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“Overlap between Investment and Commercial Arbitration”

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INTRODUCTION

Legal relations have become more complex through the years. The investor request more grounds for protecting their investments by the arbitrary conduct of states and state-entities. Commercial and investment arbitration seem to be the apparent solution. However, this can create certain problems, as the material jurisdiction of both these regimes is broad enough to allow for overlaps, and as a consequence, conflicts between the two.

This overlap can be more apparent as in the *CME* and *Lauder* cases, where essentially the same dispute was adjudicated under two different BITs, brought by the legal person, CME, on the one hand, and the majority shareholder of that legal person, Mr. Lauder, on the other. The second tribunal concluded that the two cases, even though similar, should be adjudicated separately, because the claimants and the treaties were different.

An even more confusing situation, though, can appear, when the jurisdictional overlap is spotted not within the investment regime, but across similar, but still, distinct regimes, namely the commercial and investment ones. Characteristically, the *Exxon Mobil v Venezuela* case poses as an illustrative example of that overlap. The jurisdictional findings of this case were the triggering point of this particular thesis. The investment tribunal in its 2014 award, it found that the ICC and ICSID awards "concern the liability of different parties under different normative regimes". In particular, the ICC award was rendered between Exxon Mobil and PDVSA, a fully state-owned company, while the ICSID one was against Venezuela itself. It, also, stated that the investment dispute regarded the breach of an international treaty, and, thus, of international law, while the ICC arbitration was limited to a contractual dispute. Therefore, the investment tribunal chose to simply state that it will consider the ICC award, when necessary, in order to avoid contradictory outcomes.

It could be stated from the findings of the investment tribunal, that just the fact that there could be relevant facts that affect both disputes, is a strong indicator of the overlap between the disputes. And in the end that is exactly what the ad hoc annulment committee upheld in order to annul the award partly. In particular, the Committee found that a limitation-of-compensation clause in the contract, was not irrelevant to the investment proceedings, as the tribunal claimed, and cannot simply be ignored. On the contrary, claimant's investment was "inherently circumscribed" by the contract creating it, and therefore circumscribed by the compensation limitation enclosed therein,[1] and thus, proving that the contractual obligations are not irrelevant to the international treaty-based ones.

The overlap of the two regimes can be detected in various areas, but mainly to the broad dispute resolution clauses of investment treaties that allow for "all" or "any" disputes to be submitted before treaty tribunals, as well as umbrella clauses, that elevate contractual claims to treaty ones. But even before the substantive and procedural protections that are offered by the two regimes, their overlap lies in the material jurisdiction as well. The notion of the "investment" as well as that of commerciality are broad enough to encompass disputes that can appear before both commercial and investment tribunals, and that exactly triggers the treaty-contract-claims discussion. Specifically, the *SGS v Philippines* tribunal tried to differentiate between claims that arise from the contract and those that arise from the treaty, and concluded that it should stay its proceedings instead, because distinguishing between the claims was not possible, so it opted to wait for the decision of the contract-based exclusive forum.[2]

Apart from the broad *ratione materiae* jurisdiction of the tribunals, the dispute settlement clauses in investment treaties can be broad enough to allow a variety of disputes to be brought before the tribunal, including commercial/contractual ones. For instance, it was found in the *Vivendi* case that Article 8 of the Argentina-France BIT allows for any dispute to be submitted to arbitration, and it does not limit the competence of the treaty-based tribunal to breaches of the BIT only. This leaves the way open for disputes unrelated to treaty to be brought before the treaty-based tribunal.

Lastly, the overlap can be detected positively when umbrella clauses come into play. There are different schools of thought regarding the scope of the clause; for instance, some suggest that it can elevate every contractual claim to a treaty one, thus having a mirror effect, while others require a sovereign act on behalf of the state for its invocation. Regardless, though of the different approaches, what remains evident is that the facts or an award relating to the contract are "*relevant*" in order to "*assess whether there has been a breach of the treaty*".[3]

Chapter two regards the different possible solution to this problem of the overlapping regime. Different approaches have been suggested, like for instance, the creation of an appeal's mechanism, or consolidation of the proceedings. The current thesis will focus primarily on three of these

[1] https://www.iareporter.com/articles/analysis-exxon-annulment-committee-chastises-tribunal-on-proper-role-of-domestic-law-in-bit-compensation-determinations/
[2] *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), para. 173. (hereinafter SGS v Philippines)
[3] *Eureko*, para. 101.

approaches, which according to the author seem more pertinent to tackle the issue. The first two solutions are a more flexible and substantive-based interpretations of the principles of *lis pendens* and *res judicata*. So far, a very restrictive approach of the two principles has been applied by international courts and tribunals, which however, does not allow for their application in the modern adjudicatory systems, that is fragmented and is characterized by overlapping specialized jurisdiction. The third solution suggested is the use of the principle of comity. The latter is a principle, the nature of which remains uncertain even today. But as it will show, this uncertainty allows the principle to be flexible enough and to adapt for the needs of the contemporary international legal system. Comity is a principle that initially comes from common law jurisdictions, and its place in international law is ambivalent. It lies in the discretion of the tribunal to decide to defer the case to another court or tribunal that is considered to be more competent to adjudicate the dispute. On the one hand, exactly this discretion is what creates the problems for the use of comity, since no specific rule exists that bounds arbitrators. On the other, however, arbitrators should show deference to another adjudicative body that is more competent to decide the dispute.

PART ONE: INVESTMENT AND COMMERCIAL ARBITRATION OVERLAPPING & CONFLICTING

What has dominated the international adjudication in the latter part of the twentieth century is the foundation of abundant dispute settlement mechanisms.[4] This practice was the "aftermath" of the two World Wars, after which the need for peaceful and non-violent dispute resolutions was urgent.[5] As it is eloquently established in Article 33 of the UN Charter the "*maintenance of international peace and security*" is of the utmost importance, and, therefore, disputing parties need to seek settlement of their differences in any *peaceful* means of their choice, judicial or not.[6] The different newly established tribunals are evidence of innovation on behalf of the states and private actors,[7] as well as their willingness to resolve their disputes through objective third parties in a definitive and preclusive manner. The adjudicatory bodies founded run the gamut from the International Court of Justice to the World Trade Organization's Dispute Settlement Body, to courts and tribunals with specialized jurisdictions[8], and to a number of *ad hoc* tribunals with the authority to hear claims brought directly from a private person. In the case of the international investment regime those tribunals are considered as "hybrids",[9] since they utilize the dispute settlement model of commercial arbitration, but incorporate in it elements of public international law.

I. Proliferation of dispute settlement mechanisms in international law

The proliferation of international courts and tribunals has allowed various parties to have access to dispute settlement bodies, in plenty of cases for the same issues but under distinct legal grounds.[10] In other words, this plethora of adjudicatory bodies has provided parties with the option to resort to different types of courts and tribunals, especially since a lot of those courts and tribunals exercise limited jurisdiction. This issue is exacerbated considering the fact that there exists no hierarchy in the international judicial field.[11] There is no equivalent to a national judicial system. Therefore, a

[4]Giorgetti, Chiara, 'Horizontal and Vertical Relationships of International Courts and Tribunals - How Do We Address Their Competing Jurisdiction?', *ICSID Review - Foreign Investment Law Journal*, 30 (2015), 98–117, p.1 (hereinafter Giorgetti Chiara).
[5] Bjorklund, Andrea K., *Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals Is Not Working* (Rochester, NY: Social Science Research Network, 29 September 2007) <https://papers.ssrn.com/abstract=1016880> [accessed 9 January 2017], p107. (hereinafter Bjorklund).
[6] Charter of the United Nations, Art. 33. (hereinafter UN Charter)
[7] Bjorklund, p. 107.
[8] For instance, the International Criminal Court for the former Yogoslavia (ICTY).
[9] Filip de Ly and Audley Sheppard (RAPPORTEUR), Final Report on Lis Pendens and Arbitration, Seventy-Second International Law Association Conference on International Commercial Arbitration, Toronto, Canada, 4-8 June 2006, ARBITRATION INTERNATIONAL, Vol. 25, No. 1, LCIA (2009), p33. (hereinafter ILA, Lis Pendens)
[10] Giorgetti Chiara, p.1.
[11] Hobér, Kaj, 'Res Judicata and Lis Pendens in International Arbitration, 366 Recueil des cours 99 (2013), p259. (hereinafter Hober.)

potential disputing party can simply decide to initiate proceedings before multiple international *fora*, without the latter being able to deny jurisdiction or stay their proceedings based on an established rule of hierarchy or order.

The fact that all competent courts and tribunals are apt to adjudicate essentially the same dispute, or different aspects of the same dispute on various legal bases can be an advantage to the parties, exactly because the administration of justice is secured through multiple *fora*. On the other hand, this abundance of mechanisms leads to fragmentation and duplicative proceedings.[12] The reason for that is that the different fora create "*divergent clusters and sub-clusters of international jurisprudence*", which entails a threat for the unity of international law.[13] Since no hierarchy exists between the adjudicatory bodies, several of them can be competent to arbitrate the same dispute at the same time. As a result, this situation gives way to overlapping jurisdictions.[14] Essentially the consequence of those competing jurisdictions is that the parties of the dispute will make use of different fora for the settlement of a dispute, or of other aspects of it.

For example, in the *Swordfish* case, in 2000 Chile was complaining that the EU's (EC at the time) claiming that the latter's fishing vessels were involved in excessive taking of swordfish in international waters, endangering the conservation of the highly migratory species, and thus violating the UN Convention on the Law of the Sea (UNCLOS)[15]. On the other hand, the EC claimed that Chile violated the GATT 1994 by denying access to its ports for the European fishing vessels in order to unload their swordfish. [16]Consequently, two different dispute settlement mechanisms were triggered at two different fora by the same parties and for the same dispute.

Similarly, in the *Mox Plant* case, three distinct proceedings were commenced due to a dispute between Ireland and the UK regarding an industrial plant, which allegedly polluted the Irish sea with radioactive waste. The arbitrations were initiated under UNCLOS and under OSPAR, a regional environmental agreement. The third set of proceedings was launched under the jurisdiction of the EU court. The OSPAR tribunal was concerned with issues of disclosure of information, based

[12] Frank Spoorenberg and Jorge E. Viñuales, Conflicting Decisions in International Arbitration, *The Law and Practice of International Courts and Tribunals 8, Koninklijke Brill NV, Leiden,* (2009) p100, (hereinafter Spoorenberg, Viñuales). As it was observed by Antonio Parra, the Secretary General of ICCA, the different treaties and the proliferation of mechanisms prompts "greater likelihood of different arbitration proceedings being initiated, by covered investors against their host states, in relation to the same or similar issues, events or circumstances." (Desirability and Feasibility of Consolidation: Introductory Remarks, *ICSID Review - Foreign Investment Law Journal*, Volume 21, Number 1, Spring 2006).

[13] Reinisch, August, 'The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes', *ResearchGate*, 3 (2004), 37–77, p38. (hereinafter Reinisch).

[14] Hober, p118.

[15] International Tribunal for the Law of the Sea, *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean* (Chile/EC), Order of 20 December 2000 (ITLOS).

[16] Chile — Measures affecting the Transit and Importing of Swordfish, case no. WT/DS193/1

on Article 9 of the Convention,[17] while UNCLOS with purely environmental claims.[18] Within the EU system provisions for all these issues exist. However, what is interesting is that the two tribunals followed completely different paths regarding the concurrent competence of the ECJ. On the one hand the OSPAR tribunal. despite making remarks about the use of Article 31(3)(c) VCLT, decided to interpret the Convention isolated from any other relevant rule of the EU, while on the other hand, the UNCLOS tribunal took cognizance of the European environmental directives and stayed its proceedings in favour of the ECJ's jurisdiction.

As it becomes apparent by those examples, the multiplicity of international settlement mechanisms leads to the fragmentation and duplication of international proceedings.[19] Those two concepts are two sides of the same coin; the competence of different tribunals to hear a dispute can bring about both overlapping and divergent powers. Let us be re reminded of two cases that yielded such results.

A. The *Softwood Lumber* case

This dispute revolves around softwood lumber and certain Canadian measures, which were considered by the US to constitute subsidies, and the country in juxtaposition adopting countermeasures. This case poses as a characteristic example of different claimants seeking different forms of relief under different legal bases and tribunals, but built on identical facts. Initially, WTO proceedings were commenced by Canada, with the state claiming that the US should revoke its measures. The WTO panel concluded that indeed the US Department of Commerce erred in its judgement that the Canadian measures amounted to subsidies (and thus violating the SCM Agreement), and therefore the adopted measures could not be considered as countermeasures, thus, should be appealed.[20]

Later on, Canada challenged another decision of another US body, the International Trade Commission, which concluded once again that the imports of softwood lumber from Canada was causing material injury to domestic producers. To be precise, the reason for those conclusions was that Canada and its provincial governments own most of the country's timber, and as a result the

[17] Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland, Final Award, Decision of 2 July 2003.
[18] International Tribunal for the Law of the Sea, The Mox Plant case (Ireland v United Kingdom).
[19] Bjorklund, p.116.
[20] Panel Report, *United States – Preliminary Determinations with Respect to Certain Softwood Lumber Products from Canada*, para. 7.59, WT/DS236/R (Sept. 9, 2002).

prices to harvest that timber are calculated by the administration, and not through the competition of the marketplace, which can lead to higher prices. As a consequence, the US alleged that the lumber industry is heavily subsidized by the government, and for this reason the state adopted countervailing measures. For this claim as well, the panel found the US not to be in conformity with its international trade obligations.[21]

In parallel with the first WTO proceedings, Canada also invoked Article 19 of the NAFTA agreement, while three Canadian producers commenced independently arbitration proceedings under Article 11 of the NAFTA in order to challenge the US countervailing measures.[22] Even though the claims slightly varied, all claimants invoked a violation of national treatment, of the minimum standard of treatment, and a claim for expropriation. The main basis of their claims was the "Byrd Amendment", which provided that all antidumping and countervailing duties would be used to compensate the domestic American producers. Obviously, this measure urged the domestic producers to request for the commencement of antidumping and countervailing duties investigations on the one hand, and on the other, those duties were directly payable to them.[23]

Finally, the US Court of International Trade was called to hear relevant disputes, which concerned the exact same measures, like the "Byrd Amendment". In the end, Canada and the US reached an agreement to settle their disputes, and the private parties conceded to dismiss their NAFTA arbitrations. In any case, though, what should be learned by this endeavour is how fragmented the dispute settlement system is.

B. The *Lauder/CME* controversy

Another illustrative example of such fragmentation and duplication, and in fact under the same legal regime, are the *Lauder* and *CME* cases. These cases demonstrate how essentially the same investor can bring identical claims for the exact same facts and issues, under distinct BITs. The result of those disputes was contradicting decisions, which were heavily criticized on their lack of consideration for the related proceedings. The dispute regarded broadcasting rights that were granted by the Czech Republic to a Dutch company (CME), of which Mr. Lauder was the major

[21] Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R (March 22, 2004).
[22] *Canfor Corporation (Can.) v. United States of America*, UNCITRAL, Notice of Arbitration and Statement of Claim (May 23, 2002); *Terminal Forest Prods. Inc. (Can.) v. United States of America*, UNCITRAL, Notice of Arbitration (March 30, 2004); *Tembec Inc. (Can.) v. United States of America*, UNCITRAL, Notice of Arbitration and Statement of Claim (Dec. 3, 2004).
[23] Bjorklund, p. 140.

shareholder.[24] In particular, CET 21, a Czech company, whose owner was Dr. Vladimir Železný, applied and obtained a license for a TV station. Afterwards this company, along with two others, created another corporation, CNTS, to run the station. CET 21's contribution to the formation of CNTS was the supply of the broadcasting license itself. CME, which was controlled by Mr. Lauder comes into play later on, when it acquired gradually 99% of CEDC's shares, one of the founding companies of CNTS.[25]

The differences arose because Dr. Železný, who ultimately possessed the broadcasting license, started requesting a bigger cut of the revenues, even with the support of the Czech Media Council, which claimed that CET 21 was entitled to all broadcasting revenues from the TV station. The first arbitration was initiated by Mr. Lauder, controller of CME, against the Czech Republic under the aegis of the US-Czech Republic BIT, submitting a violation of the fair and equitable treatment, full protection and security as well as that the state's acts amounted to expropriation of the investment. Six months later, CME commenced arbitration proceedings against the Czech Republic under the Netherlands-Czech Republic BIT seeking damages for the same violations based on the exact same facts.[26]

However, despite the striking similarities between those cases the arbitrators decided to adjudicate them as two distinct ones, with the results being that the two tribunals reached contradictory decisions. On the one hand, the *Lauder* tribunal concluded that no damages were owned to him[27], and on the other, the *CME* Tribunal awarded damages amounting to $270 million.[28]

The result of those arbitrations, was that the Czech Republic was and wasn't responsible to pay damages for its actions supporting Dr. Železný. It becomes apparent that such awards develop great perils for the international economic field, as they cause legal uncertainty and doubts regarding recognition and enforcement. These incidents also demonstrate the lack and insufficiency of tools that can assist international tribunals to resolve such predicaments.

[24] Cremades, Bernardo M., and Ignacio Madalena, 'Parallel Proceedings in International Arbitration', *Arbitration International*, 24 (2008), 507–40, p.514. (hereinafter Cremades, Ignacio)
[25] Bjorklund, p144-145.
[26] Haig Oghigian and Mami Ohara, How To Deal With Zeus — Advocacy Of Parallel Proceedings from an Investor's Perspective, para. 4. (hereinafter How to deal with Zeus)
[27] *Ronald S. Lauder v. The Czech Republic*, UNCITRAL Final Award (3 September 2001) paras. 231-232. (hereinafter *Lauder*)
[28] *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Final Award, (14 March 2003) paras. 586-614, 624.

II. Two worlds collide: investment and commercial arbitration

In principle, investment and commercial arbitration are distinguished due to considerable differences, such as the fact that the latter refers to legal relations between purely private parties, while in the former states are involved.[29] This distinction was demonstrated in the *Methanex* case, where the US, as the Respondent state, claimed that the dispute at hand ought to "*be distinguished from a typical commercial arbitration*", because the parties, the issues of the case and the awards are different in an investment arbitration.[30] Specifically, its reasoning relied on the fact that in investment arbitration a state is the Respondent party, the legal basis is a treaty, not a contract, and that the award can have "*a significant effect extending beyond the two disputing parties*"[31].

However, these arguments are debatable since there is no clear line separating investment and commercial arbitration, especially on these grounds. First of all, the fact that a state is a party to the dispute does not automatically form an investment arbitration, since states and their organs also participate in purely commercial contracts with private entities.[32] Besides the 2012 ICC Rules themselves allow for states to become disputing parties in commercial arbitrations.[33] Investment contracts, for example, between a state or a state-owned company and an investor may take the form of a concession contract. When the state itself or the state-owned company breaches its contractual commitments, the foreign investor has the power to proceed with both contract and treaty claims.[34]

Furthermore, the fact that the legal basis of an investment arbitration is a treaty does not exclude the applicability of a contract either as a relevant fact or even a legal basis as well with the use of an umbrella clause as we will see later on. Finally, the extensive effect that an investment award may have, is not a convincing argument, simply because what counts is the effect on the state, and if the latter is a party to a commercial contract the consequences will be one and the same.

[29] Brower, Charles N., and Shashank P. Kumar, 'Investomercial Arbitration: Whence Cometh It? What Is It? Whither Goeth It?', *ICSID Review - Foreign Investment Law Journal*, 30 (2015), 35–55 , p.36. (hereinafter Brower, Shashank)
[30] *Methanex Corporation v. United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as "amici curiae" (15 January 2001), para. 17.
[31] *Methanex Corporation v. United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as "amici curiae" (15 January 2001), para. 17.
[32]Wilske, Stephan, Martin Raible, and Lars Market, 'International Investment Treaty Arbitration and International Commercial Arbitration - Conceptual Difference or Only a Status Thing', *Contemporary Asia Arbitration Journal*, 1 (2008), 213, p. 224. (hereinafter Wilske)
[33] Li, Fenghua (2015) The divergence and convergence of ICSID and non-ICSID arbitration. PhD thesis, p. 22. (hereinafter Li, Fenghua)
[34] SYMPOSIUM CO-ORGANISED BY ICSID, OECD AND UNCTAD MAKING THE MOST OF INTERNATIONAL INVESTMENT AGREEMENTS: A COMMON AGENDA, Improving the system of investor-state dispute settlement: An overview, p.24. (hereinafter Improving the system of investor-state dispute settlement)

In fact, from an economic point of view, whether the state has acted in its commercial or sovereign capacity, which is a classic criterion for distinguishing between commercial and investment arbitration, seems to be irrelevant, simply because what matters is the performance of the contract.[35] Therefore, as long as an investment contract exists with a state or a state entity, it suffices for the invocation of both investment and commercial arbitration, since the *effect* of the breach can be "*equally destructive for the contractual equilibrium*",[36] whether it stems for the sovereign or the "merchant".

Jurisprudence has tried to make a distinction between the effect the breach of a contract has when the state acts in its private capacity or exercises its public authority, with the former giving rise to commercial claims and the latter to investments ones. However, even when the state acts as a merchant it can avoid its contractual obligations, for example, through legislative changes,[37] because, unlike private actors, the state is its own judge in its own court.[38] Therefore, since the state can control the application of the law one way or the other, it should not be important in what capacity that happens, but only that independent third-party dispute settlement means are needed. As it was affirmed by the *Amco* Tribunal:

"*the fact that the State is entitled to withdraw the approval it granted for reasons which could not be invoked by a private contracting entity, and/or to decide and implement the withdrawal by utilizing procedures which are different from those which can and have to be utilized by a private entity",*

is what separates a contract with a state or a state entity form any private law contract.[39]

Finally, neither the investment nor the commercial award are considered as sources of international law in the sense of Article 38(I)(d) of the Statute of the International Court of Justice. Both of them are perceived as persuasive sources [40], when they are well-reasoned.

Therefore, after a closer examination it becomes apparent that the distinction between investment and commercial arbitration may be more perceived than real. Besides, it should be kept in mind that plenty of arbitrators and experts "play" in both fields, while investment arbitrations are conducted

[35] Schill, S. W., 'Enabling Private Ordering - Function, Scope and Effect of Umbrella Clauses in International Investment Treaties', *Transnational Dispute Management (TDM)*, 7 (2010), p.31. (hereinafter Schill)
[36] *Id*.
[37] Brower, Shashank, p.38.
[38] Schill., p.32.
[39] *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No ARB/81/1, Award (20 November 1984), 24 ILM 1022, 1029 (the Award was subsequently annulled, but for other reasons relating to the valuation of the investment).
[40] Cremades, Ignacio, p523.

under the scope of commercial rules or institutions, such as the ICC, the Stockholm Chamber of Commerce, or UNCITRAL.[41] But if the nature of investment and commerce is so distinct, how can that be? As we will see next, the subject matter of the two kinds of arbitrations are so broad (**A**), that the overlap is practically inevitable, especially when considering the existence of extensive dispute resolution clauses in investment treaties (**B**) or of umbrella clauses in the majority of them (**C**).

A. *Ratione materiae* jurisdiction: do "investments" have a commercial aspect?

Both international investment and commercial law enjoy a very broad subject matter. In the case of investment, the recognition of contracts as investments goes way back to the *Serbian Loans*[42] and *Norwegian Shipowners*[43] cases, with the former setting the ground for the investment mechanisms we know of today, and with the latter recognising the possibility of expropriating contractual rights.[44]

Today two approaches have developed in regard to the definition of an investment, both of them having an extensive scope. According to the first approach, tribunals confine the definition of the investment to the one of the BIT, or any other treaty, considering it encompasses the intentions of the contracting parties. That is why the treaty is conceived as *lex specialis*.[45] Typically both bilateral and multilateral treaties define investment with broad terms. For example, the Energy Charter Treaty states:

"*Investment means <u>every kind of asset</u>, owned or controlled directly or indirectly by an Investor and includes: (a) tangible and intangible, and movable and immovable, property, and any property rights…*"

As it is evident by this wording, "*every kind of asset*" can be considered as an investment, thus, giving to its definition a very broad scope. What is more, the list of possible investments, that is usually included in the relevant clause, is a non-exhaustive one, aiming no to set any limitations to

[41] Nigel, Blackaby, Investment Arbitration and Commercial Arbitration (or the tale of the dolphin and the shark), Loukas A. Mistelis and Julian D.M. Lew (eds), *Pervasive Problems in International Arbitration*, Kluwer Law International 217-234 (2006), p. 230. (hereinafter Blackaby)
[42] *Serbian Loans*, Judgment of 12 July 1929, Series A.
[43] *Norwegian Shipowners Claims* (Norway v USA), 13 October 1922, REPORTS OF INTERNATIONAL ARBITRAL AWARDS, Volume I.
[44] Zivkovic, Velimir, Recognition of Contracts as Investments in International Investment Arbitration (May 15, 2012). European Journal of Legal Studies - Volume 5, Issue 1, Spring/Summer 2012, p1.
[45] *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines,* ICSID Case No. ARB/03/25, Award (16 August 2007) para. 305.

possible investments.[46] Therefore, tribunals which apply this line of reasoning, meaning that they refrain from adding any additional requirements to the definition of the investment, end up accepting as an investment a vast variety of assets. Among this widespread range of investments are also included contractual claims, despite the fact that this enters "the gray area" between investment and commerce.[47]

On the other hand, the second approach assumes a more restrictive approach, which nevertheless at the end of the day remains quite broad as well. According to the tribunals[48] following this concept, an investment encompasses an inherent meaning, hence certain characteristics exist, that, in spite of not being explicitly mentioned in the relevant clause of the treaty, they still apply to the investment, otherwise there is no such thing.

This "trend" was initiated by the *Fedax* Tribunal, which described certain criteria that formed an investment,[49] and later on it was progressed by the *Salini* Tribunal, whose reasoning is still reckoned today.[50] What those tribunals concluded is the following. An investment is consisted of certain basic features-criteria, which apply in every case without exceptions, otherwise no investment exists. The criteria are, that the investor needs to commit substantially to the asset, at least financially, and ought to assume a certain risk, as in there is no certainty about the revenues and the expenses of the investment. Furthermore, the investment is required to have a limited duration, while it must contribute to the development of the host state.[51]

Those are criteria that have been found to be in line with the wording of article 25 ICSID, which is considered to entail a definition of the investment. Based on that argument ICSID tribunals decided on those constitutive elements of the investment. However, even other tribunals, established under different rules and institutions, are resorting to this approach of the inherent characteristics. First and foremost, the *Romak* tribunal, constituted under the UNCITRAL rules, came to the same

[46] *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9 (formerly Giordano Alpi and others v. Argentine Republic), Decision on Jurisdiction and Admissibility (8 February 2013)para. 488; *Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL, Award (5 March 2011) para. 230.
[47] Li, Fenghua, p.36.
[48] *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction 11 July 1997, paras 21—33 (hereinafter *Fedax*); *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para 56 (hereinafter *Salini*); *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award, 6 August 2004, para 63 (hereinafter *Joy Mining*); *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1, Award (30 April 2014), ¶¶78-80; *Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5 (formerly Giovanna a Beccara and Others v. The Argentine Republic*), Decision on Jurisdiction and Admissibility (4 August 2011) para. 270. (hereinafter *Abaclat*)
[49] *Fedax*, para. 43.
[50] *Salini*, para. 56.
[51] Dolzer, Rudolf, and Christoph Schreuer, *Principles of International Investment Law*, Second Edition (Oxford, New York: Oxford University Press, 2012), p.66. (hereinafter Dolzer, Schreuer)

conclusion.[52] Nevertheless, even pursuant to this approach the non-exclusive list of the BIT cannot be doubted, and so if the BIT provides for contracts to embody investments, if those fulfil the above-mentioned criteria, the overlap is possible, as long as that contract can be considered as a commercial one.

As a conclusion, it should be understood that no matter the approach the result is more or less the same; in international investment arbitration a very broad definition of the investment is perceived, which, after taking into consideration the extensive concept of commerciality leads to an uncontested fact, that the overlap between the two is unavoidable.

For the sake of preciseness, there needs to be a definition of commerciality. Contrary to the division of opinions regarding the definition of investments, only one universally accepted approach exists for this concept.[53] Specifically, according to the first article of the UNCITRAL Model Law the term "commercial" should be given "a *wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not*"[54] (emphasis added).

As a result, any contract-based dispute, with a state as a disputing party, on the one hand can qualify as an investment dispute, but most definitively qualifies as a commercial dispute as well, based on this expansive interpretation of "commerciality".[55] The same conclusion was found by the *Waste Management* tribunal, which concluded that the same measure can give rise to "*breaches of contract*", as well as violate the NAFTA Agreement.[56] Hence, the distinguishing factor between investment and commercial arbitration, meaning their subject matter,[57] is not so distinguishable any more. This occurrence naturally leads to overlaps of jurisdictions.

B. The hazard of broad dispute resolution clauses in investment treaties

Zachary Douglas has divided investment treaties into four groups based on the breadth of their dispute resolution clauses. The first group encompasses "all" or "any" disputes relating to investments to be submitted to investment arbitration, which constitutes a quite common BIT

52 *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award (26 November 2009) para. 207. (hereinafter *Romak*)
53 Denice Forstén, *Parallel proceedings and the doctrine of lis penned in international commercial arbitration; A comparative study between the common law and civil law traditions*, Master's Thesis in Procedural Law (Arbitration), p.20. (hereinafter Forstén)
54 UNCITRAL Model Law, Art. 1 (footnote 2).
55 Li, Fenghua, p32.
56 Charles N. Brower, Jeremy K. Sharpe, 'Multiple and Conflicting International Arbitral Awards', *The Journal of World Investment & Trade*, 4 (2003), 211–22, p. 220. (hereinafter Brower, Sharpe)
57 Wilske, p. 224.

clause.[58] This is an illustrative example of a provision allowing purely contractual disputes to be introduced before a treaty-based tribunal. For example, Article 9 of the Italy-United Arab Emirates BIT provides that "*all kinds of disputes or differences [...] between the Contracting State and an investor of the other Contracting State*" can be referred to arbitration. Such generic provisions are in principle interpreted broadly to also cover contractual claims. A leading example constitutes the decision of the *ad hoc* Committee in the *Vivendi* case, which observed that Article 8 of the Argentina-France BIT, which provides that "*any dispute relating to investments made under this Agreement between one Contracting Party and an investor of the other Contracting Party"* may be submitted to arbitration, does not expressly call for "*a breach of the BIT itself*".[59] It added that:

"*the requirements for arbitral jurisdiction in Article 8 do not necessitate that the Claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT.*"[60]

The same conclusion was reached by the *Salini* Tribunal, when interpreting a similar dispute settlement provision, as it accepted that the clause "*compels the State to respect the jurisdiction offer in relation to violations of the Bilateral Treaty and <u>any breach of a contract</u> that binds the State directly*".[61]

As a result, broad dispute resolution clauses, that do not expressly limit the jurisdiction of the tribunal to treaty breaches exclusively, allow for the submission of contractual claims as well before the treaty-based tribunal, thus, confirming the overlap between the two types of arbitration. This is in line with the initial purpose of the ICSID Convention which was to resolve primarily disputes arising out of contracts.[62]

According to Douglas the second group of treaties is the one based on the US Model BIT, which narrows down the possible causes of action that can give rise to the dispute resolution clause. In particular, Article 24 of the Model BIT reads as follows:

"*In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:*

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[58] Zachary Douglas, Hybrid Foundations of Investment Treaty Arbitration, *British Yearbook of International Law,* Oxford Academic' p.238. (hereinafter Douglas)
[59] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic), Decision on Annulment (3 July 2002) para. 55. (hereinafter *Vivendi*, Annulment)
[60] *Id*.
[61] *Salini*, para. 15/
[62] Schill, p.34.

(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Articles 3 through 10,

(B) an investment authorization, or

(C) an investment agreement…"

Hence, the provision expressly limits its breadth without allowing any kind of claims to be invoked.

The third group limits the application of the dispute settlement clause only to breaches of the substantive provisions of the treaty, such as NAFTA and the Energy Charter Treaty.[63] Finally the fourth groups is constituted by treaties, which limit the *ratione materiae* jurisdiction to disputes regarding the *quantum* payable in case of expropriation,[64] as in the case of the China-Iceland BIT which provides in Article 9(3) that investment treaty arbitration is available only for "*the amount of compensation for expropriation*".

As a result, any treaty-based tribunals constituted pursuant to any of the first two models of dispute settlement clauses can exercise jurisdiction over contractual claim as well, and create a "symmetrical" conflict, as Professor Douglas names it, between the forum selection clause of the contract and the one of the treaty. So, the question arises what should the tribunal do in such occasions. According to the Professor, the right course of action for the tribunal would be to stay its proceedings, but we will proceed to this issue later in this thesis.

C. Defining the umbrella clause and establishing the overlap of investment and commercial arbitration

The overlap becomes even more imminent in the case of umbrella clauses, where an investor is in the position to bring a contract-based claim to treaty-based arbitration. In other words, a contractual dispute can be resolved "at a political level", with the state being the respondent party, and thus the investor applies more pressure for the settlement of the case.[65] Therefore, contract claims, which should be brought before commercial tribunals, are "repackaged" as treaty claims.

[63] Douglas, p.238.
[64] *Id*.
[65] Mapping the Future of Investment Treaty Arbitration as a System of Law, Proceedings of the 103rd Annual Meeting, the American Society of International Law, March 25-28,2009 Washington, DC, p327. (hereinafter Mapping the Future of Investment Treaty Arbitration as a System of Law)

The initial appearance of the umbrella clause can be traced to the 1956-1959 Abs Draft International Convention for the Mutual Protection of Private Rights in Foreign Countries,[66] and it reemerged in the first BIT between Germany and Pakistan in the following well-known form:

"*Either Party shall observe any other obligation it may have entered into with regard to investments by nationals or companies of any other party*."[67]

The clause was afterwards included in many other investment protection agreements.[68]

There have been different interpretations of the clause, especially about what types of conduct trigger its application. F. Mann has advocated the view that the provision "*protects the investor against any interference with its contractual rights*", independently of whether the offensive act was "*a mere breach of contract or a legislative or administrative act*" [69] In the same vein, Dolzer and Stevens supported that the purpose of the umbrella clause is to defend the contractual rights of the investors, no matter what was the kind of interference with them.[70]

Also, Gaillard notes that "*the violation of the contract is also a violation of the treaty*", and that is the reason why these provisions are "*clauses with a <u>mirror effect</u>*".[71] In other words, what is considered in private law as a violation of a contract, through the application of the umbrella clause the breach is being reflected at the level of public international law.

Other scholars have endorsed a more limited approach, like T. Wälde who considers the clause to take effect only when the contractual breach occurs by the government or through the exercise of governmental powers.[72] However, this does not seem to be a persuasive enough argument for many reasons. First of all, in the international law sphere there is no distinction between the sovereign and the commercial capacity of the state in relation to rules of attribution of conduct for the invocation of the state's international responsibility. It should be mentioned at this point that the ILC's Articles on State Responsibility apply in the investment arbitration context, because as the last Rapporteur, James Crawford asserted, for the invocation of responsibility for a breach of an international obligation, it makes no difference "*whether the obligations are owed to the other state party to the*

[66] Improving the system of investor-state dispute settlement, p. 31.
[67] Germany-Pakistan BIT, Art. 7.
[68] US Model BIT, MAI, ECT
[69] Improving the system of investor-state dispute settlement p.34
[70] *Id*.
[71] Improving the system of investor-state dispute settlement: an overview, p. 34.
[72] Improving the system of investor-state dispute settlement: an overview, p. 35.

treaty or directly to the investor".[73] Therefore, the responsibility invoked by the investor is the one governed by the ILC's Articles on Internationally Wrongful Acts.

Under Article 4 of the ILC's Articles on State Responsibility no differentiation of governmental and commercial acts exists, and in fact in J. Crawford's Commentary it is stated that "*[I]t is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as 'commercial' or as 'acta iure gestionis'*"[74], and as a result, "*the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4*"[75] regardless of the character of the conduct.

James Crawford further pointed out that requiring for the invocation of the umbrella clause the distinction between governmental and commercial acts creates the problem of indeterminacy and uncertainty[76], exactly because "*there is no textual warrant and which is capable of producing arbitrary results*".[77] In other words, since no rule of making this characterization exists in the international sphere, the appreciation of the character or the motive of the state as governmental or commercial cannot be legitimate.

The above was affirmed by the *Eureko* Tribunal, which concluded that "*the conduct of any State organ is considered an act of that State*"[78], and as long as the attribution provisions of the Articles on State Responsibility are fulfilled, the international responsibility of the state emerges.[79]

This perspective seems to be in line with the previously mentioned economic approach, based upon which the effect of a breach of contract by the state will remain the same regardless of the capacity of the state at the time of violation. In fact, including an umbrella clause in the treaty would be rendered superfluous, since the sovereign conduct of the state is governed by other standards of treaty protection, such as expropriation and fair and equitable treatment[80], and, *thus*, violating the principle of *effect utile* in relation to the umbrella clause.

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[73] Crawford, James, 'Treaty and Contract in Investment Arbitration', *Arbitration International*, 24 (2008), 351–74, p.355.
[74] James Crawford, The International Law Commission's Articles on State Responsibility, Art. 4 para. 6, page 41 (2001). (hereinafter Crawford)
[75] *Id*.; See also the decisions of the European Court of Human Rights in Swedish Engine Drivers' Union v. Sweden, Eur. Court H.R., Series A, No. 20 (1976), at p. 14; and Schmidt and Dahlström v. Sweden, ibid., Series A, No. 21 (1976), at p. 15
[76] Crawford, p.368.
[77] *Id.*
[78] *Eureko B.V. v. Republic of Poland*, Partial Award (19 August 2005) para. 127. (hereinafter *Eureko*)
[79] *Id*., §§129-134.
[80] Schill, p.29.

Regarding the interpretation of the clause, the initial ICSID Tribunal that addressed the issue was in the *Fedax* case. The tribunal did not proceed with an in-depth examination of the provision, but confined itself to a "plain meaning" interpretation of the clause, stating that the phrase "any obligation" covered also promissory notes due to its wide scope and found Venezuela (the respondent state) liable for not honoring its international obligations.[81]

A few years later the tribunal in *SGS v Pakistan* occupied itself with the interpretation of the umbrella clause. This time the tribunal attended to the issue with more detail, however, it was heavily criticized for its far-reaching conclusion. Specifically, it deduced that a violation of contractual obligations are not *"automatically "elevated" to the level of breaches of international treaty law*."[82] So in that aspect the conclusion resembles the approach endorsed by T. Wälde, that not all contract-based claims can be considered as not complying with the BIT.

However, the tribunal went a step further and stated that the umbrella clause "*was not meant to project a substantive obligation*"[83], because no such intention is clearly expressed by the parties, and that an expansive reading of the clause would turn other provisions of the BIT like the fair and equitable treatment standard and expropriation "superfluous"[84], hence a restrictive interpretation should be favoured, pursuant to which the umbrella clause "*might"* be triggered in "*exceptional circumstances*".[85]

As mentioned above, this tribunal's reasoning was densely disapproved on account of its ineffective approach to the provision. Nevertheless, another tribunal had to deal with the same clause at the same time. The *SGS v. Philippines* tribunal examined the umbrella clause and came to a wholly divergent conclusion. In fact, it decided that an infringement of binding commitments regarding investments "*makes it a breach of the BIT*"[86], and thus giving the clause a much wider scope.

In the same token, the tribunal in *L.E.S.I. v. Algeria* held that the effect of the umbrella clause "*is to transform the violations of the state's contractual commitments into violations of the treaty*", which in its turn grants jurisdiction to the investment tribunal.[87]

[81] *Fedax,* para. 29.
[82] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13*, Decision of the Tribunal on Objections to Jurisdiction (6 August 2003) para. 166. (hereinafter *SGS v Pakistan*)
[83] *SGS v Pakistan*, para. 170.
[84] *SGS v Pakistan*, para. 168.
[85] *Id*., para. 172.
[86] *SGS . Philippines*, para. 128.
[87] *Consorzio Groupement L.E.S.I.-DIPENTA c. République algérienne démocratique et populaire*, ICSID case no ARB/03/08, Award, 10 January 2005, para 25(ii).

Hence, from the analysis so far, two theories emerge about the scope and effect of the umbrella clause, both to the extreme. At the one end, a very narrow interpretation of the clause which denies any kind of effect, and the "*appropriate interpretative approach is […] in dubio mitius*",[88] while such clauses do not '*have the effect of transforming all contract disputes into investment disputes under the Treaty"*[89] Obviously, the first argument that comes to mind against this approach is the principle of effect utile, namely that there needs to be meaning to the text of every provision of the treaty.

At the other end, a line of jurisprudence and scholars support the idea that an umbrella clause automatically elevates a contractual breach to a breach of a contract.[90] According to this approach, the contract is directly "internationalized", so that any breach of the contract would automatically and instantly constitute a treaty breach as well. However, international law is not equipped with a complete legal framework for contracts between a state and an investor,[91] as state contracts are in principle governed by a national law or, seldom, by *lex mercatoria*, or other international principles.

It is obvious, therefore, that these views are at the two extremes and they seem to be too far-reaching. In between the two, two more, less excessive, approaches can be found. One of them, as expressed in the *CMS* case, adopts the position that:

"*purely commercial aspects of a contract might not be protected by the [umbrella clause] in some situations, but the protection is likely to be available when there is <u>significant interference by governments or public agencies with the rights of the investor</u>*"[92]

However, as it was pointed out before, no explicit rule exists in international law to make this characterization, while this approach focuses on the motive or the character of the breach and not on its effect.[93] As the tribunal in SGS v Paraguay held:

"*it is thus difficult to articulate a basis on which the State's actions, solely because they occur in the context of a contract or a commercial transaction are somehow no longer acts of the State, for which the State may be held internationally responsible.*"[94]

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[88] *SGS v Pakistan*, para. 171.
[89] *Joy Mining*, para. 81.
[90] Brower, Shashank, p.47.
[91] *Id*.
[92] *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8, Award (12 May 2005), para. 299. (hereinafter *CMS*)
[93] Brower, Shashank, p.48.
[94] *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, Decision on Jurisdiction (10 February 2010) para. 135. (hereinafter SGS v Paraguay)

The final, is the "integrationist" approach, which interprets broadly the clause, without, though, allowing every contractual breach to immediately constitute a breach of the treaty as well. There is no "instant transubstantiation" that transforms the basic contractual claim, but "the content of the obligation is unaffected, as is its proper law".[95]

What can be deducted by the above-mentioned analysis is that contracts play an important role in investment arbitration, either with the contract being the investment itself (*ratione materiae*), or with its violation giving rise to the state's international responsibility through an umbrella clause or even a broad dispute resolution clause. Hence it is clear by now that the way a state, a state organ or a state-owned company conducts itself regarding a contractual relationship with a private entity deeply impacts the international obligations the state has assumed in relation to investments,[96] demonstrating the relevance of the contract and the subsequent commercial arbitration to the assessment of treaty breach. This has expressly been submitted by the *Eureko* tribunal, which held that the decision of a commercial tribunal (with a contract-based jurisdiction) can "*be relevant…in assessing whether there has been a breach of the treaty*".[97]

Therefore, the legal basis of a claim is a distinguishing factor only at first sight, since an umbrella clause or even a broad dispute resolution clause, which allows for every kind of dispute to be brought in front of the tribunal,[98] blur the line separating treaty and contract claims, and as a consequence, investment and commercial arbitration.

Ergo, international responsibility for the breach of a treaty is at first glance conceptually distinct from the responsibility for breach of contract, however the latter may "entail or imply" the former.[99]

And that was exactly the legal background in the *Vivendi* case, which is considered the leading example in the treaty-contract distinction. According to the factual background of the dispute the investor entered into a contract with Tucuman, a province in Argentina, for the operation of the water and sewage systems there, with the contract conferring exclusive jurisdiction to the administrative tribunals of Tucuman for the interpretation and application of the contract.

After the dispute arose, in spite of the exclusive jurisdictional clause of the contract, the investor initiated ICSID arbitration for its resolution based upon the France-Argentina BIT. The tribunal, on

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[95] *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8, Decision on Annulment (25 September 2007) para 95. (hereianfter *CMS*, Annulment)
[96] *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award (28 September 2007) p.100-101. (hereinafter Sempra)
[97] *Eureko*, para.101.
[98] Wilske, p. 224.
[99] Crawford, p 358.

the one hand, recognized its jurisdiction to hear the claims, on the other, all the claims were concerning the performance of the contract. As the tribunal found that it was impossible to separate the treaty from the contract claims, it decided to stay the proceedings and request the claimant to tend to the administrative tribunals of Tucuman.[100] Therefore, it identified how "*crucially connected*" the claims were,[101] that the contractual breach had to in the first place be adjudicated by the exclusive jurisdiction of the national tribunals. That on its own suggests that there can be overlap of the jurisdictions of the national courts (in the *Vivendi* case) and the international ones, when the proceedings are connected to one another *factually*.[102]

But if the case with national courts and tribunals is to stay the proceedings until the competent body renders an award what distinguishes them from international commercial tribunals? In other words, why investment tribunals, when the exclusive jurisdiction for the contract is conferred to international commercial arbitration, are choosing to accept jurisdiction to hear the dispute, or disregard the relevant commercial award when there is clear overlap between the two international tribunals? The aim of this thesis is to prove exactly that a similar approach should be followed in relation to the overlap among investment and commercial arbitration, since the rationale and the purpose are the same, to safeguard legal certainty and coherence of the international courts and tribunals and for the latter to render recognizable and enforceable awards.

The *SGS v Philippines* tribunal underlined, rightfully so, that the invocation of a state's international responsibility depends on the prior conclusion of a contractual breach under the applicable national law of the contract.[103] Exactly the same counts for international commercial tribunals, which deduct the violation of the contract or not, and based on those findings the investment tribunals should reason on the violation of the treaty or not, regardless of whether an umbrella clause has been invoked.

In any case, the *Vivendi* award was partially annulled. The *ad hoc* Committee tried to distinguish between treaty and contract claims through the legal basis of each one. In particular it claimed that treaty claims are formed in reference to international law, while the contract claims to the relevant substantive law.[104] Nonetheless, the committee recognized how "*highly interrelated*" the claims are,

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[100] *Vivendi*, Award, para. 299.

[101] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic), Award (21 November 2000) para. 443. (hereinafter *Vivendi*, Award)

[102] Yuval Shany, Jurisdictional competition between national and international courts: could international jurisdiction-regulating rules apply?. *Netherlands Yearbook of International Law*, 37, (2006) p7. (hereinafter Shany (2006))

[103] *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. 126-128. (hereinafter *SGS v Philippines*)

[104] *Vivendi*, Annulment, paras. 95-96.

and, thus, the possible overlaps[105], and for that reason it proposed an "*essential basis*" test for the allocation of jurisdiction, according to which if the essential basis of the claim is contractual, then competent are the national courts and tribunals upon which jurisdiction is bestowed through the contract, otherwise, if the essential basis is the treaty, then the jurisdiction of the investment tribunal is guaranteed.[106]

[105] Shany (2006), p.8.
[106] *Vivendi*, Annulment, paras. 1155-1156.

PART TWO: INVESTMENT AND COMMERCIAL ARBITRATION OVERLAPPING & IN SEARCH OF SOLUTIONS

Keeping in mind the analysis in the previous part of the present thesis, the possibility of competing jurisdictions is left open when the legal bases of the claims are closely connected. As analyzed for instance, the umbrella clause is a ground for a substantive treaty claim, however, the "*obligation is still governed by the contract, and it can only be determined by reference to the terms of the contract*".[107] By refusing to interpret the contract, the tribunal cannot decide whether the conduct in question amounts to an infringement of the international treaty or not. So, when the essential basis of the claims is not so distinct, how can legal certainty be guaranteed? The answer is simple; already existing tools of international law, slightly differently applied, like *lis pendens* and *res judicata*, can do the trick.

It should be noted, that the jurisdictional overlap may be *partial*,[108] as with the case of umbrella clauses. Indeed, due to the proliferation of international courts and tribunals more and more bodies are competent to adjudicate upon different aspects of one dispute. And that is exactly what more sophisticated players take advantage of, in order to get compensated at the highest degree. As classic recent example qualifies the "Plain Packaging Act" cases, with Australia's attempt to curb smoking, resulting to the initiation of a series of international litigations. First Phillip Morris challenged the legislative act by commencing arbitration under the Australia-Hong Kong BIT,[109] and later cases were brought at the WTO.[110]

The most imminent peril of such partial jurisdiction, is that no tribunal will easily deny its jurisdiction, hence leading to the possibility of double recovery.[111] As professor Bjorklund has eloquently put it "*similar provisions in different treaties*" can potentially lead to "*duplicative claims*

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[107] *SGS v. Philippines*, para.127.
[108] Giorgetti, Chiara, p.12.
[109] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay)
[110] Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Ukraine v Australia), WTO DS 434 (13 March 2012); Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Honduras v Australia), WTO DS435 (4 April 2012); Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Dominican Republic v Australia) WTO DS441 (18 July 2012); Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Cuba v Australia) WTO DS458 (3 May 2013); Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Indonesia v Australia) DS467 (20 September 2013).
[111] *Lauder*, para. 172.

for recovery", however "*the inefficiency and potential unfairness of this result suggest that a different conception of the injuries involved would be desirable*".[112]

The characteristic case proving this position is *Exon Mobil v. Venezuela*[113], where the investor initiated different proceedings, under the contract and the treaty respectively, against both the state and the state-owned company. This case will be discussed in more detail in the following chapters, but it is remarkable to mention that the second-in-line investment tribunal did not take notice of the former commercial tribunal's findings, especially about the valuation of compensation, with the end result being that Venezuela was obliged to compensate the same investor for the exact same conduct but under different regimes twice. So, it is no wonder that the state decided to revoke its consent to the ICSID Convention. The international tribunals need to take notice of each other's awards, especially since no *stare decisis* doctrine is accepted in international litigation, otherwise the peril of conflictive or duplicative awards is not only imminent, but it is already unfolding considering the Lauder/CME "mess".

There are many reasons explaining the conflicting or duplicative decisions, with the non-existence of a precedent rule being one of them. But another very important justification is the strict way in which international bodies apply the principles of *lis pendens* and *res judicata*. If, for instance, the *CME* tribunal had not completely disregarded the *Lauder* case, on the grounds that the BIT was different, it would have led to a more consistent outcome. A more liberal interpretation of these doctrines can handle such potentially contradictory decisions.[114] Tribunals should focus to limit contradictions in jurisprudence not only in regard to identical disputes, but also "*with respect to those issues different in two or more cases*".[115]

These possible conflicts or duplicative results can be avoided in a number of ways, as it will be shown in the next chapter. This particular thesis is in favour of a less strict interpretation of *lis pendens* and *res judicata*, or borrowing principles from national jurisdictions, like "comity", that have proven efficient in dealing with similar problems at a national or a transnational level. It should be noted that other suggestions have been advocated, like the creation of an appeal system in

[112] Bjorklund, p. 131.
[113] *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*, Decision on Jurisdiction (10 June 2010). (hereinafter *Mobil*)
[114] Spoorenberg, Viñuales, p. 99.
[115] *Canfor Corporation v. United States of America, Tembec. et al. v. United States of America*, Terminal Forest Products Ltd. v. United States of America, Order of the Consolidation Tribunal, of 7 September 2005, para. 133.

international law, specifically by Sir Lauterpacht.[116] However such a scenario does not seem plausible yet, considering that no hierarchy exists among international adjudicative bodies[117].

I. Establishment of parallel proceedings

For the application of the *lis pendens* principle, parallel proceedings before different *fora* need to be established. Parallel proceedings occur when two parties bring the same dispute, or closely related disputes, before different *fora*.[118] Pursuant to the International Law Association (ILA) in its Final Report on *Lis Pendens* and Arbitration, parallel proceedings are formed in cases of "*proceedings pending before a domestic court or another 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.*"[119]

The issue of parallel proceedings has also been reckoned with by the Brussels I Regulation. It should be noted that the particular European regulation does not apply to arbitration, however it is of importance to have an overview of how parallel proceedings are perceived on an international context. The preamble of the Regulation expressly states that "*in the interests of harmonious administration of justice*" every measure should be taken in order to "*minimize the possibility of concurrent proceedings*" and to ensure that no "*irreconcilable judgements*" will be delivered.[120]

This statement takes form in Article 34 which states that a court of a Member State may stay its proceedings when an action is submitted for judgment "*which is related to the action in the court of the third State*".[121]

From the above-mentioned provisions, the tendency for a broader concept of parallel proceedings becomes apparent. This idea is completely understandable after taking into consideration the damage caused by conflicting interpretation of the same law or by contradicting judgments. That was exactly the end result in *Tema v Hubei*,[122] which involved a contract between an Italian seller (Tema) and a Chinese buyer of goods. The contract contained an arbitration clause, which provided

[116] Conflicting Decisions in Investment Arbitration: How Do Inconsistent Decisions Arise and How Can They Be Avoided, p. 10.
[117] Hober, p259.
[118] Cremades, Ignacio, p. 508.
[119] ILA, Lis Pendens, para. 5.12(1).
[120] REGULATION (EU) No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Preamble (para. 21). (hereinafter Brussels I Regulation)
[121] Brussels I Regulation, Article 34.
[122] Tema-Frugoli SpA v Hubei Space Quarry Industry Co. Ltd., Milan Court of Appeal (2 July 1999).

that claims initiated by Tema were to be settled at the Stockholm Arbitration Institute, whereas claims brought by Hubei would be adjudicated by the China International Trade Arbitration Commission (CIETAC).[123]

After the dispute arose Tema filed for arbitration to the Stockholm Institute, which rendered an award declaring that the Italian seller had not breached the contract. After Tema initiated the proceedings in Stockholm, Hubei commenced arbitration in CIETAC, as the arbitration clause of the contract provided. Tema did not participate in this arbitration, and the tribunal delivered an award in favour of Hubei. Therefore, two awards existed at the time, the first holding Tema on par with its contractual obligations, and the other that it violated them.

Afterwards, Tema sought to enforce the Swedish award in Rome, and succeeded. However, Hubei also requested for enforcement of the Chinese award in Milan. Tema opposed to the enforcement submitting, essentially a *lis pendens* objection, that after the commencement of the initial arbitration a second one cannot be launched,[124] and a common sense-based argument that the Chinese award was contradictory to the Swedish one, which had already been enforced, and therefore, not both of them could be enforced.[125] The Milan Court of Appeal disagreed with this position and held that the initiation of the second proceedings in front of a different tribunal was allowed by the contract, and for this reason it could not deny the recognition and enforcement of such an award.[126]

This decision is, to say the least, unsatisfactory. The Milan Court should have *proprio motu* reckoned with the contradiction of the two awards and considered whether a *res judicata* issue was at play. As McLachlan put it: "*the resulting enforcement of both awards in Italy is a nonsense, since the courts could not at one and the same time give effect to an award declaring Tema to have met its contractual obligations, and an award declaring that it had not*."[127]

It can be no persuasive argument that the CIETAC tribunal also enjoyed jurisdiction, that is a given. However, as the ILA Committee on International Commercial Arbitration stated, regarding situations of *lis pendens*: "*Lis pendens* is recognized in most legal systems, and has also been

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[123] Emil Brengesjö, Lis Alibi Pendens in International Arbitration Reflections on the Swedish Position in the Context of International Trends and Approaches, Thesis in Procedural Law, Stockholm University, Faculty of Law, p31. (hereinafter Emil Brengesjö)
[124] McLachlan, Campbell, Lis Pendens in International Litigation, Martinus Nijhoff, Leiden, 2009, p.360. (hereinafter McLachlan)
[125] Emil Brengesjö, p31.
[126] Tema-Frugoli SpA v. Hubei Space Quarry Industry Co. Ltd., Corte di Appello [Court of Appeal] - Milan, 2 July 1999, pp. 808-809
[127] McLachlan, p. 362.

recognized as prima facie applicable in international arbitration. The Committee submits that the second tribunal should stay its proceedings."[128] (emphasis added)

In this vein, in *Arthur Andersen v. Andersen Consulting*[129], two distinct arbitration agreements were invoked by the Andersen firms, the reason being that the later agreement was not signed by all firms.[130] The first proceedings were commenced at the ICC by the majority of the Andersen Consulting firms against the Arthur Andersen firms based on the later agreement. Later, one of the latter firms proceeded to arbitration in Geneva based on the earlier arbitration agreement, signed by all parties.[131] These cases demonstrate rather clearly the problems generated by disputes caused by the same conduct but based on different legal grounds. This particular dispute was finally resolved with the Swiss Federal Court recognizing the jurisdiction of the first arbitral tribunal. The court did not expressly uphold the *lis pendens* doctrine, but acknowledged the priority of the first-formed tribunal.[132]

Obviously similar problems exist in the sphere of investment and commercial arbitration. As already analyzed, foreign investment includes contract between investor and states or state-owned companies, which may take the form of a concession agreement or a public work contract.[133] Therefore the investors acquire both contractual and treaty rights protecting their investments, and often opt to activate both of them at the same time[134], as shown by the recent example of the *Mobil* case.[135] Differentiating between the two kinds of claims can be problematic, since there exists obvious overlap between them[136], and for this reason there is an unquestionable risk of duplicate proceedings, and, in consequence, of double relief.

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[128] ILA, Lis Pendens, para 4.48, Committee's Recommendation 5 at [5.13]

[129] *Arthur Andersen Business Unit Member Firms v. Andersen Consulting Business Unit Member Firms*, Swiss Federal Tribunal, 8 December 1999, [2000] ASA Bulletin 546.

[130] McLachlan, p. 359.

[131] ILA, Lis Pendens, p. 22.

[132] In other words, the court applied the first-in-time rule, which has its roots in the civil law jurisdictions, and endorses the concept that when two adjudicatory bodies are competent to hear a dispute, then the body, to which the parties filed the first request, is the one to decide the case. In France,26 the rule is called "*l'exception de litispendance* ", and it may be raised in any proceedings started after another. See FINAL REPORT ON LIS PENDENS AND ARBITRATION, ILA (2006), p. 8-10.

[133] Cremades, Ignacio, p. 508.

[134] Overlap of dispute resolution clauses: contract and treaty claims, p527.

[135] *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*, Decision on Jurisdiction (10 June 2010)

[136] *Vivendi* Award, para. 443; Shany (2006), p. 8.

However, in investment arbitration those perils are not taken into serious consideration for the sake of upholding jurisdiction. For example, the *Siemens* tribunal stated that what has been agreed by the parties regarding remedies does not "*exclude the remedies under the [ICSID] Convention*."[137]

Clearly remarkable problems exist in matters of the overlapping jurisdictions of investment and commercial tribunals. Initially the *lis pendens* and *res judicata* defences have been dismissed on a basis of very strict application of the "triple identity" test. However, investments and contractual relationships are taking place in a globalised economy, where states, firms and other private entities interact in a "complex network" of contracts and treaties, hence making the restrictive interpretation of *lis pendens* and *res judicata* a procedural formality, which allows the investors to take advantage of the international legal system.[138] There should exist mechanisms to avoid conflicting judgments, costly parallel litigation, and "oppressive litigation tactics".[139]

Apart from the principles of *lis pendens* and *res judicata*, other technics have been suggested to deal with parallel proceedings, but all seem to fall short. For example, consolidation of proceedings has been recommended as a solution. However, it requires the consent of all the parties,[140] and as it was seen in the Lauder/CME controversy, where the Czech Republic declined any possibility of bringing the two proceedings together,[141] the odds of successful consolidation are slim. The question then arises; how do we handle parallel proceedings? A persuasive solution has been proposed by Professor A. Reinisch, who claimed that a broader approach to the "triple identity" test just might safeguard the integrity and consistency of the international adjudicatory system.[142]

II. Revisiting the principle of *lis pendens*

James Fawcett in his 1994 Report to the International Academy of Comparative Law on Declining Jurisdiction in Private International Law defines *lis pendens* as a:

"*situation in which two parallel proceedings involving the same parties, and the same cause of action, are continuing in two different states at the same time*."[143]

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[137] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 August 2004) para. 181. (hereinafter *Siemens*)
[138] Overlap of dispute resolution clauses: contract and treaty claims, p538.
[139] ILA, Lis Pendens, p. 2.
[140] How To Deal With Zeus.
[141] *CME,* para. 302.
[142] Reinisch.
[143] ILA, Lis Pendens, p. 2.

In other words, *lis pendens* is a procedural mechanism with the purpose of averting possible conflicting decisions in cases of an arisen dispute between the same parties, regarding the same subject matter (*petitum*), and the same legal basis (*causa petendi*). In such situations, the judge or the arbitrator may decline jurisdiction or stay the proceedings, seek to restrain the further proceedings, or even allow for the proceedings to continue and apply the *res judicata* principle.[144] In short, when the conditions are met, the doctrine bars the second proceedings from commencing.

It is disputed whether *lis pendens* constitutes a principle of international law, however as Professor Reinisch characteristically put it "it [*lis pendens*] serves the same policy rationale as the *res judicata* rule",[145] and since the latter is considered to be a standard principle of international law,[146] so should the former. In particular, these rules serve judicial economy and security by preventing expensive litigation and the possibility of conflicting decisions, as well as protecting the defendants from oppressive litigation tactics.[147] The main purpose is to avoid "*irreconcilable judgments*" and that is exactly what *lis pendens* aims at.[148]

In retrospect, the *lis pendens* rule is not a feature exclusively of international law, but in fact appears in almost every national jurisdiction, both civil and common law in different variations. In common law jurisdictions the rule of *forum non conveniens* applies, which grants the court or tribunal the discretion to stay the proceedings, or even decline its jurisdiction when another forum is deemed more competent to hear the dispute.[149] On the other hand, civil law courts follow the more restrictive approach of the first-in-time rule, according to which the court or tribunal which first was presented with the dispute is also the competent one to adjudicate it.[150]

From the international law perspective, practice of *lis pendens* is scarce. Nevertheless, in the *Benvenuti* case the principle was recognized, though not applied due to lack of the parties' identity.[151] In the *Certain German Interests in Polish Upper Silesia* case the Court was called to decide whether the doctrine of *litispendance* was applicable in international relations.[152] Although the Court decided that the rule did not apply between different state courts, it still recognized it as a

[144] Cremades, Ignacio, p. 509.
[145] Reinisch, p.43.
[146] Shany (2006).
[147] Francisco Orrego-Vicuña, Chapter 7. Lis Pendens Arbitralis in Bernardo M. Cremades Román and Julian D. M. Lew (eds), Parallel State and Arbitral Procedures in International Arbitration, *Dossiers of the ICC Institute of World Business Law, Volume 3* (© Kluwer Law International; International Chamber of Commerce (ICC) 2005) pp. 207 - 218, p. 213.
[148] *Gubisch Maschinenfabrik KG v Palumbo*, Case 144/86, para. 8.
[149] ILA, Lis Pendens, p.2
[150] *Id*.
[151] Shany (2006). p. 39.
[152] Certain German Interests in Polish Upper Silesia, P.C.I.J. Ser. A No. 6, 1926, at 20.

principle of international law, by expressly referring to the "principles generally accepted in regard to litispendance".[153]

As it was demonstrated by James Fawcett's definition, *lis pendens* consists of three criteria, which constitute the so-called "triple identity test". In other words, for the principle to apply, this triple identity test needs to be fulfilled.[154]

Specifically the proceedings must be conducted between the same parties, on the same legal grounds and seeking the same relief.[155] However, there are cases where the tribunal decided to continue with the parallel proceedings in spite of the other pending dispute, as it happened with the *Buenaventura* and *Fomento* cases.[156] The facts of the former case were the following; Buenaventura, a Peruvian mining company entered into an agreement with BRGM, a French state company, for the acquisition of a share of BRGM's subsidiary in Peru, with the agreement including an arbitration clause for arbitration in Switzerland. So, when the dispute arose, Buenaventura sought damages in front of the Peruvian courts, to which of course BRGM objected that they lacked jurisdiction. [157]

Subsequently, BRGM filed for arbitration against Buenaventura in Zurich pursuant to the agreement and in accordance with the ICC Rules. The respondent party in Zurich requested the tribunal to stay its proceedings, because the dispute was already pending in Peru. Nevertheless, the Swiss tribunal upheld its jurisdiction.[158] As expected, Buenaventura tried to set aside the award in Switzerland, though without success, since the Federal Court held that the Peruvian award would not be enforceable in Switzerland, hence no case of *lis pendens* occurred.[159]

In the same vein, in the *Fomento* case, a Spanish company, Fomento, and a Panamanian one, Colon Container Terminal (CCT), entered into a construction contract, which provided for arbitration under the ICC Rules in Switzerland. Once again, when the dispute arose, Fomento, instead of proceeding with Swiss arbitration, filed a lawsuit in the Panamanian Courts, seeking a declaration that the contract was null and void, and CCT, on the one hand, challenged the jurisdiction of the courts based on the arbitration clause of the contract, and on the other, initiated arbitration in

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[153] *Id*.
[154] How to deal with Zeus.
[155] Shany, Yuval, *The Competing Jurisdictions of International Courts and Tribunals*, International Courts and Tribunals Series (Oxford, New York: Oxford University Press, 2003) (hereinafter Shany, Book)
[156] Cremades, Ignacio, p. 510.
[157] Kaufmann-Kohler, Gabrielle, and Antonio Rigozzi, International Arbitration: Law and Practice in Switzerland (Oxford University Press, 2015), p. 255. (hereinafter Kaufmann-Kohler, Rigozzi)
[158] Cremades, Ignacio, p. 512.
[159] Supreme Court Decision of 19 December 1997, ATF 124 III 83. (Compania Minera Condensa SA v. de Minas Buenaventura SA, BRGM-Peru SAS v. ICC Arbitral Tribunal).

Geneva.[160] The arbitral tribunal also upheld its jurisdiction and, subsequently, FCC requested the annulment of the award by the Federal Court.

Surprisingly, the Swiss court considered that the rule of *lis pendens* applies in decisions between courts and tribunals, *ergo*, the tribunal should have stayed its proceedings until the court in Panama rendered an award, because the latter could be enforceable in Switzerland. Accordingly, the award was set aside.[161] However, the federal court decision was heavily criticized, and resulted in the amendment of the Private International Law Act, recognizing the arbitrator's competence to decide on their jurisdiction, regardless of whether the dispute is pending in front of another foreign court or tribunal.[162]

In matters to the application of the doctrine a rather strict interpretation has been adopted. A characteristic example of that is the above-mentioned *Lauder* and *CME* cases. The Czech Republic had already rejected the suggestion of consolidating the two proceedings, therefore the tribunals had to decide on their jurisdiction *proprio motu*. Ironically enough, in the second case, the *CME* tribunal did not even bother to reflect on whether a situation of *lis pendens* existed, completely disregarding the issue.[163] Instead, it explained that taking advantage of another arbitration clause does not amount to exploitation of the investor's rights, and thus conveniently sidestepping the issue of *lis pendens*.[164]

As expected, the award was challenged at the Svea Court of Appeal in Stockholm. The Swedish court disregarded the application of the doctrine on the formalistic basis that technically the parties were not identical and therefore the awards rendered did not refer to the exact same dispute. Although the court recognized that the one investor was the majority shareholder, and the "controlling" one at that, of the company that pursued the second proceedings, it still did not hold them to be identical.[165]

Notwithstanding that from a formalistic point of view this conclusion is correct, the outcome is strikingly unsatisfactory. Czech Republic on the one hand was required to pay damages, and on the other it was not, for the exact same dispute. As professor Reinisch suggests, the only way out of the

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[160] Handbook of ICC Arbitration: Commentary, Precedents, Materials, Thomas H. Webster, Dr Michael Buhler, (Sweet & Maxwell), p.328.
[161] Swiss Federal Tribunal, May 14, 2001, Fomento de Construcciones y Contratas SA v. Colon Container, ATF 127 111(2001).
[162] Federal Act on Private International Law (PILA), Art. 186 (1 bis).
[163] *CME*, para. 410.
[164] *CME*, para. 412.
[165] Challenge of Arbitral Award, judgement of SVEA Court of Appeal (15 May 2003) p.98.

"*cul-de-sac*" is to endorse a more relaxed application of the triple identity test, that focuses less on the formalistic aspect of the test, and more to the substance of it.[166] In short, the tribunal should not only pay attention to the different names of the investors of the treaties upon which the disputes are grounded, but the interconnection among them and how different they really are. Even though no full identity exists among the parties, the *petitum* and the *causa petendi*, the underlying relationship might still be the same, having a certain impact on each award, such as double recovery.[167] It should be kept in mind that we live in a globalized economy where groups of companies are the rule, not the exception, and also the proliferation of international dispute settlement mechanisms can only lead to a fragmented system with contradicting decisions being exploited by private entities. So, in the words of Christoph Shreuer and August Reinisch, the main reasons for a relaxed identity test is that the:

"*main purposes of preventing costly parallel litigation, avoiding conflicting judgments and protecting parties from oppressive litigation tactics will be achieved in a world of expanded dispute settlement opportunities only if [res judicata and lis pendens] ae applied in a fashion transcending strict formalism*"[168]

In fact, a more realistic "economic" approach regarding the identity of parties and issues seems to be emerging in international law. Proof of that is the Brussels Regulation, which clearly stipulates that when <u>related</u> actions in different courts have been initiated the second-in-line court may stay its proceedings.[169]

Returning to the criteria of the triple identity test, the examination of all three of them will follow, starting with the "identity of the parties" (A), and then moving on to the "same legal grounds and petitum (B).

A. Identity of the parties

Specifically regarding the identity of the parties, when it comes to mixed arbitration, it is not clear whether the various claimants and respondent parties are identical considering the various subsidiaries and controllers within a company.[170] Therefore the question that arises is whether the different corporate manifestations should be considered as separate entities, and, *thus*, not fulfil the identity requirement, as it happened with the CME and Lauder cases.

[166] Reinisch, p.56.
[167] Cremades, Ignacio, p. 515-516.
[168] Emil Brengesjö, page 56.
[169]Brussels Regulation I, Article 34.
[170] Reinisch, p. 55.

The jurisprudence both in commercial and investment arbitrations indicates that a broader concept of identity should be considered. In commercial arbitration specifically, the tribunals have come up over the years with a few methods of relaxing the strict application of a contract only to its signatory parties. In a 1982 ICC arbitral award the "economic approach" was expressly endorsed by the tribunal, when it reasoned that that conclusions must be drawn "*from the economic reality*" and attend to "*the needs of international commerce*".[171] For example authorities of different jurisdictions have accepted that a party can still be bound by a contract, even if it's not a party to it, when its "*alter ego*" entity is.[172] This doctrine is used when the relations of the two entities are so close interrelated, and the one party "dominates" the affairs of the other one, that it is only sensible to consider them as a single entity.[173] In other words, there exist "*such a unity of interest and ownership*" that it would be senseless and unjust to consider them as two distinct legal personalities.[174]

In addition, the "piercing of the corporate veil" functions in a similar manner. Its purpose is to eliminate "*the misuse of the privileges of legal personality*".[175] In *Bridas SAPIC v Government of Turkmenistan*, the US court held, after assessing various factors, that a state-owned company was not financially independent from the state that owned it, Turkmenistan, and was a well-founded reason to pierce the corporate veil.[176] Among the factors that the court took into consideration, was the identity of the directors, their financial co-dependence, and whether the two entities acted independently.[177]

Another case of expanding the parties' identity requirement is when a third-party beneficiary exists, which is obviously not a party to the contract, but nonetheless, benefits form it.[178] As it was well stated in a 2004 ICC award:

"*It is generally accepted that if a third party is bound by the same obligations stipulated by a party to a contract and this contract contains an arbitration clause, or, in relation to it, an arbitration*

[171] Reinisch, p. 57.
[172] Gary B. Born, International Arbitration: Cases and Materials (Second Edition), Kluwer Law International (2015) p.1431. (hereinafter Born)
[173] Born., p.1431.
[174] *Bridas S.A.P.I.C. v. Gov't of Turkmenistan* ("Bridas II"), _F.3d_ (5th Cir. April 21, 2006), 2006 WL 1046963.
[175] Born ft. 140.
[176] Bridas S.A.P.I.C. v. Gov't of Turkmenistan ("Bridas II"), _F.3d_ (5th Cir. April 21, 2006), 2006 WL 1046963.
[177] Born, p. 1437-1438.
[178] Born, p.1454.

agreement exists, such a third party is also bound by the arbitration clause, or arbitration agreement, even if it did not sign it."[179]

In the same vein, even if such doctrines do not apply, it has been accepted that the principle of estoppel may bar a party from pursuing litigation. That, primarily has to do with the parallel proceedings in front of different courts and tribunals, based on distinct legal grounds. Characteristically, when a party commences proceedings at a national court pursuant to the contract, it could be estopped from pursuing another claim in another procedure. The claimant cannot have it both ways. It cannot only refer to the contract when the latter works to its advantage. Those considerations should be taken also in regard to states and state entities which are part to an arbitration agreement. There are plenty of cases that a state entity is party to a contract, but despite its separate legal personality it is controlled by the state, and it acts as an "*instrument of the state*".[180] This is reaffirmed by the Draft Articles on State Responsibility, which expressly provide that when non-state organs exercise governmental powers their acts are attributed to the state itself.[181]

In addition, it is considered a "common law tradition", that for *lis pendens* only "*<u>similar</u> parties and matters*" are required.[182] For instance, in *Continental Time Corp. v. Swiss Credit Bank* a federal US court had to deal with a request for stay of proceedings due to a *lis pendens* issue. Continental sued Credit Suisse, because the latter allegedly did not honor its obligations under a letter of credit. Initially this letter of credit was issued to Credit Suisse, however the latter assigned its interest in it to S. Frederick & Company and to Arlington Distributing Co. Later on, Credit Suisse advised Merchants Bank, where Frederick had an account, that the air waybill did not meet the requirements of the letter of credit, with the end result being the expiration of the payment deadline without the payment being made.[183]

Afterwards, Frederick and Arlington filed a lawsuit in Switzerland for recovery of damages. While this suit was pending, Continental initiated another suit against Credit Suisse, to which the latter objected that Continental was no party to the dispute anymore, and that the Swiss courts were already in charge of it. The court held that:

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[179] Ferrari, Franco, and Stefan Kröll, *Conflict of Laws in International Arbitration* Walter de Gruyter, (2010), p.162.
[180] Amoco International Finance Corporation v the Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company, and Kharg Chemical Company Limited, AWARD NO. 310-56-3, 14 July 1987.
[181] ILC, Art. 5.
[182] Forstén, p.56.
[183] International Civil Litigation in Us Courts: Commentary and Materials, Gary Born, Kluwer Law Arbitration, p.468.

"*it is true that this action includes other parties and claims than those in the suit in Switzerland, relating to the purchase and sale of merchandise underlying the letter of credit transaction. However, this factor does not support Continental's contention that only this action can resolve the relevant issues, for it is settled that a letter of credit agreement constitutes an independent transaction between the issuer and the beneficiary, to be resolved without the reference of the underlying contracts and transactions*".[184]

Thus, the court considered which issues were similar to the Swiss proceedings, by examining the identities of the parties, and the similarity of the issues in the parallel proceedings, and finally dismissing the action in favour of the Swiss proceedings.[185]

Regarding investment proceedings the "economic approach" has also been adopted by a variety of tribunals. For instance, in *Amco v Indonesia*, the question that arose was whether a parent company could initiate an ICSID arbitration under an agreement that covered only its subsidiary. The Tribunal concluded that this was the case and upheld its jurisdiction.[186] This "economic approach" was adopted in order for the tribunal to determine its jurisdiction. In the same vein, the tribunal in *TSA Spectrum* pierced the corporate veil of an Argentine firm that attempted to sue Argentina. The company appeared through its Dutch ownership, which pursuant to the claimat was enough to prove its foreign nationality. Nevertheless, the tribunal pierced the corporate veil, because it considered that the Dutch company does not have control over the Argentine one, "*but is a mere vehicle*".[187]

Similar events took place in the case of *Aguas del Tunari v Bolivia*. Attempts were made for privatization of water and sewage services in Bolivia based on a 40-year concession contract, which at the end was not fully executed due to public opposition. The result was the emergence of a dispute. The interesting thing was, though, that for the claimant, in order to get access to the Netherlands-Bolivia BIT, the transfer of the ownership of the privatized assets from the Cayman Islands to the Netherlands was necessary. The tribunal found that the definition of control is accompanied by ownership.[188] Therefore, control derives from the capacity of an entity to legally

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[184] Forstén, p.57.
[185] Born, p.470.
[186] para. 400.
[187] *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award (19 December 2008) para.116. (hereinafter *TSA Spectrum v. Argentina*)
[188] *Aguas del Tunari, S.A. v. Republic of Bolivia*. ICSID Case no. ARB/02/3. Jurisdiction. 20 ICSID Review: Foreign Investment Law Journal 450 (2005) Kenneth J. Vandevelde The American Journal of International Law Vol. 101, No. 1 (Jan., 2007), pp. 181.

control another.[189] Hence, the tribunal concluded that the acquisition of 55% of the company share, as was the case with the Dutch company, sufficed to claim control over it.[190]

As the broader "economic approach" has become a tool for the determination of jurisdiction of the tribunal, there is no reason not to also apply it for the purposes of *lies pendent* and *res judicata*. Otherwise, claimants have the privilege of endlessly re-litigating the same dispute until an award is rendered in their favour. Obviously, such a prospect is especially disadvantageous for the respondents, who only need one award ordering them to pay damages. That is why, it is of utmost importance to look for the underlying economic relations of the different entities, rather than sticking to their typical separate corporate forms. It can be seen that both in commercial and in investment arbitration is becoming a more relaxed identity of the parties seem to gain ground.

Returning now to the case of *Mobil*, applying the more relaxed and "realistic" test for the identities of the parties, it would become clear that this *lis pendens* prerequisite is fulfilled. The Tribunal there concluded that no issue of *lis pendens* arose in regard to the ICC arbitration due to the distinct parties to the procedures. The parties to the ICC arbitration were Mobil and PDVSA, while to the investment arbitration were Mobil and the State of Venezuela.[191] However, the investment tribunal did not take into consideration that, in fact, PDVSA was formed through a Nationalization Law which provided that activities regarding Venezuelan petroleum "*were to be carried out by the State acting through State-owned entities*".[192] Not to mention that the State was PDVSA's sole shareholder, and the law itself provided that Mobil could "*be indemnified by PDVSA in the event of certain governmental measures*",[193] meaning that in the eyes of the state the two entities, state and company, were acting interchangeably, filling each other's shoes. Nevertheless, despite the fact that the law itself ascertained that in charge of the petroleum services was the state, and that the latter was the only shareholder of the company, *ergo* exercising absolute control over it, the tribunal applied a very formalistic approach of the doctrine and did not find identity of the parties. What is worrisome is that, Venezuela was found in both procedures liable for violating its obligations, therefore to some extent double recovery could not be avoided, since the facts of the case were identical.

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[189] *Aguas del Tunari*, para. 264.
[190] *Id*.
[191] *Mobil*, para 216.
[192] *Id*., para. 37.
[193] *Id*., para. 216.

A much more appropriate approach was adopted in *Wintershall v. Qatar*[194], where the Qatar General Petroleum, an entity also fully owned by the State but with its own separate legal personality, was held to be an agent of the state due to the involvement of the government in the company's affairs.

In conclusion, it is of utmost importance to use the reasoning of Schreuer, who also supports the idea that the same parties test should be applied liberally between international and national proceedings. But why shouldn't the same apply for investment and commercial proceedings? The *ratio* is exactly the same; avoidance of parallel claims with the same set of interests. Flexible concepts of the party's identities have been endorsed both in commercial and investment arbitration, in order to secure legal coherence, procedural justice, effectiveness and fairness.[195] Such approaches are more attuned to the legal coherence and the purpose of avoiding double recovery, and that is the reason for their implementation, otherwise the purpose of the international legal system would be defeated. The same stands, though, for the application of the *lis pendens* doctrine; it aims at the avoidance of inconsistent decisions. If a flexible approach is accepted for regimes of commercial and investment arbitration respectively, the same flexible approach is only natural to be applicable to their overlapping territory.

B. Identical grounds and *petitum*

There is a clear distinction of the three prerequisites for *lis pendens*, as they were developed in the *Chorzow Factory* case by judge Anzilotti who identified "*persona, petitum and cause petendi*".[196] Similarly the *Trail Smelter* decision made reference to the same three elements, identity of parties, object and ground.[197] As already analyzed, identical *petitum* means that the same type of relief is sought in both the proceedings and regarding identical *causa petendi*, that the same legal arguments and rights are employed at different proceedings. It should be taken into account at this point that the issue of identical facts is closely related the two requirements mentioned above, exactly because the factual background of the dispute is determinative of whether a breach has actually occurred and what remedies are appropriate.[198]

[194] Jan Ole Voss, *The Impact of Investment treaties on Contracts between Host States and Foreign Investors*, Martinus Nijhoff Publishers, LEIDEN, BOSTON (2011) p. 142. (hereinafter Jan Ole Voss)
[195] Shany (2006), p.23.
[196] Interpretation of Judgments Nos. 7 & 8 *Concerning the Case of the Factory at Chorzów,* 1927 P.C.I.J. (Ser. A) No. 11, at 23 (dissenting opinion of Judge Anzilotti).
[197] Trail Smelter (U.S. v. Canada), 3 R.I.A.A. 1905, 1952 (1941).
[198] Reinisch, p.62.

This position has been clearly upheld by arbitral tribunal constituted under UNCLOS in the *Southern Bluefin Tuna* case[199]. The facts of the case were the following. Australia, New Zealand and Japan had signed in 1993 a trilateral treaty, the Convention for the Conservation of the Southern Bluefin Tuna (CCSBT), according to which the parties ought to harvest the particular kind of fish at specific quotas, because it is considered to be an endangered species.[200] In 1999, Australia and New Zealand filed for the formation of an ad hoc tribunal under UNCLOS to hear their claims against Japan, alleging that the latter had exceeded this quota, and, thus, threatening the maintenance of a stable maritime environment. However, prior to the request, the parties had initiated proceedings under the CCSBT in an attempt to resolve the dispute, but without success as Japan refused to decrease its overfishing of the Bluefin tuna. Therefore, the *ad hoc* tribunal under UNCLOS, had to decide whether the dispute should be resolved under the auspices of the CCSBT or UNCLOS. Finally, the tribunal concluded that it lacked jurisdiction,[201] because it considered the CCSBT dispute resolution mechanism to exclude the procedure provided for under UNCLOS[202].

The tribunal's reasoning, though, reaching this conclusion is of relevance, as it contemplated with the identity of the disputes under the two conventions. It specifically stated that:

"The parties to this dispute [...] are the same parties parties grappling not with two separate disputes but with what <u>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 CCSBT would be artificial</u>" [203]

Considering the distinction of the two disputes "artificial", the tribunal found that the two proceedings regarded to the same subject-matter and, *thus*, formed one single dispute. It could be said as an objection to this conclusion, that the CCSBT had a much narrower subject matter, since it referred exclusively to the fishing of one particular kind and it administered quotas, whereas

[199] Southern Bluefin Tuna case (Australia and New Zealand v. Japan), Award on Jurisdiction and Admissibility, 4 August 2000, 39 I.L.M. (2000), 1359. (hereinafter UNCOLS, Bluefin Tuna)

[200] Southern Bluefin Tuna Case: Australia and New Zealand v. Japan, Leah Sturtz, Ecology Law Quarterly, Volume 28 | Issue 2 (June 2001), p. 458.

[201] UNCLOS, Bluefin Tuna.

[202] Article 16 CCSBT provides: "1. If any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.
2. Any dispute of this character not so resolved shall, with the consent in each case of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration; but failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above.
3. In cases where the dispute is referred to arbitration, the arbitral tribunal shall be constituted as provided in the Annex to this Convention. The Annex forms an integral part of this Convention."

[203] UNCLOS, Bluefin Tuna, para. 54.

UNCLOS has a broader approach, establishing general norms, hence, the legal grounds are distinct. Still, though, the tribunal reached this conclusion, based on the identity of the facts surrounding the dispute.

It should be noted, at this point, that the tribunal did not invoke *lis pendens* or *res judicata* issues, as a similar clause already exists in UNCLOS, according to which the dispute settlement mechanism of the Convention is not available if the parties have agreed to seek settlement of their dispute "*by a peaceful means of their own choice*".[204] As a result, the invocation of the doctrines was not necessary. Nonetheless, this rationale still reflects the underlying policy of *lis pendens* to avoid parallel proceedings.[205]

In the same vein, in *Glaziou v France* the UN Human Rights Committee noted that:

"*the author's complaint before the European commission was based on the <u>same events and facts</u> as the communication that was submitted under the Optional Protocol to the Covenant, and that it raised substantially the same issues; accordingly, the Committee is seized of the same matter as the European Commission*"[206]

In regard to contracts, the European Court has held that when the same parties are suing each other in different Member States but under the same contractual relationship, the requirement of the same cause of action is fulfilled, without the claims having to be identical.[207]

That should be the case with umbrella clauses or broad enough dispute settlement clauses to allow contractual claims. Under an umbrella clause, as discussed above the facts of the case remain the same, and essentially the legal basis is the same, which is the contract. The fact that a BIT or another multilateral investment agreement is used to activate the state's responsibility should not be a reason for the non-identity of legal grounds, since the beach of the obligation will be concluded based on the contract. And that is exactly the reason why tribunals, like in *Vivendi*, opted to stay the proceedings until the domestic courts decided on the issue. They did not expressly state that an issue of *lis pendens* existed, and if they were asked to maybe they would have concluded that no such issue exists following a formalistic application of the doctrine. However, they still decided to stay the proceedings on the issue of the contract, as it is not clear which facts are relevant exclusively to the BIT claims and which to the treaty claims, and in any case the facts will influence

[204] United Nations Convention on the Law of the Sea (UNCLOS), Art. 281(1).
[205] Reinisch, p. 67.
[206] UN Human Rights Commission 452/1991, Glaziou v. France, Decision of 18 July 1994, CCPR/C/51/D/452/1991, p. 6, para. 7.2
[207] Gubisch Maschinenfabrike.

the outcome of both proceedings, illustrating the relevance between them. And, in any case, the decision of a commercial tribunal is "relevant" when it comes to assessing breaches of the treaty, as it was found in the *Eureko* case.[208]

Consequently, as Prof. Reinisch has stated in order to re-litigate already decided disputes, it is necessary to look at the "*underlying* <u>*nature*</u> *of the dispute*" and not its "*formal classification*".[209]

Following this analysis, what should be taken into consideration for the fulfilment of the identity of the issues is the <u>substance</u> of the dispute, whether the actions are "*substantially identical*" between the parties.[210]

In this respect, the European Commission and later the European Court of Human Rights in *Pauger v Austria*, instead of the strict formal identity of the issues, opted for the substantial identity of them. The bodies had to decide on the admissibility of the claim, because the applicant had already filed a complaint with the UN Human Rights Committee. The European Commission in its decision on admissibility held that the same matter was simultaneously submitted to two international institutions, and *thus*, it needed to consider whether the applications "*have* <u>*substantially*</u> *the same content*."[211]

The same rationale applies for the injury requested, for instance when the same injury is requested, but under different legal grounds. One can demand compensation under customary law and a BIT, or under a contract, or any other possible legal instrument. Technically, these requests are not based on the same *causa petendi* and so the application of *res judicata* and l*is pendens* seems to be excluded. However, this is a "highly artificial distinction" since all the legal grounds are requesting for compensation, so what is important is to look at the "*specific rules and examine how far they are* <u>*substantially identical or different*</u>"[212] Accordingly, if it is the same rule included in different legal instruments, the identity of the *causa petendi* undoubtedly exists. And taking into consideration the proliferation of international courts and tribunals, this is the only way to avoid duplicative claims for recovery.[213] Instead, with the endorsement of the position that substantially identical provisions can actually clash with each other, the negative effects of exploiting the

[208] *Eureko*, para. 101.
[209] Reinisch, p.71.
[210] V. Lowe, "Overlapping Jurisdiction in International Tribunals", 20 *Australian Year Book of International Law* (1999), 202.
[211] European Commission of Human Rights, Application 16717/90, Pauger v. Austria, Decision on Admissibility of 9 January 1995, 80 D&R 24 (1995)
[212] Reinisch, p.64.
[213] Bjorklund, p.131.

different *fora*, namely forum shopping, are eliminated and the coherence of the legal system is better secured.

In regard to investment and commercial arbitration and their overlap the same problem exists. The legal grounds may not be identical, however the factual background is the same, and therefore the claims are founded on the same injury, and that essentially leads to claim-splitting and cases of double recovery. It is no wonder that tribunals have taken the position that even though no case of *lis pendens* exist, the threat of double recovery is still imminent. That is why closely related claims that could have been raised in the first proceedings need to be barred by the second ones.

III. Revisiting the principle of *res judicata*

The principle of *res judicata* finds its expression in two Latin *maxims*; "*interest reipublicae ut sit finis litium*" ("it is in the public interest that there should be an end of litigation"), and "*nemo debet bis vexari pro una et eadem causa*" ("no one should be proceeded against twice for the same cause").[214] The first encapsulates the public policy perspective of the doctrine, and the second is the matter of private justice.[215] Since then it has evolved, but its aim has remained unchanged.

Res judicata is accepted as an established principle of international law.[216] Bin Cheng stated in 1953 that "t*here seems little, if needed any question as to res judicata being a general principal of law*".[217] A number of international court and arbitral tribunals' decisions have accepted the doctrine as reflecting a binding legal principle. Initially, the *Pious Fund Foundation* paved the way for its establishment. The controversy was about whether bishops in Upper California were entitled to annual interest payments from the "Pious Fund of the Californias", which was finally upheld by the umpire of the US-Mexican Claims Commission in 1875.[218] However, the US requested for further payments and that became the first dispute before the Permanent Court of Arbitration in the Hague. The arbitral tribunal in its award, in 1902, considered that the umpire's decision constituted *res judicata*, and, thus, Mexico's obligations for payments to the Foundation was already settled.[219] As a result, the 1875 was final and binding on the parties, and it could not be re-litigated.

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214 Hober, p. 120.
215 ILA, Berlin Conference (2004), p.3.
216 Shany (2006), p.40; Trail Smelter case, pp. 1950-1951.
217 ILA, Berlin Conference, International Commercial Arbitration (2004), p.18.
218 Reinisch, p.45.
219 Pious Fund of the Californias (U.S. v. Mex.), Hague Ct. Rep. (Scott) 1, 5 (Perm. Ct. Arb. 1902); 2 AJIL (1908), 893.

Similarly, in the often-cited *Trail Smelter* case, the arbitrators concluded that "*the sanctity of res judicata attached to a final decision of an international tribunal is an essential and settled rule of international law*."[220] The ICJ has also repeatedly upheld the principle, with the Court stating in the *UN Administrative Tribunal* case that *res judicata* is a "*well-established and generally recognized principle*".[221]

The ILA in its Interim Report on "R*es Judicata* and Arbitration" has provided with occasions where *res judicata* issues may arise. One of the occasions is when the two arbitration proceedings are constituted on different agreements, but when they arise "*under the same legal relationship*" or when the claims arise "o*ut of the same factual situation before different tribunals*."[222]

That is exactly the case with the umbrella clause, the agreements are different, as in the commercial proceedings the basis based upon which the claims are brought is the contract, and in the investment the BIT. However, when invoking the umbrella clause, the legal basis may seem different but the legal relationship does not change; the respondent has still allegedly breached its obligations under the contract, and those obligations, the content of which remain unchanged, are at stake in both proceedings.

It should be noted at this point that the ILA Report focuses on international commercial arbitration, however the ILA expressly stated that its recommendations do not exclude the possibility that through future refinement they can apply to parallel proceedings,[223] and that they still have "*indirect relevance for BIT arbitrations*".[224] It is critical to underline that the ILA considered in its 2006 report that the main issue with the application of *lis pendens* and *res judicata* is the non-identity of the parties.[225] However, this seems to have already been resolved in both commercial and investment arbitration, since an "economic" more realistic approach has been adopted for jurisdictional purposes "*the same standard should also be applied for purposes of res judicata*".[226]

As to the effect of the principle, when a prior decision has been rendered between the same parties, then the same dispute cannot be adjudicated in subsequent proceedings, which rely on the same subject matter or relief and the same legal grounds.[227] In other words the effect of *res judicata* is

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220 Trail Smelter (U.S. v. Canada), 3 R.I.A.A. 1905, at 1950 (1941).
221 Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, I.C.J. Reports 1954, 47, at 53.
222 ILA, Berlin Conference (2004).
223 ILA, Lis Pendens, p.33.
224 Final Report on Res Judicata and Arbitration, p.33.
225 *Id*.
226 ILA, Berlin Conference (2004), p.21.
227 Cremades, Ignacio, p.519.

double; on the one hand the decision is final and binding between those specific parties and it cannot be challenged or appealed (positive effect), and on the other, the same dispute cannot be re-litigated in successive proceedings (negative effect).[228] When it comes to arbitration, it is recognized that arbitral awards cast the same effect.[229] The principle of preclusion is acknowledged, meaning that the award is final and binding between the parties However, as it is in general international law, no rule of precedent exists, *ergo*, previous awards are not binding on the judges and arbitrators, but they can only be considered as persuasive sources[230] due to their well-structured reasoning. Exactly that was upheld by the *SGS v Philippines* tribunal when the respondent state asked the tribunal to follow the reasoning of its predecessor in *SGS v. Pakistan* regarding the interpretation of umbrella clauses. The Tribunal, however, determined that it was not bound by precedent, hence, it could follow a different approach, which it did.[231] Similarly, article 53(1) of the ICSID Convention stipulates that the ICSID awards are only binding on the specific parties of the dispute.

Furthermore, the *res judicata* principle, like many others, has been inspired by national jurisdictions, in which it can have different forms and effects. In common law systems like the UK, India and Australia it has the form of cause of action estoppel or issue estoppel. The former precludes the parties from re-litigating the same cause of action (or claim) of an already final decision, while the latter, which is also referred to as collateral estoppel, has a broader preclusive effect and forbids re-litigation of factual or legal issues in general, which have already been adjudicated in previous proceedings.[232] Collateral estoppel can be described as an "*authoritative determination of the whole 'story' of the dispute*".[233] In contrast, in most civil law countries the preclusive effect of judgments is limited to the operative part of it, not the reasons.[234]

Failing to apply the principle of *res judicata*, would result to serious enforceability issues.[235] This is not simply a scholarly problem, but a very practical one. Once more, the cases of *Lauder* and *CME* are of great use. At that situation the Czech Republic, on the one hand, was obliged to pay damages pursuant to the CME tribunal, but the Lauder award thought otherwise. So, it was only logical that the Czech Republic raised the issue of enforceability during the annulment proceedings.

228 Cremades, Ignacio, p.519.
229 Emil Brengesjö, p. 18.
230 ILA, Lis Pendens, p.29.
231 *SGS v. Philippines*, para. 97.
232 Emil Brengesjö, p. 16.
233 Brekoulakis, Stavros, The Effect of an Arbitral Award and Third Parties in International Arbitration: Res Judicata Revisited, American Review on International Arbitration, Volume 16, 2005, pp. 182.
234 Emil Brengesjö, p.17.
235 Born, Gary B., International Commercial Arbitration, Kluwer, Alpheen aan den Rijn, 2009., p. 2914.

Regarding the application of the *res judicata* principle, the same triple identity test applies, as with *lis pendens*. The parties have to be identical, as well as the cause of action and the subject matter.[236] And that is why the two doctrines serve the exact same purpose, that is to avoid re-litigation of the same dispute and guarantee legal security with the prevention of conflicting or duplicative proceedings, as well as finality and certainty.[237]

At this point it is worthwhile to examine the different forms of *res judicata* in civil (A) and common law (B) jurisdictions, because as it will be seen, they can inspire the international system to adopt a broader approach for its application.

A. *Res judicata* in civil law jurisdictions

Different concepts and forms of the doctrine appear in various national jurisdictions. Starting with the civil law approach, the principle is interpreted in a narrow and formalistic fashion. Apparently each jurisdiction adopts a different version of the doctrine, however a categorization is possible. Regarding the prerequisite of the same parties, some jurisdictions only refer to the "same party", others limit the test by requiring "the same parties in the same or identical capacities", while a third category seem to favour a broader idea, by demanding the "same parties and heirs".[238]

In relation to the "same cause of action", once again civil law jurisdictions lack uniformity, with of them referring simply to "the same cause of action", while others aim at the "same underlying occurrence or transaction".[239] Finally, in regard to the same relief sought, practically it is identified as "the same objective or object".[240] In general civil law jurisdictions address *res judicata* in a formalistic and narrow manner.

B. *Res judicata* in common law jurisdictions

On the other hand, the common law approach, and specifically the one of the US, is significantly more expansive and leaves room for amplifying the principle. In *Southern Pacific Railroad Company v. United States*, the Supreme court while recognizing that the principle is one of the

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[236] Christer Söderlund, Lis Pendens, Res Judicata and the Issue of Parallel Judicial Proceedings, Journal of International Arbitration 22(4), Kluwer Law International (2005) p. 305. (hereinafter Söderlund)
[237] Randy D. Gordon, Only one kick at the cat; A Contextual Rubric for Evaluating Res Juducata and Collateral Estoppel in International Commercial Arbitration, *18 Fla. J. Int'l L. 549* (2006) p. 552. (hereinafter Gordon)
[238] Pedro Martinez, Harout Jack Samra, The role of Precedent in Defining Res Judicator in Investor-state arbitration, *32 Nw. J. Int'l L. & Bus. 419* (2011-2012) p.424. (hereinafter Martinez, Samra)
[239] *Id*. p. 426.
[240] *Id*., 427.

reasons why courts have been established and its importance for the "maintenance of social order", [241] it declared that the purpose of the doctrine is:

"*to preclude parties form contesting matters that have had a full and fair opportunity to litigate, protects their adversaries from the expense and vexation attending multiple lawsuits, construes judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions*." [242]

Furthermore, regarding the triple identity test, it still applies, however in a broader and substantive-based manner. A key recitation of the test provides that:

"*a right, question, or fact, distinctly put in issue, and directly determined by a court of competent jurisdiction, as ground for recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even <u>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</u> so long as the judgment in the first suit remains unmodified.*"[243]

From the very definition of the triple identity test becomes apparent that it is interpreted much broader than in civil law jurisdictions. Characteristically it is accepted that even if the cause of action, namely the legal grounds for the dispute are different, what is predetermined remains as such and it is not subject to a second judgment.

In addition, there are exceptions to the identity test, which allows for the application of the principle in various situations, that normally would fall outside its scope. For instance, the preclusive effect of *res judicata* can apply even to a non-party, who shares "*the same interest*" with the actual party of the dispute,[244] and as a result the third party is bound by the decision and cannot re-litigate the issue. Such principles have been adopted in commercial arbitration, as we already discussed. For example, the "*alter ego*" doctrine, essentially has the same effect with the third party having the same interest as the disputing one, and therefore the outcome of the dispute restricts both.

Such a view of the sameness of the parties would be extremely resourceful in the cases of the overlapping between commercial and investment proceedings. Once again of use is the case of *Mobil*. In the commercial proceedings, the respondent was the state-owned company, while in the investment dispute the state itself, Venezuela. The ICSID tribunal found that no identity of parties

[241] Southern Pacific Railroad Company v. United States, 168 U.S. 1, 18 (1897), at 48.
[242] See Montana v. United States, 440 U.S. 147, 153 (1979).
[243] S. Pac. R.R. Co. v. United States, 168 U.S. 1, 48 (1897).
[244] Taylor, 553 U.S. at 881.

existed, thus no *res judicata* issue emerged. However, a different approach could be followed. The two respondent parties were functioning in essence as a single entity. The sole shareholder of the company was the state and all decisions were made by state officials. They did not simply share the same interests, but the state actually owned and controlled the company. Therefore, in both decisions the entity who has to bear the costs and the losses is the state.

In a globalized economy, that is only the norm. Group of companies function most of the times through their affiliates and subsidiaries, which have a separate legal personality. This does not mean, though, that they act independently from their parent company. If that is accepted for the private sector, why cannot it be accepted for the public as well. It is very common for states to control different aspects of their public affairs through various state-owned companies. Those companies are controlled and mostly owned by the state, therefore they do not conduct business independently. Why should they be treated as separate entities? The consideration that *res judicata* is not a good enough tool to tackle such situations is not convincing at all. *Res judicata* is the right tool, but needs to be used in a different manner. And the US approach to the principle seems to be the right path to choose. That is also endorsed by the International Law Association, which in its Final Report on *res judicata* concluded that:

"*a person not a party to an action but controlling or substantial participating 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.*"[245]

Furthermore, in relation to the second prong of the triple identity test, the US perspective of it precludes re-litigation of all causes of action and defenses that were available to the parties during the first proceedings, so even if they were not raised then, they cannot be raised afterwards.[246] Such a view of the test aims at the actual finality of the dispute. It considers the issue as concluded, not on a basis of formality, but on its substance. If the issue has substantially been resolved, it cannot be raised again in successive proceedings regardless of the cause of action brought forth.

The chasm between the civil and the common law approach becomes even wider when the doctrine of collateral estoppel comes into play. Collateral estoppel deals with issues, instead of claims. As it has been stated whereas *res judicata* deals with the preclusion of already decided claims, collateral

[245] Final Report on Res Judicata and arbitration, p.34.
[246] Martinez, Samra, p.431.

estoppel focuses on "*finality of specific instances of fact-finding*".[247] Thus, the courts shift their emphasis from claims to issues.

For instance, in *City of Gainesville v. Island Creek Coal Sales Co*., the city was already in arbitration with the Creek, when it filed a lawsuit against another coal supply company. In the meantime, the first arbitration ruled in favour of Creek. Therefore, the court was faced with the fact that the issue of the contract was already decided. Finally, the court found that despite the fact that the lawsuit presented different claims than those decided in arbitration, it should still be dismissed based on the conclusion that the contractual issues had already been settled in arbitration, and, therefore, the possibility of adjudicating any supportive claims regarding these contractual issues had already been stripped away due to collateral estoppel.[248]

Collateral estoppel can be applied both to issues of fact and law and does not require a strict identity test, but rather can be applied also to non-parties. Indicatively, the *US Supreme Court in Montana v. United States* held that collateral estoppel can be used for extending the preclusive effect of a decision to non-parties.[249]

As a result, the effect of collateral estoppel extends not only to legal issues but also to factual ones and thus broadening the preclusive effect of *res judicata.* This way the negative effects of forum shopping, namely the attempt of litigants to have a second bite at the apple is significantly cut short. Finally, the main difference between the civil and the common law approach is the base upon which *res judicata* is construed. In civil law jurisdictions, a more formalistic and less flexible approach is preferred which aims to better fit into the context of every specific jurisdiction. On the other hand, the common law perspective follows a more transactional approach, better suited for the international scene, concentrating on the substance of the claims and issues of the proceedings. Considering that no *state decisis* exists in international arbitration, such a broad interpretation of the principle can help minimize the problems created by fragmentation and duplication.

Such an approach seems to have been advocated by the tribunal in the *Southern Bluefin Tuna* case under UNCLOS, where it decided, without reference to *res judicata* or *lis pendens*, that looking at the substance of the claims, the fact that two different treaties have been invoked does not imply

[247] Gordon, p.554.
[248] City of Gainesville Florida v. Island Creek Coal Sales Co, 771 F. 2d 1495, at 518.
[249] Montana, 440 U.S. at 154.

that also distinct proceedings have been initiated, but rather that such a distinction would be "artificial".[250]

The usefulness of collateral estoppel is amplified after taking into consideration the cases of *Saipem v Bangladesh* and *GEA Group v. Ukraine*. In the former the Bangladeshi courts annulled an ICC award, after which Saipem filed for arbitration under ICSID. The award was rendered in favour of Saipem, with the tribunal stating that "*the expropriation rites at hand were Saipem's residual contractual rights under the investment as crystallized in the ICC award*."[251] Taking into consideration the conclusion of the US Supreme Court in the *City of Gainesville v. Island Creek Coal Sales Co*. applying the rule of collateral estoppel would result is the dismissal of the claims under the contract. However, in essence Bangladesh was found liable twice for breaching the same contract, and there is no surprise that the ICSID tribunal considered that the proper amount of compensation was the one awarded at the ICC proceedings.[252] By actually awarding the same remedies and in fact referring to the ICC Award the tribunal inevitably underline that identity of substance between the two proceedings.

In the same vein, in *GEA Group v. Ukraine*, GEA had entered into a contract with Oriana, a state-owned company. After the dispute arose GEA brought an ICC arbitration against Oriana, with the award being in favour of GEA, which, though, could not be enforced in the national courts. Like Saipem, GEA initiated an ICSID arbitration against Ukraine. The tribunal ruled in favour of Ukraine,[253] without considering any doctrine of *res judicata* or collateral estoppel, but attempted to justify its reasoning by arguing that an award "*in and of itself cannot constitute an investment*"[254] Instead the tribunal could have simply underlined the common denominator of the commercial and investment proceedings and the attempt of the claimant to transform the former into the latter. The end result of both cases are much criticized awards that leave much to be desired. Future tribunals, faced with the same problems, do not have a persuasive and reliable source to rely on, but instead a precedent exists through these cases that allows for the possibility of duplicative proceedings.

In conclusion, both awards underline the need for an effective application of *res judicata*. It is a fact that almost under no circumstances the prerequisite of the same parties will be fulfilled in commercial and investment proceedings. However, an expansive interpretation of the test based on

[250] para. 39.
[251] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, (21 March 2007), para. 127.
[252] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award (30 June 2009), para. 202.
[253] *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award (31 March 2011) (hereinafter *GEA*)
[254] para. 161.

the substance of the parties and the issues raised would preclude the inefficiencies of the *Saipem* and the *GEA* cases.

Fortunately, the principle of collateral estoppel seems to be gaining more and more ground, with the award in *RSM v Grenada* being the most characteristic example of that. The factual background of the case was the following. RSM had entered into a petroleum exploration agreement with Grenada. RSM initiated an ICSID arbitration under the contract[255] because Grenada refused to provide the investor with an exploration license. In 2009, the ICSID tribunal rendered an award in favor of Grenada, dismissing all of RSM's claims.[256] In January 2010, RMS filed again for arbitration at ICSID against Grenada, this time under the United States-Grenada BIT. The tribunal dismissed the claims on the basis of collateral estoppel. After recognizing the doctrine as "*general principle of law" applicable in international arbitration*[257], it held that:

"[*the] findings [of the Prior Tribunal] on a series of rights, questions and fact, bind this Tribunal and that these findings must apply in the assessment of whether Claimants Present Treaty claims are "manifestly without legal merit.*"

Thus, the tribunal accepted that collateral estoppel applies to all the issued dealt with in the previous arbitration, and that it was bound by the conclusions of its predecessor.

In fact, it should be noted, that the tribunal dealt also with the issue of the parties' identity. Specifically, in the second proceedings claimants were the three shareholders of RSM individually, while during the first RSM itself posed as claimant. The tribunal concluded the fact that the claimants are different is irrelevant, because it is the three sole shareholders of RSM, *thus* they are "*privies of RSM*" and "*as such, they, like RSM, are bound by those factual and other determinations regarding questions and rights arising out of or relating to the Agreement.*"[258] It recognized that RSM enjoys a separate legal personality, however it declared that shareholders cannot use this distinction "*as both sword and shield*"[259] in order to pursue different litigations, but instead

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255 It should be kept in mind that the ICSID's original purpose was to create a mechanism for contractual disputes. (Nigel, Blackaby, Investment Arbitration and Commercial Arbitration (or the tale of the dolphin and the shark), p. 223.)
256 *RSM PRODUCTION CORPORATION v Grenada*, ICSID CASE NO. ARB/05/14, Award (13 March 2009).
257 *RACHEL S. GRYNBERG, STEPHEN M. GRYNBERG, MIRIAM Z. GRYNBERG, AND RSM PRODUCTION CORPORATION v Grenada*, ICSID Case No. ARB/10/6, Award (10 December 2010) para. 7.1.2.
258 *Id*., para. 7.1.5.
259 *Id*., para, 7.1.7.

"*if they wish to claim standing on the basis of their indirect interest in corporate assets, they must be subject to defenses that would be available against the corporation - including collateral estoppel*".[260]

The tribunal concluded that the findings of the previous arbitration based on the contract have a binding effect on RSM and its shareholders and they "*may not be re-litigated in these proceedings*".[261]

The same determination was reached by the tribunal in *Helnan v Egypt*. The facts of the case were similar to *RSM*. The claimant had entered into an agreement for the management of a hotel. After the dispute arose a tribunal was constructed under the arbitration clause of the agreement, which rendered an award stating that the contract was "*impossible to execute*" and therefore was terminated by Egyptian law.[262] However, the claimant sought another award this time under the BIT between Egypt and Denmark. The ICSID tribunal concluded that "*the [first]award […] is final and binding. It has been in force and <u>has res judicata effects</u>*" and that "*the present Arbitral Tribunal cannot ignore its effect, unless it would be established that the rendering of the Award was made in breach of the Treaty, or general international law*."[263]

Similarly, in *Apotex v United States*, claimant initiated arbitration proceedings based on the NAFTA Agreement, and the Jamaica-US BIT in August of 2009. In 2012 Apotex filed for another arbitration, this time pursuant to the ICSID Arbitration Facility Rules regarding substantially the same dispute.[264] The first tribunal rendered an award in June 2013 not qualifying Apotex as an investor that made an investment under NAFTA, and therefore it denied jurisdiction.[265]

The second tribunal addressed the issue of *res judicata*, as it was raised by the United States, and concluded that it would be:

"impermissible to parse the two sets of claims in the two arbitrations, so as artificially to distinguish one case from the other. The purpose of the res judicata doctrine under international

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[260] *Id*.
[261] *Id*., para, 7.1.8.
[262] *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award (3 July 2008), para. 6.
[263] *Id*., para. 163.
[264] August Reinisch, Jose Magnaye, Revisiting Res Judicata and Lis Pendens in Investor-State Arbitration, in *The Law and Practice of International Courts and Tribunals 15, Koninklijke brill nv, leiden, 6* (2016), p.284.
[265] *Apotex Inc. v. The Government of the United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility, 14 June 2013, paras. 172(b), 176, 244, 235.

law is to put an end to litigation; and it would thwart that purpose if a party could so easily escape the doctrine by 'claim-splitting' in successive proceedings".[266]

As a result, the second *Apotex* tribunal applied a substantive/transactional approach of *res judicata*.

In conclusion, it should be noted that an expansive substance-based approach of *res judicata* and collateral estoppel, closer to the US common law perspective, is endorsed by the ILA as well. In its No. 5 Recommendation the Committee states that "an *arbitral award has preclusive effect […] as to a claim, cause of action, or issue of fact or law*". The US common law conception of *res judicata* and collateral estoppel could serve as conceptual bastion from which a transnational formulation of the principles can emerge, that is expansive and substantive-based. It should be taken into consideration that no rule of precedent exists in the international legal system and no hierarchy of the dispute settlement mechanisms, *thus*, increasing the chances of unpredictability and inconsistency. Against this background, the International Law Association Recommendations must be read, which aspire to build a transnational conception of the principles, aiming at a "*global harmonized approach. Their focus is the development of uniform rules, and in this sense the Recommendations can be characterized as being "de lege ferenda*".[267]

IV. The principle of comity

Comity is a well-rooted principle in both civil and common law jurisdictions. It reflects the deference demonstrated by adjudicative bodies for the laws of other jurisdictions and the decisions of their judicial bodies.[268] Shany considers it to be part of the inherent powers of the judicial and arbitral organs, as an extension of the competence-competence principle.[269] The latter is a universally accepted principle, also in arbitration,[270] and it allows a tribunal to decide on its jurisdiction, not only accepting it, but also dismissing a dispute.[271] Therefore, the competence-competence principle recognizes the inherent power of the tribunal to decide on issues of procedure and jurisdiction. An extension, or rather an intrinsic element of that principle is comity, according

[266] *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/ 12/1, Award, 25 August 2014, para. 7.58.
[267] Martinez, Samra, p.259
[268] Shany, Book, p. 335.
[269] Shany (2006), p. 42.
[270] Exclusive Agent v Manufacturer, Final Award, ICC Case No. 8938, 1996, p. 174; Born, Gary B., International Commercial Arbitration, Kluwer, Alpheen aan den Rijn, 2009, p.870 (fn. 103); UNCITRAL Model Law, Art. 16(1).
[271] Emil Brengesjö, p. 23.

to which a tribunal when deciding on its jurisdiction should respect any other possibly competent adjudicative organ.

The purpose of comity is to avoid any conflict of laws, and thus the organ opts to stay their proceedings or even deny their jurisdiction if another more appropriate body exists.[272] For instance, the US Supreme Court has held that if the parties to a contract have agreed to resolve their disputes through arbitration in Japan, the American courts have no jurisdiction to hear the claim.[273] The Court essentially attempted to mitigate the conflict of the different jurisdictions, and instead of recognizing its competence to adjudicate the dispute, as one of the defendants was not a party to the arbitration agreement, opted to respect the law of the other jurisdiction and deny its competence to rule on the dispute.

As far as the nature of the principle is concerned, there is no clear perspective of whether it constitutes an actual obligation or not. Justice Gray in *Hilton v Guyot* stated that comity is neither a matter of absolute obligation, on the one hand, nor mere courtesy and good will upon the other.[274] Justice Story in his Commentaries on Conflicts of Laws has accepted that comity is deficient of a clear sense of obligation, but it "*rests on a deeper foundation; that it is not so much a matter of comity as courtesy, as a matter of paramount moral duty.*"[275]

In international arbitration, the principle has been recognized and used by plenty of tribunals, including ICSID in *SPP v Egypt*, as we will see later on. And that is only natural since the same rational that dictates the use of comity in domestic jurisdictions, applies on the international level as well.[276] Perhaps the need for comity in the international legal system is even greater, as no hierarchy of the different dispute settlement mechanisms exist and in many cases *lis pendens* and *res judicata* are still applied in a formalistic way. The proliferation of the separate international legal regimes and their special settlement mechanisms have generated the demand for coordination of multiple proceedings. And that is exactly what the principle of comity is capable of; where traditional concepts like *res judicata* cannot apply, because the proceedings are not identical but are still related, comity endorses the court or the tribunal with the power to act as it would if *res judicata* has applied.

In a preliminary award in ICC case no. 6401 (1991) against the Philippines National Power Company (NPC), two separate proceedings were initiated almost simultaneously. The first was the

[272] Joel R. Paul, Comity in international law, *32 Harv. Int'l. L. J. 1* (1991) p.66. (hereinafter Joel R. Paul)
[273] Mitsubishi Motor Corp. v. Soler-Chrysler, 473 US 614 (1985).
[274] Joel R. Paul, p.44.
[275] JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF Laws, para. 33.
[276] Shany, Book, p. 335.

commercial arbitration against the national electricity company and the Philippines, and the other was the lawsuit filed in the US Federal Court by the respondents against the claimants of the arbitration.[277] The US Judge decided to stay its proceedings, exercising its discretionary powers, for all the issues subjected to arbitration.[278] Similarly the Secretariat of the North American Agreement on Environment Cooperation (NAAEC) decided to stay its proceedings, as a matter of deference to the pending *Methanex* dispute under Chapter 11 of the NAFTA, in spite of the fact that the parties to the disputes were different.[279]

The most characteristic example of the function of comity on the international legal system is the *SPP v Egypt*[280], or the Pyramids case. The dispute involved a Hong-Kong based corporation and the Government of Egypt regarding a cancelled investment project in the respondent state. Pursuant to the arbitration clause in the contract, SPP initiated arbitration under the ICC, which ruled in favour of the claimant.[281] However Egypt applied for the annulment of the awards in France, the seat of the arbitration.[282] In the meantime, SPP turned to an ICSID tribunal, based on an Egyptian law accepting *ipso facto* the jurisdiction of the Centre. Initially the ICSID tribunal in its Decision on the Preliminary Objections to Jurisdiction declined the application of *lis pendens* in regard to the proceedings at the French *Cour de Cassation* in Paris, on the grounds that the two bodies were "*unrelated and independent*" and so there is "*no rule of international law which prevents either tribunal from exercising jurisdiction*".[283]

However, it carried on with its reasoning and stated that:

"*[I]n the interest of international judicial order, either of the tribunals may, in its discretion and <u>as a matter of comity, decide to stay the exercise of its jurisdiction by the other tribunal</u>*"[284] (emphasis added).

Ergo, the tribunal decided to stay its proceedings until the French court rendered a decision.[285] The stay of the proceedings was the proper solution at that particular case, because otherwise, if the

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[277] Douglas R. Reichart, Problems with Parallel and Duplicate Proceedings: The Litispendence Principle and international arbitration, ARBITRATION INTERNATIONAL, Vol. 8, No. 3, LCIA (1992) p.245.
[278] *Id*.
[279] Vicuna, p. 4.
[280] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3.
[281] SPP, Award, para. 1.
[282] *Southern Pacific Properties (Middle East) Ltd v. Egypt,* Judgment of 12 July 1984, 3 ICSID Rep. 79 (France, Courd'appel).
[283] Shany, Book, p. 243.
[284] *Southern Pacific Properties (Middle East) Limited [SPP(MEJ] v Arab Republic of Egypt* (Jurisdiction (No. I), 27 November 1985), 3 ICSID Rep 101.
[285] *SPP*, Award, para. 15.

Cour de Cassation granted a decision annulling the ICC award, and the ICSID tribunal had already declined jurisdiction, then the claimant would be left without any available and effective remedy.

Essentially, the tribunal applied the "*generalia specialibus not derogat*" and the *pacta sunt servanda* principles, by accepting that the forum selection clause and the specific agreement of the parties to the contract would take precedence.[286]

A similar conclusion was reached in the *Klockner v Cameroon* case, where the parties had entered into a protocol of an agreement and a supply agreement, both including an ICSID arbitration clause, and later or a management contract which referred to ICC arbitration. The Tribunal held regarding the management contract that the "*Claimant is right in denying the jurisdiction of the Arbitral Tribunal to rule on disputes arising from this contract*",[287] and therefore validating the parties' choice of ICC arbitration for disputes arising out of this (management) contract.

Based upon these cases so far, what can be concluded is that when a certain method of dispute resolution has been chosen by the parties to a contract, that *forum* should be respected by the treaty-based tribunal, and the latter should decline jurisdiction. The only exception can be the case where the possibility of denial of justice by the contractual *forum* exists. In that case the investment tribunal could hear the claims.[288]

That's why Shany endorses the principle of comity, since due to its flexibility it can offer a case-by-case pragmatic approach to related proceedings in the complexity of the international adjudication.[289]

It is a fact that the *SPP* Tribunal dealt with jurisdictional competition between domestic and international tribunals, the ICSID and the *Cour de Cassation*. However, it still adopted a general reasoning regarding the issue of related proceedings, which transcends the barriers of the relation between domestic and international tribunals, and it can apply *a fortiori* to the international legal order in cases of jurisdictional conflicts among international judicial and arbitral bodies.[290]

In the same vein, in the *Mox Plant* case the UNCLOS tribunal stayed its proceedings, based on the anticipation of the EU decision, and stated that:

[286] Douglas, p. 246.
[287] *Klöckner Industrie-Anlagen GmbH, KlOckner Beige, SA and Kleckner Handelsmaatschappij BV v Republic of Cameroon and Societe Camerounaise des Engrais SA.* (Award, 21 October 1983) Case No. ARB/81/2, 2 ICSID Rep 9, p.17.
[288] *Compaiiia de Aguas del Aconquija, SA and Compagnie Generale desEaux/Vivendi Universal v Argentine Republic*, ICSID Case No. ARB/96/I, Award, 21 November 2000, para. 80. (hereinafter Vivendi, Award).
[289] Shany (2006), p. 45.
[290] Shany, Book, p. 265.

"*bearing in mind considerations of mutual respect and comity which should prevail between judicial institution both of which may be called upon to determine rights and obligations as between the two states, the tribunal considers that it would be inappropriate for it to proceed further with the hearing of the Parties on the merits of the dispute. […] Moreover, a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the parties*."[291]

Therefore, the fact that jurisdiction exists, is difference from it being exercised, and the international tribunals should consider the possibility to stay their proceedings, when the same or similar claims are pending before different tribunals.

Especially in investment arbitration under ICSID it can be argued that such an inherent power of the tribunal is enclosed in article 44 of the ICSID Convention, which provides that "*If any question of procedure arises…<u>the Tribunal shall decide the question</u>*", *thus*, extending a general power to the tribunal to decide on its competence on the basis of international principles like comity.[292]

Such an approach seems to be in line with the International Law Association's Recommendation, that when parallel arbitrations "*raising the same of substantially the same issues*" are initiated, the Committee concluded that "it would be wrong" for the second tribunal to proceed with its arbitration, but it should have "*considerable discretion to order a stay of the arbitration*".[293] The Committee concluded that the tribunal should exercise its discretional powers to stay the proceedings, even when the criteria of *lis pendens* are not fulfilled.[294]

The ICJ has also endorsed its inherent power to decline jurisdiction in order to safeguard the administration of justice.[295] In the same vein, the ECHR has followed a similar approach *vis-à-vis* the ICTY. In *Naletilic v Croatia* (2000), the complainant filed a violation of Article 6(1) ECHR, claiming that his extradition to the ICTY, where proceedings were already pending, constituted a violation of his right to a trial within reasonable time.[296] The Court concluded that the ICTY was the court to which jurisdiction had been conferred, and therefore found the claims inadmissible.[297] The Court did not expressly rely on the principle on comity to justify its refusal to adjudicate the

[291] The MOX Plant case (Ireland v. UK), Procedural Order No. 3, Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures (24 June, 2003), para. 28.
[292] Shany (2006), p. 43.
[293] ILA, Lis Pendens, p. 25.
[294] *Id*., p. 26.
[295] Legality of the Use of Force (Serbia and Montenegro v Serbia), Decision on Preliminary Objections, (15 December 2004), para. 33.
[296] August Reinisch, Challenging Acts of International Organizations Before National Courts, , Oxford University Press (2014) p. 114.
[297] *Mladen Naletilic v Croatia,* Application No 51891/99, European Court of Human Rights, 4 May 2000, para 1.

case, but it clearly took under due consideration the related proceedings in front of the ICTY, and demonstrated deference to those proceedings, thus denying the adjudication of the case.

The fact that a tribunal or a court does not expressly deny their jurisdiction under the auspices of comity, does not mean that they are not implicitly applying it. In fact, as Shany has stated:

"*every instance in which a court to a tribunal relies on a decision of their judicial or quasi-judicial bodies can be regarded as a grant of "due consideration" to such decisions, and therefore an extension of some degree of comity*".

The same could be said for the decision of the High Court in New Zealand in the *Attorney General of New Zealand v. Mobil Oil New Zealand Ltd*, where, after the submission by Mobil of a request for arbitration under ICSID against New Zealand, the latter commenced interim injunction proceedings before its domestic courts. The court ordered a stay of proceedings for all claims related to the ICSID arbitration, until the latter has rendered an award.[298]

It is undeniable that even if the strict approach to *lis pendens* and *res judicata* is followed, still the two cases, the commercial and the investment one, are related, since they are based on the same facts, and possibly on the same legal grounds essentially, if the umbrella clause or a broad resolution clause is invoked. It cannot be denied that the findings of the first tribunal on the facts of the case, and whether the conduct of the respondent party constitute a breach of its international obligations should be treated as "evidence" during the second proceedings.[299] It could be associated to the use of article 31(3)(c) of the Law of the Treaties, where relevant rules can be employed for the interpretation of treaty provisions. Essentially, the outcome of a related proceeding will have "persuasive effect" for the second-in-time one.[300]

Therefore, even if *res judicata* or *lis pendens* cannot apply to the facts of a case, still the findings of the first-in-time tribunal should be taken under due consideration for the sake of legal certainty and security. That would not only be beneficial for the international adjudicatory system, but also for the party that will try to get the awards recognized and enforced, as it will face less objections. For such circumstances, the exercise of comity seems to be an expedient path to take, since it balances on the one hand the need for coherence, and on the other hand the duty of the tribunals to act in an equitable manner, respecting each other's competence.

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[298] Bertrand P. Marchais, Attorney General of New Zealand v. Mobil Oil New Zealand Ltd. et al, ICSID REVIEW (1987) 2 (2), p. 495-495.

[299] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Serbia and Montenegro), Judgment of 26 February 2007, para. 214.

[300] Hober, p. 254.

In conclusion, the principle of comity is a tool flexible enough to cover all jurisdictional issues that may arise with regard to related proceedings, and help mitigate the problems of conflicting jurisdictions. If parallel proceedings are pending the tribunal should exercise its discretionary powers and at least stay the proceedings, until the first adjudicative body issues an award, or even decline jurisdiction, in case of successive proceedings.

In investment and commercial arbitration, the tribunals have to yet accept by majority a less formalistic and more relaxed identity test for the utilization of the *lis pendens* and *res judicata* principles. Comity constitutes a great substitute, which allows the tribunals to exercise their inherent powers as they see fit, in order to avoid conflicting jurisdictions, contradictory or duplicative awards, as in the case of Mobil and Venezuela.

CONCLUSION

It has been confirmed through this thesis that an overlap between investment and commercial arbitration indeed exists. That seems inevitable, when taking into consideration the broad subject matter of both investment and commerciality. Essential anything can be considered as an object of a commercial contract on the one hand, and on the other, typically "every kind of asset" can be an investment.

This conflict of jurisdictions is further affirmed by the broad dispute resolution clauses in investment treaties, or by the possible umbrella clauses included therein. Despite the different approaches regarding the interpretation and their scope, it has been generally recognized that they encompass contractual claims, meaning that the violation of a contract may be brought before the treaty tribunal, without transforming the context of the obligation. In other words, the obligations arising out of the contract, and their breach, can be submitted to investment arbitration, by changing the cause of action into a treaty claim, but without altering the substance of the obligation.

Therefore, considering that contractual claims, for which commercial arbitration is possible, can be also examined by tribunals constituted by an investment treaty, establishes the overlap between the two regimes, and as a consequence calls for a solution to their jurisdictional conflict. Different methods have been suggested throughout this thesis. One of the possible solutions was consolidation, as suggested by the CME tribunal, however, due to the distinction of the arbitration regimes it was quickly abandoned.

Another possible solution is to adopt a more expansive substantive-based approach the traditional tools of international law, such as *lis pendens* and *res judicata,* as Professor Reinisch has suggested. This view is in line with the modern globalized economy, where groups of companies constitute the investors, with a complex web of interests connecting them.

Also, principles, like comity that have not been so widely used in the past should further considered. Comity can be a very useful mechanism to examine on a case-by-case basis whether the tribunal needs to stay its proceedings until another renders a decision that may have an impact on the former's reasoning. The majority of tribunals seem to follow the opposite, meaning that the consent to arbitrate under the BIT is distinct from the forum selection clause of the contract, and so it can be invoked alternatively, as it was the case in *Eureko*.[301] The dissenting opinion, though, criticized the majority's position, that it left the door open "*to foreign parties to commercial contracts concluded with a State-owned company to switch their contractual disputes from normal jurisdiction of international commercial arbitration tribunals or state courts to BIT Tribunals"*.[302]

As a result, whenever a treaty claim is submitted before a treaty tribunal the fundamental basis of the claim should be examined, whether it is the contract or the treaty. If the respondent succeeds in proving that the cause of action is indeed the contract, then the tribunal should in fact stay its proceedings and defer the case to the other forum chosen by the parties in the contract.[303] Or in any case, whenever it is concluded that the outcome of the first-seized forum, is of relevance to the tribunal, the latter should still stay the proceedings until the first award is rendered, in order to assess the impact it will have on its reasoning. For instance, in the CME case a Service Agreement was concluded between CET and CNTS, two irrelevant parties to the investment arbitration proceedings. The termination of this agreement was challenged by CNTS, the investment of CME, before the Czech courts. Obviously, this case does not impose any obstacle to the jurisdiction of the investment tribunal, however the decision of the court would be crucial in determining whether CME's treaty claims could stand. In particular, the Prague Regional Commercial Court held a decision in favour of CNTS accepting the exclusivity of the relationship between CET and CNTS, and therefore, the amendment of the agreement did not affect CNTS's investment. However, if another ruling was upheld, then CET's termination of the agreement might not be unlawful, and as

[301] *Eureko,* paras. 92-114, 250.
[302] *Eureko*, Dissenting Opinion, para. 11.
[303] Douglas, p.265.

a consequence CNTS could not challenge the violation of the agreement, and as a result CME, which invested in CNTS, might not have been able to submit its claims to arbitration.[304]

In conclusion, it becomes obvious that even in cases of contracts being involved in investment arbitration, the arbitral tribunal should think twice before blindly proceeding with granting its jurisdiction to rule on the merits, but on the other hand, it should consider, whether any grounds exist for staying its proceedings until another *forum* renders a decision.

[304] Douglas, p.268.

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