*, Oxford OUP (1986)
419. Mann, *Reflections on a Commercial Law of Nations*, 33 British Yearbook of International Law 20 (1957)
420. Mantilla Serrano, *Multiple Parties and Multiple Contracts: Divergent or Comparable Issues?*, in Schwartz, Hanotiau (eds.), Multiparty Arbitration, Dossiers of the ICC Institute of World Business Law 11 (2010)
421. Marboe, ICSID *Annulment Decisions: Three Generation Revisited*, in Binder,

Kriebaum, Reinisch, Wittich (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* 200, Oxford University Press (2009)

422. Martin, *International investment disputes, nationality and corporate veil: some insights from Tokios Tokeles and TSA Spectrum de Argentina*, 8 Transnational Dispute Management, Issue 1, (2011)

423. Martinez Fraga, Samra, *The Role of Precedent in Defining Res Judicata in Investor–State Arbitration*, 32 Northwestern Journal of International Law and Business 419 (2012)

424. Mauro, *Gli accordi bilaterali sulla promozione e protezione degli investimenti*, Giappichelli Torino (2003).

425. Mayer, *Extension of the Arbitration Clause to Non-signatories under French Law*, in Permanent Court of Arbitration (ed.), *Multiple Party in International Arbitration* 189, (2009)

426. Mayer, *Table ronde: Le système actuel est-il déséquilibré en faveur de l'investisseur privé étranger at au detriment de l'Etat d'Accueil?*, in Leben (ed.) *Le contentieux arbitral transnational relative à l'investissement* 195, Louvain-la-Neuve, Anthemis (2006)

427. Mayer, *The Effect of Awards Rendered in Multiparty/Multicontract Situations*, in Schwartz, Hanotiau (eds.), Multiparty Arbitration, Dossiers of the ICC Institute of World Business 223 (2010)

428. McCarthy, *The Problems of Fragmentation and Diversification in the Resolution of Complex International Claims*, 17 Journal of World Investment & Trade 140 (2016)

429. McDougall, Markbaoui, *Case Note to ConocoPhillips Petrozuata, ChonoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v. Bolivarian Republic of Venezuela*, 15 Journal of World Investment and Trade 1062 (2014)

430. McGibbon, *Estoppel in International Law*, 7 International and Comparative Law Quarterly 468 (1958)

431. Mcllwrath, Moolan, *Joinder*, *Current Practice in International Arbitration*, www.transnational-dispute-management.com (2005)

432. McLachlan, *Lis Pendens in International Litigation*, Publications of The Hague Academy of International Law, (2009)

433. McLachlan, Shore, Weiniger, *International Investment Arbitration*, Oxford University Press (2007)

434. McNair, *The General Principles of Law Recognized by Civilized Nations*, 33 British Yearbook of International Law 1 (1957)

435. Menchini, *Sull'attitudine al giudicato sostanziale del lodo non più impugnabile non assistito dalla omologa giudiziale*, 8 Rivista dell'arbitrato 773 (1998)

436. Meyers, *In Defense of the International Treaty Arbitration System*, works.bepress.com/Daniel_meyers/2 (2008)

437. Merusi, *Buona fede e affidamento nel diritto pubblico*, Giuffré (2001)

438. Millar, *The Historical Relation of Estoppel by Record to Res Judicata*, 35 Illinois Law Review of Northwestern University 41 (1940)

439. Millar, *The Premises of the Judgment as Res Judicata in Continental and Anglo-American Law*, 39 Michigan Law Review 1 (1940)

440. Miller, *An International Jurisprudence? The Operation of "Precedent" Across International Tribunals*, 15 Leiden Journal of International Law 483 (2002)

441. Miller, *Consolidation in Hong Kong: The Shui On case*, 3 Arbitration International 87 (1987)

442. Mistelis, *Confidentiality and Third Party Participation*, 21 Arbitration International 211 (2005)

443. Mistelis, Baltag, *Denial of Benefits and Article 17 of the Energy Charter Treaty*, 113 Penn State Law Review 1301 (2009)

444. Mistelis, *Mandatory Rules in International Arbitration: Too Much Too Early or*

Too Little Too Late, in Mistelis, Berman (eds.), Mandatory Rules in International Arbitration 233, Jurish Publishing (2010)

445. Mitchell, *Good Faith in WTO Dispute Settlement*, 7 Melbourne Journal of International Law 339 (2006)

446. Mitchell, Heaton, *The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function*, 31 Michigan Journal of International Law 561 (2010)

447. Monichino, Fawke, *Parallel Litigation and Arbitration, an abuse of process?*, 2012 Asian DR 121 (2012)

448. Moore, Currier, *Mutuality and Conclusiveness of Judgments*, 35 Tulane Law Review 301 (1961)

449. Moreland, *"Foreign Control" and "Agreement" Under ICSID Article 25 (2) (b): Standards for Claims Brought by Locally Organized Subsidiaries against Host States*, 9 Currents Int'l Trade Law J. 18 (2000)

450. Morelli, *Questioni preliminari nel processo internazionale*, 65 Rivista di diritto internazionale 5 (1971)

451. Morelli, *Eccezioni preliminary di merito?*, 69 Rivista di diritto internazionale 5, (1975)

452. Morris, *Nonparties and Preclusion by Judgment: The privity Rule Reconsidered*, 56 California Law Review 1098 (1968)

453. Mosk, Nelson, *The effects of Confirming and Vacating an International Arbitration Award on Enforcement in Foreign Jurisdictions*, 18 Journal of International Arbitration 463 (2001)

454. Motomura, *Arbitration and Collateral Estoppel: Using Preclusion to Shape Procedural Choices*, 63 Tulane Law Review 29 (1988)

455. Muroni, *Il conflitto pratico tra lodi e la Convenzione di New York*, 9 Rivista dell'arbitrato 755 (2000)

456. Nadakavukaren Schefer, International Investment Law, Edward Elgar (2013)

457. Nair, Ludwig, *ICSID Annulment Awards: The Fourth Generation?*, http://www.lexology.com/library/detail.aspx?g=7218cb56-7a64-426f-8cc0-8475303444e6 (2011)

458. Nazzini, *Remedies at the Seat and Enforcement of International Arbitration Awards: Res Judicata, Issue Estoppel and Abuse of Process in English Law*, 7 Contemporary Asia Arbitration Journal 139 (2014)

459. Nesin, *The Benefits of Applying Issue Preclusion to Interlocutory Judgments in Cases That Settle*, 76 New York University Law Review 874 (2001)

460. Newcombe, *Investor Misconduct: Jurisdiction, admissibility or merits?*, in Brown, Miles (eds.) *Evolution in Investment Treaty Arbitration* 187, Cambridge University Press (2011)

461. Nguyen, *The Applicability of Res Judicata and Lis Pendens in World Trade Organisation Dispute Settlement*, 25 Bond Law Review 123 (2013)

462. Nicklisch, *Multi-Parti Arbitration and Dispute Resolution in Major Industrial Projects*, 11 Journal of International Arbitration 57 (1994)

463. Nigro, Prosperi, *L'irragionevole durata dei processi*, Experta (2009)

464. Nolan, Sourgens, *Issues of Proof of General Principles of Law in International Arbitration*, 3 World Arbitration and Mediation Review 505 (2009)

465. Obadia, *ICSID, Investment Treaties and Arbitration: Current and Emerging Issues*, in Kaufmann Kohler, Stucki (eds.), Investment Treaties and Arbitration 67, Swiss Arbitration Association, Zurich, Special Series, No. 19 (2002)

466. Oberstainer, *"In Accordance with Domestic Law" Clauses: How International Investment Tribunals Deal with Allegations of Unlawful Conduct of Investors*, 31 Journal of International Arbitration 265 (2014)

467. O'Connor, *Good Faith in International Law*, Dartmouth Publishing (1991)

468. Oellers-Frahm, *Multiplication of International Courts and Tribunals and Conflicting Jurisdiction — Problems and Possible Solutions*, 5 Max Panck UNYB 67 (2001)
469. Oghigian, Ohara, *How To Deal With Zeus — Advocacy Of Parallel Proceedings from an Investor's Perspective*, http://www.bakermckenzie.co.jp/e/material/dl/supportingyourbusiness/articles/201011_LexisNexis.pdf (2011)
470. Okekeifere, *Public Policy and Arbitrability under the UNCITRAL Model Law*, 2 International Arbitration Law Review 71 (1999)
471. Okobi, *The Umbrella Clause: A Panacea For Contractual Instability? A Look at Production Sharing Contracts*, http://www.dundee.ac.uk/cepmlp/gateway/files.php?file=CAR-12_43_673776155.pdf (2008)
472. Olatawura, *The "Privy to Arbitration" Doctrine: The Withering of the Common-Law Privity of Contract Doctrine in Arbitration Law*, 16 The American Review of International Arbitration 429 (2005)
473. Orakhelashvili, *Judicial Competence and Judicial Remedies in the Avena Case*, 18 Leiden Journal of International Law 31 (2005)
474. Orakhelashvili, *Peremptory Norms in International Law*, Oxford University Press (2008)
475. Orrego Vicuna, *Lis Pendens Arbitralis*, in Cremades, Lew (eds.), *Parallel States and Arbitral Procedures in International Arbitration* 207, ICC Publication (2005)
476. Ortolani, *Anti-suit Injunctions in Support of Arbitration Under the Recast Brussels I Regulation*, 6 MPILux Woking Paper 1 (2015)
477. Ottolenghi, Prows, *Res Judicata in the ICJ's Genocide Case/ Implications for Other Courts and Tribunals?*, 21 Pace International Law Review 37 (2009)
478. Ovchar, *Estoppel in the Jurisprudence of the ICJ: A Principle Promoting Stability Threatens to Undermine It*, 21 Bond Law Review 1 (2009)
479. Pair, *Consolidation in international commercial arbitration*, eleven international publishing (2012)
480. Pair, Frankenstein, *The New ICC Rule on Consolidation: Progress or Change?*, 25 Emory International Law Review 1061 (2011)
481. Palchetti, *Opening the International Court of Justice to Third States: Intervention and Beyond*, 6 Max Planck UNYB 139 (2002)
482. Palombino, *Gli effetti della sentenza internazionale nei giudizi interni*, Editoriale scientifica, Napoli (2008)
483. Palombino, *Il potere inerente di riesame dei tribunali internazionali: in margine al caso Celibici*, 59 La Comunità Internazionale 707 (204)
484. Palombino, *Il trattamento giusto ed equo degli investimenti stranieri*, Il Mulino (2012)
485. Palombino, *Judicial Economy and Limitation of the Scope of the Decision in International Adjudication*, 23 Leiden Journal of International Law 909 (2010)
486. Palombino, *The Overlapping between War Crimes and Crimes Against Humanity in International Criminal Law*, 12 The Italian Yearbook of International Law 123 (2002)
487. Paparinskis, *Inherent Powers of ICSID Tribunals: Broad and Rightly So*, ssrn.com/abstract=1876705 (2012)
488. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity In International Arbitration*, 63 Tul. L. Rev. 647 1988-1989
489. Park, *Non-Signatories and International Contracts: An Arbitrator's Dilemma*, in Permanent Court of Arbitration (ed.) Multiple Party in International Arbitration 1, Oxford University Publishing (2009)
490. Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 Int'l & Comp. L.Q. 21 (1983)

491. Parker, *A BIT at a Time: The Proper Extension of the MFN Clause toDispute Settlement Provisions in Bilateral Investment Treaties*, 2 The Arbitration Brief 30 (2012)
492. Pastore, *"Giusto processo" e verità giudiziale*, http://m.docente.unife.it/orsetta.giolo/Percorsi%20di%20Genere%20-%20Testi%20seminario%201%20dicembre.doc (2012-2013)
493. Paul, *Comity in International Law*, 32 Harvard International Law Journal 1 (1991)
494. Paul, *The Transformation of International Comity*, 71 Law and Contemporary Problems 19 (2008)
495. Paulsson, *Jurisdiction and Admissibility, Global Reflections on International Law*, Commerce and Dispute Resolution – Liber Amicorum in Honour of Robert Briner 601 (2005)
496. Pauwelyn, *At the Edge of Chaos? Foreign Investment Law as A Complex Adaptive System, How It Emerged And How It Can Be Reformed*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2271869 (2014)
497. Pauwelyn, Salles, *Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, 42 Cornell International Law Journal 77 (2009)
498. Pellet, *The Case Law of the ICJ in Investent Arbitration*, 28 ICSID Review FILJ 223 (2013)
499. Perezcano, *Has the Proliferation of BITS Gone Too Far? Is it Now Time for a Multilateral Investment Treaty?*, 5 Journal of World Investment and Trade 89 (2004)
500. Perez Manzano, *La prohibicion constitucional de incurrir en ne bis in idem*, tirant lo blanch (2002)
501. Perry, *Will treaty arbitration survive?*, www.globalarbitrationreview.com (2014)
502. Petrochilos, *Extension of the Arbitration Clause to Non-Signatory States or State Entities: Does it Raise a Difference?*, in Schwartz, Hanotiau (eds.), Multiparty Arbitration, Dossiers of the ICC Institute of World Business Law 11 (2010)
503. Pharaon, *The extent of arbitrators' power to order class action*, 31 Arbitration International 589 (2015)
504. Picò y Junoy, *La buona fede processuale: una manifestazione dell'autoritarismo giurisdizionale?*, 48 Rivista di diritto processuale 171 (2013)
505. Piergrossi, *Tutela del terzo nell'arbitrato*, in *Studi in onore di Enrico Tullio Liebman*, Giuffré, Milano (1979)
506. Pierini, *The Inflated Invocation of Inherent Jurisdiction and Powers by International and Internationalized Criminal Courts and Tribunals: Between Gap Filling and the Erosion of Core Values*, Università di Catania – Online Working Paper 2015/n. 75 (2015)
507. Pino, *L'abuso del diritto tra teoria e dogmatica (precauzioni per l'uso)*, in Maniaci (ed.). *Eguaglianza, ragionevolezza e logica giuridica* 115, Giuffré, Milano (2006)
508. Pinos, *Res Judicata Redux*, 26 Osgoode Law Law Journal 713 (1988)
509. Pitkowitz, *Joinder and Consolidation Under the Vienna Rules 2013*, in Zeiler, Welser et al. (eds.), Austrian Yearbook on International Arbitration Vol. 2015 301 (2015)
510. Platte, *When Should an Arbitrator Join Cases?*, 18 Arbitration International 67 (2002)
511. Polasky, *Collateral Estoppel - Effects of Prior Litigation*, 39 Iowa Law Review 217 (1953-1954)
512. Pörnbacher, Dolgorukow, *Reconciling Due Process ad Efficiency in International Arbitration – The Arbitrator's Task of Achieving the One Without Sacrificing the Other*, 61 Annal FLB - Belgrade Law Review 50 (2013)
513. Potestà, Sobat, *Frivolous Claims in International Adjudication: A Study of ICSID Rule 41(5) and of Procedures of Other Courts and Tribunals to Dismiss Claims Summarily*, 3 Journal of International Dispute Settlement137 (2012)

514. Price, *Some observations on the role of the state in investor-state dispute settlement: Horizontal issues still over the horizon*, in Cremades, Lew (eds.), Parallel States and Arbitral Procedures in International Arbitration, ICC Publication 73 (2005)
515. Prosser, *Law of Torts,* 3d ed., St. Paul, Minn. West (1964).
516. Proto Pisani, *Opposizione di terzo ordinaria*, Jovene, Napoli (1965)
517. Pryles, Waincymer, *Multiple Claims in Arbitrations Between the Same Parties*, http://www.arbitration-icca.org/media/0/12223886747020/multiple_claims_in_arbitrations_between_the_same_parties.pdf (2009)
518. Phull, *U.S. Anti-suit Injunctions in Support of International Arbitration: Five Questions American Courts Ask*, *Journal of International Arbitration*, Vol. 28 No. 1, 21-50, 2011
519. Polinari, *Pluralità di parti e pluralità di convenzioni d'arbitrato*, 16 Rivista dell'arbitrato 537 (2006)
520. Purcell, *The Public Right to Precedent: A Theory and Rejection of Vacatur*, 85 California Law Review 867 (1997)
521. Quadri*, Diritto Internazionale Pubblico – V edizione*, Liguori (1968)
522. Quass Duarte, *Anti-suit Injunctions in the Context of International Commercial Arbitration*, 48 Antitrust and Unfair Competition Law 20 (2010)
523. Radicati di Brozolo, *La soluzione delle controversie tra stati e stranieri mediante accordo internazionale: gli accordi tra Stati Uniti ed Iran*, 76 Rivista di diritto internazionale 299 (1982)
524. Radicati di Brozolo, *Res Judicata and International Arbitral Awards*, ssrn.com/abstract=1842685 (2011)
525. Raphael, *The Anti-suit Injunction*, Oxford University Press (2008)
526. Rau, *"Consent" to Arbitral Jurisdiction: Disputes with Non-Signatories*, in Permanent Court of Arbitration (ed.) *Multiple Party in International Arbitration* 1, Oxford University Publishing (2009)
527. Raz, *A Concept of a Legal System*, Oxford (1980).
528. Razvi, *Mandatory Rules of Law in International Business Arbitration*, 3 Lahore Journal of Economics 35 (1999)
529. Reetz, Martinez-Fraga, *Forum Non Conveniens and the Foreign Forum: A Defense Perspective*, www.transnational-dispute-settlement.com (2012)
530. Reinhold, *Good Faith in International Law*, Bonn Research Papers on Public International Law No. 2/2013, ssrn.com/abstract=2269746 (2013)
531. Reinisch, *The Issues Raised by Parallel Proceedings and Possible Solutions*, in Waibel, Kaushal (eds.) The Backlash against Investment Arbitration 113, Kluwer (2010)
532. Reinisch, *The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections from the Perspective of Investment Arbitration*, in Buffard, Hafner, Crawford (eds.), *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* 107, Brill (2008)
533. Reinisch, *The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes*, 3 The Law and Practice of International Courts and Tribunals 37 (2004)
534. Reisman, *Law, International Public Policy (so-called) and Arbitral Choice in International Commercial Arbitration*, http://www.law.yale.edu/documents/pdf/Reisman.ICCA_Speech_for_Montreal.6.15.06.pdf (2006)
535. Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 Duke Law Journal 739 (1990)
536. Reisman, *The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of Its Threshold*, 15 ICSID Review FILJ 362 (2000)

537. Reisman, Craig, Park, Paulsson, *International Commercial Arbitration*, Foundation Press (1997)
538. Ricci, *Il lodo rituale di fronte ai terzi*, 23 Rivista di diritto processuale 655 (1989)
539. Ricci, *Il nuovo arbitrato societario*, 53 Rivista trimestrale di diritto e procedura civile 517 (2003)
540. Rigo Sureda, *Investment Treaty Arbitration Judging under Uncertainty*, Cambridge University Press (2014)
541. Rigo Sureda, *Precedent in Investment Treaty Arbitration*, in Binder, Kriebaum, Reinisch, Wittich (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* 830, Oxford University Press (2009)
542. Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 American Journal of International Law 45 (2013)
543. Romanetti, *Preventing the Multiple and Concurrent Arbitration Proceedings: Waiver Clauses*, Stockholm International Arbitration Review Volume 2009:2, 75 (2009)
544. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 International Law and Politics 709 (1999)
545. Romano, *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent*, 39 International Law and Politics 791 (2007)
546. Romano S., *L'ordinamento giuridico* (1917)
547. Rosenfeld, *Arbitral Praeliminaria – Reflections on the Distinction between Admissibility and Jurisdiction after BG v. Argentina*, 29 Leiden Journal of International Law 137 (2016)
548. Rubino-Sammartano, *International Arbitration Law and Practice*, Juris Publishing (2014)
549. Ruffini, *L'intervento nel giudizio arbitrale*, 5 Rivista dell'arbitrato 647 (1995)
550. Sabater, *Towards Transparency in Arbitration (A Cautious Approach)*, 5 Berkeley Journal Int'l. L. Publicist 47 (2010)
551. Sacerdoti, *Expert Opinion in Case T 8753-01-77, The Czech Republic v. CME Czech Republic BV*, 2 Transnational Dispute Management (2005)
552. Sacerdoti, *Has the Proliferation of BITS Gone Too Far? Is it Now Time for a Multilateral Investment Treaty?*, 5 Journal of World Investment and Trade 89 (2004)
553. Sacerdoti, *I contratti tra Stati e stranieri nel diritto internazionale*, Giuffré (1972)
554. Sacerdoti, *The Proliferation of BITs: Conflicts of Treaties*, *Proceedings and Awards*, in Sauvant (ed.) Appeals Mechanism in International Investment Disputes 127, Oxford (2008)
555. Sakai, *La Bonne Administration de la Justice in the Incidental Proceedings of the International Court of Justice*, 55 Japanese Yearbook of International Law 110 (2012)
556. Salacuse, *Making transnational law work through regime-building: the case of international investment law*, in *Making Transnational Law Work in the Global Economy – Essays in Honour of Detlev Vagts* (Bekker, Dolzer and Waibel eds.), Cambridge, 406 (2010)
557. Salerno, *Giurisdizione ed efficacia delle decisioni straniere nel Regolamento (UE) n. 1215/2012 (rifusione)*, Kluwers – Cedam, Padova (2015)
558. Salerno, *Rapporti fra procedimenti concernenti le medesime istanza individuali presso diversi organismi internazionali di tutela dei diritti umani*, 93 Rivista di diritto internazionale 363 (1999)
559. Salles, *Forum shopping in International Adjudication: The Role of Preliminary Objections,* 141 Cambridge University Press (2014)
560. Sanders, *Rethinking Arbitral Preclusion*, 24 Law and Policy of International Business 101 (1992)
561. Sandrock, *Arbitration Agreements and Groups of Companies*, 27 Int'l L. 941 (1993)

562. Sauvant, *The Rise of International Investment, Investment Agreements and Investment Disputes*, in Sauvant (ed.) *Appeals Mechanism in International Investment Disputes* 3, Oxford (2008)
563. Savarese, *Il concorso di giurisdizioni nelle controversie tra stati e private in materia d'investimenti: a proposito di due contrastanti sentenze dell'ICSID*, 17 Diritto del commercio internazionale 955 (2004)
564. Savarese, *Investment Treaties and the Investor's Right to Arbitration between Broadening and Limiting ICSID Jurisdiction*, 7 Journal of World Investment and Trade 407 (2007)
565. Savarese, *La nazionalità delle società commerciali e la funzione del controllo: alcune riflessioni in margine alla decisione ICSID Tokios Tokeles v. Ukraine*, 15 Rivista dell'arbitrato 369 (2005)
566. Savarese, *La nozione di giurisdizione nel sistema ICSID*, Editoriale scientifica (2012)
567. Savarese, *Multiple Fora for the Same Disputed Facts. What Coordination Between International and National Jurisdictions in the Framework of ICSID?*, www.federalismi.it (2009)
568. Scarselli, *Sul cd. abuso del processo*, 47 Rivista di diritto processuale 1450 (2012)
569. Scherer, *Effects of Foreign Judgments Relating to International Arbitral Awards/ Is the 'Judgment Route' the Wrong Road?*, 4 Journal of International Dispute Settlement 587 (2013)
570. Scherer, *The Recognition of Transnational Substantive Rules By Courts in Arbitral Matters*, in IAI Series on International Arbitration n. 3, *Towards a Uniform International Arbitration Law* 91, Juris Publishing (2005)
571. Schill, *Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties*, 18 Minnesota Law Journal 1 (2009)
572. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 Virginia Journal Of International Law 57 (2011)
573. Schill, *System-building in Investment Treaty Arbitration and Lawmaking*, 12 German Law Journal 1083 (2011)
574. Schill, *The Multilateralization of International Investment Law*, Cambridge (2009)
575. Schill, *The Multilateralization of International Investment Law: The Emergence of a Multilateral System of Investment Protection on the Basis of Bilateral Treaties*, Inaugural Conference of the Society of International Economic Law, Geneva, July 15-17, 2008, www.ssrn.com/link/SIEL-Inaugural-Conference.html (2008)
576. Schimek, *Anti-suit and Anti-anti-suit Injunctions: A Proposed Texas Approach*, 45 Baylor Law Review 499 (1993)
577. Schneider, *Multi-Fora Disputes*, 6 Arbitration International 101 (1990)
578. Schneiderman, *Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1965629 (2010)
579. Schreuer, *Concurrent Jurisdiction of National and International Tribunals*, 13 Hous. L. Rev. 508 (1975-1976)
580. Schreuer, *From ICSID Annulment to Appeal Half Way Down the Slippery Slope*, 10 The Law and Practice of International Courts and Tribunals 211 (2011)
581. Schreuer, *Jurisdiction and Applicable Law in Investment Treaty Arbitration*, 1 McGill Journal of Dispute Resolution 1 (2014)
582. Schreuer, *Nationality Planning*, in Rovine (ed.) The Fordham Papers 2012, 17
583. Schreuer, *Revising the System of Review for Investment Awards*, http://www.univie.ac.at/intlaw/wordpress/pdf/99_rev_invest_awards.pdf (2009)

584. Schreuer, *Shareholder Protection in International Investment Law*, www.transnational-dispute-management.com (2005)
585. Schreuer, *The Relevance of Public International Law in International Commercial Arbitration: Investment Disputes*, http://www.univie.ac.at/intlaw/pdf/csunpublpaper_1.pdf (2007)
586. Schreuer, *Three Generations of ICSID Annulment Proceedings*, in Gaillard, Banifatemi (eds.), *Annulment of ICSID Awards, IAI Series on International Arbitration N°1* 17, Juris (2004)
587. Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Fork in the Road*, 5 The Journal of World Investment and Trade 231 (2004)
588. Schreuer (et al.), *The ICSID Convention: A Commentary*, Oxford University Press (2009)
589. Schreuer, Reinisch, *Legal opinion in the CME v. Czech Republic case*, www.italaw.com (2002)
590. Schultz, *Against Consistency in Investment Arbitration*, papers.ssrn.com/sol3/papers.cfm?abstract_id=2318358 (2013)
591. Schultz, Dupont, *Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study*, ssrn.com/abstract=2399179 (2014)
592. Schultz, *The Concept of Law in Transnational Arbitral Legal Orders and some of its Consequences*, 2 Journal of International Dispute Settlement 59 (2011)
593. Schwartz, *Multi-Party Arbitration and the ICC*, 10 Journal of International Arbitration 5 (1993)
594. Schwebel, *Public Policy and Arbitral Procedure*, in Sanders (ed.), *Comparative Arbitration Practice and Public Policy in Arbitration, ICCA Congress Series Vol. 3* 205 (1987)
595. Scobbie, *Res Judicata, Precedent and the International Court: A Preliminary Sketch*, 20 Australian Yearbook of International Law 299 (1999)
596. Scott, *Collateral Estoppel by Judgment*, 56 Harvard Law Review 1 (1942)
597. Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 Columbia Law Review 1457 (1968)
598. Sereni, *Principi generali del diritto e processo internazionale*, Giuffré, Milano (1955)
599. Seriki, *Anti suit injunctions, arbitration and the non-EU perspective: some recent developments*, International Arbitration Law Review 19 (2011)
600. Shany, *Consolidation and Tests for Application: Is International Law Relevant?*, 21 ICSID Review –FILJ 135 (2006)
601. Shany, *Contract Claims v. Treaty Claims/ Mapping Conflicts Between ICSID Decisions on Multi-Sourced Investment Claims*, 99 American Review of International Law 835 (2005)
602. Shany, *Jurisdictional Competition between National and International Courts: Could International Jurisdiction-Regulating Rules apply?*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=902928 (2006)
603. Shany, *Questions of Jurisdiction and Admissibility before International Courts*, Cambridge University Press (2015)
604. Shany, *Regulating Jurisdictional Relations between National and International Courts*, Oxford University Publishing (2007)
605. Shany, *Similarity in the Eye of the Beholder: Revisiting the Application of Rules Governing Jurisdictional Conflicts in the Lauder/CME Cases*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=999021 (2007)
606. Shany, *The Competing Jurisdictions of International Courts and Tribunals*, Oxford University Press (2003)
607. Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35

UCLA L. Rev. 623 (1987-1988)
608. Sheppard, *Arbitrator Independence in ICSID Arbitration*, in Binder, Kriebaum, Reinisch, Wittich (eds.) International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer 131, Oxford (2009)
609. Sheppard*, Res Judicata and estoppel, in Cremades, Lew (eds.), Parallel States and Arbitral Procedures in International Arbitration*, ICC Publication 219 (2005)
610. Shihata, Parra, *Applicable Substantive Law in Disputes between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention*, ICCA Congress Series No. 7 294 (1996)
611. Silberman, *Some Judgments on Judgments: A View from America*, 19 King's Law Journal 235 (2008)
612. Sinai, *Reconsidering Res Judicata: A Comparative Perspective*, 21 Duke Journal of Comparative and International Law, 353 (2011)
613. Sinclair, *The Substance of Nationality Requirements in Investment Treaty Arbitration*, 20 ICSID Rev. FILJ 357 (2005)
614. Smutny, *Claims of Shareholders In International Investment Law*, in Binder, Kriebaum, Reinisch, Wittich (eds.) International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer 363, Oxford University Press (2009)
615. Soderlund, *Lis Pendens, Res Judicata and the Issue of Parallel Judicial Proceedings*, 22 Arb. Int. 301 (2005)
616. Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration*, in Sauvant (ed.) *Appeals Mechanism in International Investment Disputes* 39, Oxford (2008)
617. Sornarajah, *The International Law on Foreign Investment*, Cambridge (2010)
618. Spagnolo, *Iura Novit Curia and the CISG: Resolution of the Faux Procedural Black Hole, in Schwenzer*, Spagnolo (eds.), *Towards Uniformity: the 2nd Annual MAA Schlechtriem CISG Conference* 181 (2011)
619. Sperduti, *Il principio della buona fede e l'ammissione di nuovi membri alle Nazioni Unite*, 7 La comunità internazionale 42 (1952)
620. Sperduti, *Le eccezioni tratte dalla nozione di dominio riservato quali eccezioni preliminari di merito*, 68 Rivista di diritto internazionale 649 (1974)
621. Spoorenberg, Vinuales, *Conflicting Decisions in International Arbitration*, 8 Law & Practice of International Courts & Tribunals 91 (2009)
622. Spiermann*, Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction Under Bilateral Investment Treaties*, 20 Arbitration International 179 (2004)
623. Spurr, *An Economic Analysis of Collateral Estoppel*, 11 International Review of Law and Economics 47 (1991)
624. Steingruber, *Abaclat and Other v. Argentine Republic – Consent in Large-scale Arbitration Proceedings*, 27 ICSID Review FILJ 237 (2012)
625. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 Iowa Law Review 473 (1986-1987)
626. Stoehr, *A question of Sovereignty, Development, and Natural Resources: A New Standard for Binding Third Party Nonsignatory Governments to Arbitration*, 66 Washington and Lee Law Review 1409 (2009)
627. Strong, *Contractual Waivers of Investment Arbitration: Wa(i)ve of the Future?*, 29 ICSID Review FILJ 1 (2014)
628. Strong, *Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?*, 31 Vand. J. Transnat'l L. 915 (1998)
629. Strong, *Mass Procedure in Abaclat v. Argentine Republic: Are They Consisten with the International Investment Regime?*, 3 YB International Arbitration 261 (2013)
630. Strong, *Third Party Intervention and Joinder of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable*

Measure?, 31 Vanderbilt Journal of Transnational Law 915 (1998)
631. Strozzi, *I "Principi" dell'ordinamento internazionale*, 47 La comunità internazionale 162 (1992)
632. Swoboda, *Consent is the Key to Compel: The Eight Circuit Properly Denies a Motion to Compel a Non-Signatory to Arbitrate. United States Court of Appeals, Eight Circuit: Bank of America v. UMB Financial Services*, 2 Journal of Dispute Resolution 1 (2011)
633. Tamburini, *Trattamento degli stranieri e buona fede nel diritto internazionale generale*, CEDAM, Padova (1984)
634. Tams, *An Appealing Option? The Debate About an ICSID Appellate Structure*, http://telc.jura.uni-halle.de/sites/default/files/altbestand/Heft57.pdf (2006)
635. Tan, *Anti-Suit Injunctions and the Vexing Problem of Comity*, 45 Virginia Journal of International Law 283 (2005)
636. Taruffo, *Aspetti Fondamentali del Processo Civile di Civil Law e di Common Law*, 36 Revista da Faculdade de Direito da UFPR 27 (2001)
637. Taruffo, *Precedente e giurisprudenza*, Editoriale scientifica (2007)
638. Tarzia, *L'intervento di terzi nell'arbitrato societario*, 44 Rivista di diritto processuale 349 (2004)
639. Tawil, *Applicable Law*, *UNCTAD Course on Dispute Settlement in International Trade, Investment and Intellectual Property*, http://unctad.org/fr/Docs/edmmisc232add5_en.pdf (2003)
640. Ten Cate, *Multi-Parti and Multi-Contract Arbitrations: Procedural Mechanism and Interpretation of Arbitration Agreements Under U.S. Law*, 15 The American Review of International Arbitration 133 (2004)
641. *The Mutuality Requirement in Res Judicata and Estoppel by Record*, Note in 2 Washington and Lee Law Review 233 (1941)
642. Tirado, Page, Meagher, *Corruption Investigations by Governmental Authorities and Investment Arbitration: An Uneasy Relationship*, 29 ICSID Review FILJ 493 (2014)
643. Tizi, *Litisconsorzio successive e imparzialità del tribunale arbitrale*, 17 Rivista dell'arbitrato 485 (2008)
644. Tonini, *La tutela internazionale dei diritti contrattuali degli investitori esteri*, Doctoral Thesis – University of Padua, http://paduaresearch.cab.unipd.it/3532/ (2011)
645. Tonolo, *Pluralità di giudicati ed opposizione all'esecuzione delle sentenze straniere*, 43 Rivista di diritto processuale, 1277 (2008)
646. Topcan, *Abuse of Right to Access to ICSID Arbitration*, 29 ICSID Review FILJ 627 (2014)
647. Townsend, *Extending an Arbitration Clause to a Non-Signatory Claimant or Non-Signatory Defendant: Does it Make a Difference?*, in Schwartz, Hanotiau (eds.), Multiparty Arbitration, Dossiers of the ICC Institute of World Business Law 111 (2010)
648. Townsend, *Non-signatories in International Arbitration: An American Perspective*, in van den Berg (ed.) International Arbitration 2006: Back to Basics?, 13 ICCA Congress Series 359 (2007)
649. Treves, *Conflicts Between the International Tribunal for the Law of the Sea and The International Court of Justice*, 31 New York University Journal of International Law and Politics 809 (1999)
650. Trocker, *I limiti soggettivi del giudicato tra tecniche di tutela sostanziale e garanzie di difesa processuale (profili dell'esperienza giuridica tedesca)*, 23 Rivista di diritto processuale 35 (1989)
651. Tyler, Kovarsky, Stewart, *Beyond Consent: Applying Alter Ego and Arbitration Doctrines to Bind Sovereign Parents*, in Permanent Court of Arbitration (ed.) Multiple Party in International Arbitration 1, Oxford University Publishing (2009)
652. Vadi, *Towards Arbitral Path Coherence & Judicial Borrowing/ Persuasive Precedent in Investment Arbitration*, www.transnational-dispute-management.com

(2008)
653. Vadi, *Through the Looking-Glass: International Investment Law through the Lens of a Property Theory*, 8 Manchester Journal of International Economic Law 22 (2011)
654. Valenti, *Gli standard di trattamento nell'interpretazione dei trattati in materia di investimenti stranieri*, Giappichelli (2009)
655. Valenti, *Il trattamento "conforme al diritto internazionale" degli investimenti stranieri nelle convenzioni internazionali*, 17 Diritto del Commercio Internazionale 973 (2004)
656. Van Aaken, *Fragmentation of International Law: The Case of International Investment Protection*, 17 Finnish Yearbook of International Law 91 (2006)
657. Van Bockel, *The Ne Bis in idem principle in EU law,* Kluwer (2009)
658. Van Harten, *Investment Treaty Arbitration and Public Law*, Oxford (2007).
659. Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 ICLQ 371(2007)
660. Van Harten, Malysheuski, *Who has benefited financially from investment treaty arbitration? An evaluation of the size and wealth of claimants*, 12 Osgoode Legal Studies Research Paper No. 14 1 (2016)
661. Vandevelde, *Aguas del Tunari, S.A. v. Republic of Bolivia*, 101 Am. J. Int'l L. 179 (2007)
662. Vandevelde, *Bilateral Investment Treaties*, Oxford (2010)
663. Van Houtte, McAsey, *Abaclat and Others v. Argentine Republic – ICSID, the BIT and Mass Claims*, 27 ICSID Review FILJ 231 (2012)
664. Vecchione, *L'arbitrato nel sistema del processo civile*, Giuffrè, Milano (1971)
665. Vervaele, *Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?*, 9 Utrecht Law Review 211 (2013)
666. Vestal, *Extent of Claim Preclusion*, 54 Iowa Law Rev. 1 (1968)
667. Vestal, *Preclusion/Res Judicata Variables: Nature of the Controversy*, 1965 Washington University Law Quarterly 158 (1965)
668. Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 Iowa Law Review 27 (1964-1965)
669. Vestal, *Rationale of Preclusion*, 9 St. Louis University Law Journal 29 (1964-1965)
670. Vestal, *Res Judicata/Preclusion: Expansion*, 47 Southern California Law Review 356 (1974)
671. Vestal, *The Constitution and Preclusion/Res Judicata*, 62 Michigan Law Review 33 (1963)
672. Viegas de Freitas Monteiro, *Jura Novit Curia in International Commercial Arbitration, Doctoral Thesis – University of Helsinki*, https://helda.helsinki.fi/bitstream/handle/10138/40746/Pro%20gradu.pdf?sequence=5 (2013)
673. Viola, Zaccaria, *Diritto e interpretazione*, Laterza, Bari (2009)
674. Virally, *Review Essay: Good Faith in Public International Law*, 76 American Journal of International Law 130 (1983)
675. Virzo, *Il regolamento delle controversie nel diritto del mare: rapporti tra procedimenti*, CEDAM (2008)
676. Volpino, *L'oggetto del giudicato nell'esperienza americana*, CEDAM (2007)
677. von Jhering, *Die ReflexWirkungen oder die Ruckwirkung rechtlicher Tatsachen auf dritte Personen*, in Annali per la dogmatica 245 (1871)
678. Voon, Mitchell, Munro, *Legal Responses to Corporate Manoeuvring in International Investment Arbitration*, 5 Journal of International Dispute Settlement 41 (2014)
679. Voser, *Multi-party Disputes and Joinder of Third Parties*, in van den Berg (ed.),

50 Years of the New York Convention: ICCA International Arbitration Conference, 14 ICCA Congress Series 343 (2009)

680. Voser, *Swiss Perspective: "The traditional approach with a twist regarding abuse of rights" or "Consent theory plus"*, Conference Materials of the School of International Arbitration 30th Anniversary Conference: "The Evolution and Future of International Arbitration: The Next 30 Years", Unpublished (2015)

681. Voser, Meier, *The Arbitrator – Joinder of Third Parties or the Need to (Sometimes) Be Inefficient*, in Zeiler, Welser et al. (eds.), Austrian Yearbook on International Arbitration Vol. 2008 115 (2008)

682. Waggoner, *Fifty Years of Bernhard v. Bank of America Is Enough: Collateral Estoppel Should Require Mutuality But Res Judicata Should Not*, 12 The Review of Litigation 391 (1993)

683. Wagner, *Jurisdiction by Estoppel in the International Court of Justice*, 74 California Law Review 1777 (1986)

684. Waibel, *Investment Arbitration: Jurisdiction and Admissibility,* Legal Studies Research Paper Series University of Cambridge, Paper No. 9/2014 (2014)

685. Waibel, Kaushal, Chung and Balchin, *The Backlash against Investment Arbitration: Perceptions and Reality*, ssrn.com/abstract=1733346 (2010)

686. Waincymer, *Procedure and Evidence in International Arbitration*, Kluwer (2012)

687. Walters, *Fitting a Square Peg into a Round Hole: Do Res Judicata Challenges in International Arbitration Constitute Jurisdictional or Admissibility Problems?*, 29 Journal of International Arbitration 651 (2012)

688. Wang Dong, *Binding Force and Enforcement*, *UNCTAD Course on Dispute Settlement in International Trade, Investment and Intellectual Property*, http://unctad.org/en/Pages/DITC/DisputeSettlement/Project-on-Dispute-Settlement-in-International-Trade,-Investment-and-Intellectual-Property.aspx (2003)

689. Wang Dong, *Post-Award Remedies and Procedures*, *UNCTAD Course on Dispute Settlement in International Trade, Investment and Intellectual Property*, http://unctad.org/en/Pages/DITC/DisputeSettlement/Project-on-Dispute-Settlement-in-International-Trade,-Investment-and-Intellectual-Property.aspx (2003)

690. Watt, Radicati di Brozolo, *Party Autonomy and Mandatory Rules in a Global World*, 6 International Law FORUM du droit international 90 (2004)

691. Watson, *Joseph Story and the Comity of Errors*, The University of Georgia Press (1992)

692. Watson, *Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality*, 69 Canadian Bar Review 623 (1990)

693. Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*, Oxford University Press (2013)

694. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 William and Mary Law Review 1895 (2010)

695. Weininger, *Apropos of ConocoPhillips v. Venezuela: Revision of Earlier Decisions in Fragmented Proceedings – A Matter of Principle?*, www.kluwerarbitrationblog.com (2014)

696. Weininger, *Jurisdiction Challenges in BIT Arbitrations – Do You Read a BIT By Reading a BIT or By Reading Into a BIT?*, in Mistelis, Lew, Pervasive Problems in International Arbitration 235, Kluwer (2006)

697. Weiss, Inherent Powers of National and International Courts: The Practice of the Iran-US Claims Tribunal, in Binder, Kriebaum, Reinisch, Wittich (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* 185 (2009)

698. Weissenfels, *Umbrella Clauses*, https://intlaw.univie.ac.at/fileadmin/user_upload/int_beziehungen/Internetpubl/weissenfels.pdf (2007)

699. Welser, *Efficiency – Today's Challenge in Arbitration Proceedings*, in Zeiler, Welser et al. (eds.), Austrian Yearbook of International Law 149 (2014)
700. Wendlandt, *SGS v. Philippines and the Role of ICSID Tribunals in Investor-State Contract Disputes*, 43 Texas International Law Journal 532 (2008)
701. Westerlind, Fox, *The Preclusive Effect of Arbitration Awards*, 21 Mealey's Litigation Report 1 (2010)
702. Whitesell, *Multiparty Arbitration: The ICC International Court of Arbitration Perspective*, in Permanent Court of Arbitration (ed.) Multiple Party in International Arbitration 203, Oxford University Publishing (2009)
703. Wilkie, *UNCITRAL Unveils New Transparency Rules – Blazing a Trail Towards Transparency in Investor-State Arbitration?*, www.kluwerarbitrationblog.com (2013)
704. Williams, *Jurisdiction and Admissibility*, in Muchlinski, Ortino, Schreuer (eds.), *The Oxford Handbook of International Investment Law* 868, Cambridge University Press (2008)
705. Wilske, Shore, Ahrens, *The "Group of Companies Doctrine" – Where Is It Heading?*, 17 The American Review of International Arbitration 73 (2006)
706. Winstanley, *Multiple Parties, Multiple Problems: A View from the London Court of International Arbitration*, in Permanent Court of Arbitration (ed.) Multiple Party in International Arbitration 213, Oxford University Publishing (2009)
707. Wirtz, *Due Process of Arbitration*, in *The Arbitrator and the Parties, Proceedings of the Eleventh Annual Meeting of the National Academy of Arbitrators* 1, Washington (1958)
708. Wisner, Gallus, *Nationality Requirements in Investor-State Arbitration*, 5 Journal of World Investment and Trade 927 (2004)
709. Wolfrum, *Intervention in the Proceedings before the International Court of Justice and the International Tribunal for the Law of the Sea*, in Götz, Selmer, Wolfrum (eds.), *Liber amicorum Günther Jaenicke – Zum. 85 Geburstag* 427, Springer (1998)
710. Wong, *Court or Arbitrator - Who Decides Whether Res Judicata Bars Subsequent Arbitration under the Federal Arbitration Act*, 46 Santa Clara Law Review 49 (2005)
711. Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, And Developed Countries in Foreign Investment Disputes*, 14 Geo. Mason Law Review 135 (2006)
712. Woolhouse, *Group of Companies Doctrine and English Arbitration Law*, 20 Arbitration International 435 (2004)
713. Yang, *Resolving Potential Jurisdiction Conflicts in ACFTA: The Principle of Res Judicata*, 3 Tsinghua China Law Review 335 (2011)
714. Yannaca-Small, *Consolidation of Claims: A Promising Avenue for Investment Arbitration?*, OECD International Investment Perspectives 225 (2006)
715. Yannaca-Small, *Improving the system of investor-State dispute settlement: An Overview*, OECD Working Papers on International Investment 2006/1, www.oecd.org/investment
716. Yannaca-Small, *Interpretation of the Umbrella Clause in Investment Agreements*, OECD Working Papers on International Investment, 2006/03, http://dx.doi.org/10.1787/415453814578 (2006)
717. Yannaca-Small, *Parallel Proceedings*, in Muchlinski, Ortino, Schreuer (eds.), *The Oxford Handbook of International Investment Law* 1010, Oxford University Press (2008)
718. Youssef, *The Limits of Consent: The Right or Obligation to Arbitration of Non-Signatories in Group of Companies*, in Schwartz, Hanotiau (eds.), *Multiparty Arbitration, Dossiers of the ICC Institute of World Business Law*, 71 (2010)
719. Youssef, *Universal Arbitration Between Freedom and Constraint: The Challenges of Jurisdiction in Multiparty*, Multi-Contract Arbitration, 16 ICCA Congress Series 103 (2012)

720. Zarra, *Il nuovo regolamento Bruxelles I-bis ed il problema dell'esclusione dell'arbitrato*, www.giustiziacivile.com, approfondimento del 5 dicembre 2014 (2014)
721. Zarra, *Il ricorso alle anti-suit injunctions per risolvere i conflitti internazionali di giurisdizione ed il ruolo dell'international comity*, 50 Rivista di diritto internazionale privato e processuale 561 (2014)
722. Zarra, *L'esecuzione dei lodi arbitrali annullati presso lo Stato della sede e la Convenzione di New York: verso un'uniformità di vedute?*, 24 Rivista dell'arbitrato 574 (2015)
723. Zarra, *The Arbitrability of Disputes Arising from Intra-EU BITs*, 25 The American Review of International Arbitration 573 (2014)
724. Zeiler, *Jurisdiction, Competence, and Admissibility of Claims in ICSID Arbitration Proceedings*, in Binder, Kriebaum, Reinisch, Wittich (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* 76, Oxford (2009)
725. Zekos, *Precedent and Stare Decisis by Arbitrations and Courts in Globalization*, 10 The Journal of World Investment and Trade 475 (2009)
726. Zhang, *Proper Interpretation of Corporate Nationality Under International Investment Law to Prevent Treaty Shopping*, 6 Contemp. Asia Arb. J. 49 (2013)
727. Zhenjie, *Forum Non Conveniens: An Unjustifed Doctrine*, 48 Netherlands International Law Review 143 (2009)
728. Zhilsov, *Mandatory and Public Policy Rules in International Commercial Arbitration*, 42 Netherlands International Law Review 81 (1995)
729. Ziccardi Capaldo, *Il principio di buona fede nell'esecuzione dei trattati. Il caso Battisti: un esempio emblematico di mala fides*, in Vassalli di Dachenhausen (ed.), *Atti del convegno in memoria di Luigi Sico* 509, Editoriale Scientifica, Napoli (2011)
730. Zivkovic, *Contract, Treaties and Umbrella Clauses: Some Jurisdictional Issues in Investment Treaty Arbitration*, http://ssrn.com/abstract=2119861 (2011)
731. Zoller, *La bonne foi en droit international public*, Paris (1977)
732. Zoppo, *La soluzione delle controversie commerciali tra Stati tra multilateralismo e regionalismo*, Jovene Editore Napoli (2013)
733. Zucconi Galli Fonseca, *La convenzione arbitrale rispetto ai terzi*, Giuffré, Milano (2004)