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LIST OF ABBREVIATIONS

Ad Hoc Committee	Ad Hoc Committee established according to Art. 52 of the ICSID Convention
BIT	Bilateral Investment Treaty
CAFTA – DR	Dominican Republic–Central America Free Trade Agreement
CETA	European Union – Canada Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
DSU	Dispute Settlement Understanding of the WTO
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECR	European Court Reports
ECtHR	European Court of Human Rights
EFILA	European Federation for Investment Law and Arbitration
EU	European Union
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
HKIAC	Hong Kong International Arbitration Centre
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
IIL	International Investment Law
ISDS	Investor – State Dispute Settlement
ITA	Investment Treaty Arbitration
ITLOS	International Tribunal for the Law of the Sea
LCIA	London Court of International Arbitration
NAFTA	North American Free Trade Agreeent
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SCC	Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
TPP	Trans-Pacific Partnership Agreement
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law

UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNRIAA	United Nations Reports of International Arbitral Awards
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

INTRODUCTORY REMARKS AND ANALYSIS OF THE SCOPE OF THE WORK

The issue of parallel proceedings is typical to all domestic systems of law and arises in those cases where two (or more) tribunals are called upon to deal with proceedings in which parties, legal basis and one (or more) of the issues under scrutiny are the same or substantially the same.

Unsurprisingly, as a result of the multiplication of international courts and tribunals, the same issue has become crucial in international law as well. [1] Suffice it to consider that a claim for expropriation could be brought before both a human rights court (such as the European Court of Human Rights) and an investment arbitration tribunal, as well as before two investment arbitration tribunals.

From the angle of international investment arbitration, *i.e.* that form of arbitration involving States and foreign investors, the problem of parallel proceedings is extremely relevant, due to the fact that parallel proceedings undermine the credibility of investment arbitration as a public form of adjudication, because they run against the principle of legal certainty.

Going more into detail, the emergence of the problem of parallel proceedings in investment arbitration is due to the increasing number of investment cases, which, in turn, is the consequence of a series of reasons.

The first reason lies in the perceived bias of the traditional remedies available in this field, *viz.* litigation in national courts of the host State or diplomatic protection.

The second reason is the entry into force of thousands of Bilateral Investment Treaties (BITs) that States sign with the aim of encouraging foreign investments. BITs usually contain two main features that directly contribute to the growth in the number of investment arbitrations. On the one hand, BITs contain a "blind" offer (*i.e.* an advanced consent) by the host State to arbitrate all future disputes with foreign investors (having the nationality of the other signatory State) before international arbitral tribunals constituted *ad hoc*. [2] On the other hand, States' con-

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[1] The first (and only) book which has deeply analysed the problem is Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003).

[2] Scholars talk, in this regard, of *arbitration without privity*, due to the lack of a specific contrac-

sent to arbitration in BITs is usually expressed in very broad terms. Indeed, it involves disputes arising from every kind of activity encompassed in the definition of "investment" contained in the same BIT. Such a definition usually refers to "every kind of asset", including even shares and indirect interests in companies incorporated in the host State. Hence, all foreigners owning an "asset" can be classified as investors and are thus entitled to start an international arbitration for the violation of any of the (even in this case, very broadly formulated) standards of treatment set forth in the relevant BIT.

The third and last cause of expansion of investment arbitration is the approach that arbitrators have adopted in assuming jurisdiction. Indeed, the broadness of BITs provisions providing for the definition of investment has allowed tribunals to assume jurisdiction also in cases where, according to the general rules of international law, they should not have done so (*e.g.* in cases of indirect damages suffered by shareholders).

This has led to the risk of possible abuses by investors. Such abuses may take place in three ways. First, investors are usually companies that, in turn, are often owned by other companies having a different nationality. In this case each company of the chain, which may be considered as an investor according to the relevant BIT, may take advantage of such BIT and start its own arbitration. Second, multinational companies are usually owned by several shareholders having different nationalities. All of them are to be considered as separate investors and may thus start autonomous investment claims for the same damage suffered by the company. Third, in some cases States and investors enter into investment contracts in order to regulate foreign investments. In these cases, nothing precludes that the investor starts both an arbitration under the arbitration clause contained in the contract and another arbitration according to the offer to arbitrate contained in the relevant BIT.

In all the mentioned cases, from a formal point of view, in starting parallel proceedings investors are exercising their rights and are fully entitled to do so.

However, several policy considerations militate against this situation. The reference goes to the efficiency of arbitration proceedings, the finality of decisions and, finally, the legitimacy and credibility of investment arbitration as an effective system of adjudication. Parallel proceedings in investment arbitration lead to extremely long disputes, with the effect of increasing times and costs, and they undermine legal certainty with the risk of conflicting outcomes. From the perspective of the State, this is a waste of public money and, directly or indirectly, risks affecting the rights of people that depend on the issues to be adjudged (suffice here to recall that investment disputes usually involve sectors of the States' economy that

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tual commitment to arbitrate between the investor and the host State. See Paulsson, ICSID Review – FILJ (1995), 232 and ss.

are essential for public life, such as water, electricity, and telecommunications).

Furthermore, allowing parallel proceedings would also mean undermining the same function of arbitration as a credible method of dispute settlement. It is strongly arguable, indeed, that arbitration fulfils its function only if it finally settles the dispute underlying the claims of the parties. This means that the end of arbitration proceedings shall coincide, from a substantial point of view, with the end of the dispute between the parties. If, when a claim is judged, another substantially identical claim is pending in another arbitration (or can be started again before another tribunal), arbitration has failed in fulfilling that function. Systems of adjudication are considered reliable and credible on the basis of the degree of satisfaction of both parties involved in the dispute and, mainly, of the perception that the parties have of the fairness of the system of adjudication.[3] Being perceived as an undue disadvantage for the interests of the State involved in the dispute, parallel proceedings undermine the same existence of investment arbitration, as testified by the fact that inconsistency is one of the main causes for which several States are today considering terminating BITs and denunciating the ICSID Convention.[4]

In light of all the above, it is possible to say that there is a clash between the current legal framework regulating jurisdiction of arbitral tribunals (allowing for parallel claims) and the several policy considerations that seek to limit the phenomenon of parallel proceedings.

A research that looks for a solution to the problem of parallel proceedings is, therefore, required.[5]

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[3] 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. 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. 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.

[4] See European Federation for Investment Law and Arbitration (EFILA), www.efila.org (2015), Cosmas, International Journal of Scientific and Research Publications (2014), 1 and ss.

[5] The subject of parallel proceedings in investment arbitration, as of today, has not been widely discussed. There is only one monograph directly dealing with the subject, *i.e.* Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration* (2013). There are, however, other books that – albeit indirectly – regard the subject, as well as some articles. See Shany (n. 1) (2003); McLachlan, *Lis Pendens in International Litigation* (2009); Hober, *Res Judicata and Lis Pendens in International Arbitration*, Recueil de courses vol. 366 (2013), 103 and ss. See also Ascensio, Chinese

Such a research is the task that will be carried out in the present book. In particular, the main goal of the author is to try to identify whether there are certain principles of general international law that may be used by arbitrators in order to preclude the continuation of duplicative proceedings.

Chapter 1 will try to provide the reader, on the one hand, with an analysis of the taxonomy of parallel proceedings, by also identifying the sources of this phenomenon (Paragraph 1.1), and, on the other hand, with an analysis of the most likely reasons behind the growth of such an issue (Paragraph 1.2). However, in order to say that a solution to parallel proceedings is required, it will also be necessary to ascertain the existence of systemic features in investment arbitration. Indeed, only if one accepts that investment Tribunals are not a mere patchwork of autonomous and *ad hoc* Tribunals, will it be theoretically possible to say that the risk of conflicting outcomes shall be avoided. This will be therefore the goal of Paragraph 1.3 of this work. Chapter 1, finally, will analyse in depth the already mentioned policy considerations at the basis of the research (Paragraph 1.4) and will describe the way towards a solution to the problem of parallel proceedings (Paragraph 1.5).

The following structure of the research will follow the temporal sequence of the various phases of arbitration proceedings where the problem of parallel proceedings may emerge, *i.e.* pre-award (in particular at the jurisdiction and admissibility phases) and post-award (annulment and enforcement of arbitral awards).

Chapter 2 examines the pre-award remedies based either on a manifestation of party autonomy or on an exercise of discretion by arbitrators. The former category will be analysed in Paragraph 2.1. Such remedies can be divided into those provided by a treaty clause setting forth a solution for possible and future parallel

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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., Reinisch, The Law and Practice of International Courts and Tribunals (2004), 37 and ss; Martinez Fraga, Samra, Northwestern Journal of International Law and Business (2012), 419 and ss.; 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., 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., 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. 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*. See 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.

proceedings (analysed in Paragraph 2.1.1) and those which have been developed in international commercial arbitration in order to manage multi-party and multi-contract situations (analysed in Paragraph 2.1.2). The first category encompasses forum selection, fork-in-the-road and waiver clauses, while the second involves joinder, intervention, consolidation and quasi consolidation. Paragraph 2.1.3 will then make a brief analysis of the phenomenon of collective proceedings started by investors. Lastly Paragraph 2.2 will analyse remedies based on an exercise of discretion by arbitrators, in particular *forum non conveniens*, international comity and anti-suit injunctions.

The research then moves to the analysis of the pre-award remedies based on international law sources (Chapter 3) which are applicable at the admissibility stage of proceedings, *viz.* the phase of proceedings where arbitrators may decide that the exercise of (validly conferred) jurisdiction is not appropriate for the interest of justice. We will, preliminarily, examine the legal foundation of the distinction between jurisdiction and admissibility in international investment arbitration (Paragraph 3.1) and identify the law applicable at the admissibility phase (with a particular focus on the applicability of general principles of international law) (Paragraph 3.2). After these preliminary considerations, we will discuss the applicability in international arbitration of the main remedy used by civil law courts (and today adopted in EU law) in order to avoid parallel proceedings, namely *lis pendens* (Paragraph 3.3). We will then move to an analysis of the general principles of good faith and finality (Paragraph 3.4). These principles respectively furnish the grounds for the doctrine of abuse of process (analysed in Paragraph 3.5), on the one side, and *res judicata* and collateral estoppel, on the other side (respectively analysed in Paragraphs 3.6 and 3.7). We will try to understand whether and how these tools may be applied in international law, in general, and in investment arbitration, in particular. This will require, firstly, a comparative analysis of how they have been applied in different municipal systems and, secondly, an analysis of these doctrines in international law. The analysis carried out in Chapter 3 will be concluded with some concrete proposals for the pre-award management of parallel proceedings (Paragraphs 3.8 and 3.9).

Finally, Chapter 4 will analyse remedies to parallel proceedings available at the post-award stage of arbitration proceedings. These remedies are different with regard to ICSID awards – being ICSID a self-contained form of arbitration – 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. Post-award remedies in the ICSID framework will be analysed in Paragraph 4.1, while the case of non-ICSID awards will be examined in 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.

It is important to note that this book will 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.

CHAPTER 1

INTERNATIONAL INVESTMENT ARBITRATION AND THE NEED FOR COHERENCE

CONTENT: 1.1. The taxonomy of multiple claims and the inevitability of parallel proceedings. – 1.1.1. Contract and treaty claims. – 1.1.2. Majority and minority shareholders (or company and its shareholders). – 1.1.3. Chain of entities of the same group – 1.1.4. Different adjudication systems provided in the same legal instrument. – 1.2. The reason behind parallel proceedings: the historical necessity to incentivize investments. – 1.3. Systemic features in investment arbitration: a network needing internal coherence. – 1.4. Policy considerations against parallel proceedings. – 1.4.1. Reliability and legitimacy of the adjudication process and the principle of legal certainty. – 1.4.2. Judicial economy and the need for efficiency in the decision-making process. – 1.4.3. Fairness and finality. – 1.5. The apparent lack of a general remedy for ensuring consistency and finality. The impossibility of finding a solution at the jurisdictional stage and the necessity to go beyond party autonomy.

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). It will then search for the historical reasons behind the emergence of the problem (Paragraph 1.2). In this regard, 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 should be avoided. This will require, first of all, in Paragraph 1.3, to ascertain the existence of systemic features in investment arbitration. Having demonstrated that investment arbitration can be considered as a network needing internal coherence, the policy considerations against parallel proceedings will be therefore analysed in depth in Paragraph 1.4.

Such considerations require us to search for a solution to the issue at stake, pertaining both to procedural and substantive repercussions of parallel proceedings. 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. Substantive implications of parallel proceedings regard the risk of conflicting outcomes and the negative effects of parallel proceedings on the principle of legal certainty and on the principle of finality.

Finally, after having outlined (in Paragraph 1.5) 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.

1.1. *The taxonomy of multiple claims and the inevitability of parallel proceedings*

Parallel proceedings in international arbitration can be defined as proceedings pending before two (or more) arbitral tribunals, in which the parties, the legal basis and one (or more) of the issues are the same or *substantially* the same. [1]

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

1) the purpose of the claims is the same;
2) the facts on which the claims are based are the same;
3) the legal basis of the claims is substantially identical;
4) the parties in the two proceedings represent the same centres of interests, even if they are not formally identical.

In the present study, we will refer to *parallel* proceedings also in the case of proceedings that are not concurrently pending, even though they substantially involve the same claims, facts and interests between the same parties. With regard to this last category of proceedings, it is worth mentioning that it would perhaps be more appropriate to speak about *multiple* proceedings. However, for the sake of clarity, we will discuss 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 likely that two proceedings might fall into the aforementioned definition.

As it has been stated by several authors, parallel proceedings are fundamentally

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

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, 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 in 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 a 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.

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 a 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 standards of treatment

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[2] Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration* (2013), 2.

[3] Guillaume, International and Comparative Law Quarterly (1995), 862.

[4] Oellers-Frahm, Max Planck UNYB (2001), 67, Romano C., International 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 – FILJ (2015), 98 and ss., and van Aaken, Finnish Yearbook of International Law (2006), 91 and ss.

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

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 investment 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 is governed by international law. [11]

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

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[7] Tonini, *La tutela internazionale dei diritti contrattuali degli investitori stranieri* (2011), 4 and ss., Savarese, *La nozione di giurisdizione nel sistema ICSID* (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 be 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, generally speaking, 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, *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 signed in 1959. Today, as reported 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.

[12] BITs are aimed at the promotion and protection of foreign investments. With this scope such treaties provide for very broad standards 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.

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, there emerges the problem of understanding which dispute resolution procedure must be applied – the one contained in the applicable BIT or the one indicated by the investment contract between the investor and 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 if there is (also) a BIT between the investor's Home State and the Host State, the investor is entitled to 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

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[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 into 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, http://ssrn.com/abstract=2119861 (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, https://intlaw.univie.ac.at/fileadmin/user_upload/int_beziehungen/Internetpubl/weissenfels.pdf (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, George Mason Law Journal (2006), 135 and ss.

[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.

> breach a treaty without breaching a contract and vice versa (…) In accordance with this general principle (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 the above statement is that the investor has the choice of pursuing: (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 contract), whereupon the Tribunal

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[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.

found that Grenada did not violate any BIT obligation. RSM then 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 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 light of the above, from the perspective of the present book the difference between contract and treaty claims is very relevant, since it is one of the most relevant sources of parallel arbitration proceedings.[26] It is also worth considering that, in light of the fact that contract claims and treaty claims are not necessarily governed by the same 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.[27] Therefore, BITs' definitions are no longer "enterprise based definitions"[28] – 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

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

[26] 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.

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

[28] 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).

amount of shares.[29] Therefore, the mere participation in the locally incorporated company becomes the investment.[30] 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.[31]

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.[32]

As far as the position of minority shareholders is concerned, while in the (older) *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,[33] the following authorities show that claims by minority shareholders are today common practice in international investment arbitration, both administered by ICSID 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

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[29] 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).

[30] Schreuer (2005) (n. 27), 6.

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

[32] See Dumberry, Valasek, ICSID Review – 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, 10 February 1999, para. 89, and *Suez 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.

[33] *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.

> 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). [34]

In this regard it should be highlighted that the Convention does not define the concept of *foreign control* and, therefore, arbitral tribunals have usually [35] interpreted this 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. [36]

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. [37]

Tribunals have therefore assumed jurisdiction on claims brought by shareholders representing even 14,18% of the company's shares. [38] 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 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. [39]

The practice of assuming jurisdiction on claims brought by minority shareholders is today so widespread that some Authors have argued that a customary rule of international law has developed in this regard. [40]

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[34] On this point see Moreland (2000) (n. 33), 19.

[35] See the *Vacuum Salt* case, where an opposite conclusion has been reached by the Tribunal.

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

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

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

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

[40] See, *e.g.*, McLachlan, Shore, Weininger, *International Investment Arbitration: Substantive Prin-*

It should also be 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.[41] 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.

Historically, in international law it was understood that claims based on a reflective injury to shareholders are generally barred.[42] In this regard it is worth noting what the ICJ stated in the *Diallo* case (re-affirming the *Barcelona Traction* case), *i.e.* that a wrong done to the company frequently causes prejudice to its shareholders. In this regard, the same ICJ added that damage affecting both company and shareholder does not usually mean that both are entitled to claim compensation. According to the ICJ, in the case where shareholders suffer only indirect damages it is only one entity whose rights have been infringed[43] 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.[44] As it has been stated by the English Court of Appeal in *Gardner v. Parker*,

> [t]he shareholder's loss will be made good if the wronged company, which has the primary claims, enforces in full its claims against the wrongdoer.[45]

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.[46] Arbitral tribunals have in fact found that shareholders can bring autonomous claims even when the company has effective recourse.[47] The decisions

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ciples (2007), 186. For a contrary opinion see Dumberry, Michigan State Journal of International Law (2010), 365 and ss.

[41] 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.

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

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

[44] Gaukrodger (2013) (n. 42), 15 and ss.

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

[46] Gaukrodger (2013) (n. 42), 25 and ss. Bottini, U. Pa. Journal of International Law (2010) 563 and ss.

[47] Gaukrodger (2013) (n. 42), 29.

in *Azurix*,[48] *LG&E*,[49] *Enron*[50] and *Siemens*[51] may be cited as examples of this practice.[52]

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.[53]

This is what has happened in the cases regarding *Sempra v. Argentina*[54] and *Camuzzi v. Argentina*,[55] where the majority shareholder (Camuzzi) and the minority shareholder (Sempra) of the companies Sodigas Sur S.A. and Sodigas Pampeana S.A., which allegedly suffered damages due to the change in the regulation of the gas sector in Argentina, 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*[56] and *Total v. Argentina*[57] 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 were 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

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

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

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

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

[52] For more cases see Bottini (2010) (n. 46), 584 and ss. For a contrary case see *Consorzio Groupement L.E.S.I. Dipenta v. Algeria*, ICSID Case No. ARB/03/8, Award, 10 January 2005, para. 1. 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.

[53] Dumberry, Valasek (2010) (n. 32), 71.

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

[55] *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.

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

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

well-known *Yukos* saga, where several shareholders of the Russian company Yukos started different claims on the basis of the same facts.[58] Various arbitration cases emerged[59] 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 inter-

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[58] 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, "[t]he 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 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".

[59] Arbitrations started by minority shareholders: *Quasar de Valores SICAV S.A. v. Russian Federation*, Stockholm Chamber of Commerce SCC Case No. 080/ 2004, 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, PCA Case No. AA 228, 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 179 and 180 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.

national 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. [60]

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 investment cases, investors are companies. Such companies are owned by shareholders, who may themselves be companies. [61] Indeed, investments very often present a complex structure consisting of companies incorporated in different jurisdictions and owned by nationals of different countries. [62] It is possible, in this regard, to talk about "strategic structuring"; [63] companies are in fact often established in a certain place in order to allow their owners to benefit from certain advantages related to their place of incorporation. [64]

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. [65]

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

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

[61] Schreuer (2005) (n. 27), 1.

[62] Wisner, Gallus, Journal of World Investment and Trade (2004), 927.

[63] Sinclair, ICSID Rev. FILJ (2005), 357. See also Schreuer, The Fordham Papers (2012), 17 and ss.

[64] Sinclair (2005) (n. 63), 363.

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

the protection of particular bilateral (or other) treaties covering foreign investment. [66]

This must be added to the fact that some States actively promote themselves as favourable venues for corporate presence (in particular from the point of view of favourable taxation) and access to a favourable network of investment treaties. Such an approach may also positively influence investment inflows. [67]

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: [68]

1) claimants 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, [69] the host State [70] and of a third State; [71]

2) claimants which are intermediate ("holding", "shell" or "mailbox") corporations. Such companies are very often incorporated in favourable tax jurisdictions, but usually do not have significant assets or operations in such countries and are established for the sole purpose of owning shares of other corporations. [72]

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*, [73] *Rompet-*

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[66] *HICEE v. Slovakia*, UNCITRAL, PCA Case No. 2009-11, Partial Award. 23 May 2011.

[67] Sinclair (2005) (n. 63), 363.

[68] See Dumberry, Valasek (2010) (n. 32), 51 and ss. The following examples in the text are taken from Dumberry and Valasek's article.

[69] *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.).

[70] *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.

[71] *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).

[72] Dumberry, Valasek (2010) (n. 32), 55.

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

rol,[74] *Yukos*[75] and *Saluka*.[76] In this last case, the Tribunal 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 that it was bound to give weight to what the parties have textually expressed in the arbitration clause and assumed jurisdiction.[77]

The above approach of arbitral tribunals – which, to the knowledge of the present author, has been (partially and in different circumstances, that will be examined in Paragraph 1.2 and 1.5) put in discussion only in the *TSA*[78] and *National Gas*[79] awards – has generated a practice known as "treaty shopping".[80] Such a concept has been defined as a

> commonly used scheme for multinational corporations to '*steal*' not only higher lev-

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2004. This award has been strongly criticized by Alexeyev, Voitovich, Journal of World Investment and Trade (2008), 519 and ss. The Authors in particular criticized the very formalistic approach of the Tribunal disregarding commercial reality.

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

[75] *Yukos Universal v. Russian Federation*, (UNCITRAL) Permanent Court of Arbitration, Interim Award on Jurisdiction and Admissibility, 30 November 2009 (mentioned at footnote 63 above). 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.

[76] *Saluka Investments BV v. Czech Republic*, (UNCITRAL), Partial Award, 17 March 2006.

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

[78] *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).

[79] *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 these awards cannot be considered as a deviation from the main approach described in the text.

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

> els 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). [81]

Bernardo Cremades has talked, in this regard, about "gambling methods". [82] Blyschak has referred to an investor which "freeloads" onto a treaty that was not properly intended to apply to the investor. [83]

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 (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 happened in the *CME* [84] and *Lauder* [85] 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 will be seen more clearly in Paragraph 1.5 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. [86]

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

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

[83] Blyschak (2011) (n. 77), 195.

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

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

[86] Zhang (2013) (n. 81), 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 be noted that such clauses are not unanimously perceived as an effective mechanism to limit treaty shopping. See Blyschak (2011) (n. 77), 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 the recently approved text of the CETA, at