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DISSERTATION / DOCTORAL THESIS

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"Multiparty Proceedings, Consolidation, and Mass Claims in Investment Arbitration: Methods and Approaches Applied for Establishing Consent and Related Issues"

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Abstract

Das Ziel der vorliegenden Dissertation ist, die effizientesten Methoden und Konzepte zu identifizieren, die für die Feststellung einer Zustimmung zur konsolidierten Entscheidung von zusammenhängenden Mehrparteienansprüchen als Instrument zur Koordinierung paralleler Einzelinvestitionsverfahren angewendet werden müssen.

Schiedsparteien vereinbaren kaum die Geltendmachung ihrer zusammenhängenden Ansprüche in einem einzigen Schiedsverfahren in der Schiedsvereinbarung oder nach der Einleitung der konkreten Schiedsverfahren. Widersprechen einige Parteien (oder eine Partei) der gemeinsamen Entscheidung von Streitigkeiten, muss ein Schiedsgericht feststellen, ob die Zustimmung aus der Schiedsvereinbarung, den Investitionsverträgen und den anwendbaren *Investitionsabkommen*, die die zugrunde liegenden Ansprüche regeln, doch impliziert werden kann. Die Dissertation legt nahe, dass eine solche Feststellung abhängig von der Art des Mehrparteien-Investitionsschiedsverfahrens (Mehrparteien-Schiedsverfahren *ab initio*, obligatorische Konsolidierung von Verfahren *stricto sensu*, und Massenklagen) erfolgen muss. Dies ergibt die angemessenste und auf den Fall zugeschnittene Lösung, die Interessenausgleich der Parteien und öffentliche Ordnung berücksichtigt.

Zunächst bestimmt die o.g. Typologie, ob die jeweilige Entscheidung über die gemeinsame Streitbeilegung eine Frage der Zuständigkeit, des Prozesses oder der Zulässigkeit ist. Weiters hängen die Methoden zur Auslegung der Schiedsvereinbarung in Bezug auf Mehrparteien-Schiedsverfahren sowie die entsprechenden problematischen Aspekte auch von der jeweiligen Art der Mehrparteien-Schiedsverfahren ab.

Zum Beispiel kann bei einem Mehrparteien-Schiedsverfahren *ab initio* die Frage auftreten, ob Streitigkeiten aus mehreren Investitionsverträgen unter mehreren *Investitionsabkommen* in einem einzigen Verfahren gelöst werden können. In zwei NAFTA-Konsolidierungsfällen stellte sich die Frage, ob das Fehlen des Einvernehmens der Parteien auch dann die Entscheidung über den Antrag auf Konsolidierung beeinflussen muss, wenn die Verfahrensregeln eine Konsolidierung ohne Zustimmung aller Parteien im Rahmen der prozessualen Ermessensbefugnis des Schiedsgerichts zulassen. Der problematischste Aspekt von Massenklagen (Fall *Abaclat*) war, ob die Bestimmung der Zuständigkeit für tausende Kläger als Gruppe eine Frage der Zulässigkeit ist und somit in die prozessuale Ermessensbefugnis des Schiedsgerichts fällt.

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INTRODUCTION

1. This doctoral thesis is submitted to the University of Vienna in accordance with the requirements of the PhD Program for obtaining the *Doctor iuris* degree.

Subject of Research

2. Nowadays, foreign investments are often made by investors from numerous nationalities and are structured in the form of complex projects organised under multi-layered contractual arrangements. Regulatory state measures may affect the multitude of investors within the same economic sector. Thus, in the event that investment projects and/or state measures become the subject of investor-state arbitration, they may be governed by several investment agreements and/or bilateral investment treaties (BITs) and/or involve multiple claimants – the phenomenon known as multiparty investment arbitration.[1]

[1] L. Carroll, 'Parallel Proceedings in Investment Arbitration: Moving Forward after Orascom TMT Investments V. Algeria', 23 *Australian International Law Journal* (2018) 147; B. Cremades, 'Arbitration Under the ECT and Other Investment Protection Treaties: Parallel Arbitration Tribunals and Awards', 3 *Transnational Dispute Management* (2005) 1, 2; B. Cremades, 'Parallel Proceedings in International Arbitration', 24 *Arbitration International* (2008) 507-509; Y. Derains and J. Sicard-Mirabal, *Introduction to Investor-State Arbitration* (2018) 66; M. Dimsey, *The Resolution of International Investment Disputes: Challenges and Solutions* (2008) 126; R. Hansen, 'Parallel Proceedings in Investor-State Treaty Arbitration: Responses for Treaty-Drafters, Arbitrators and Parties', 73 *The Modern Law Review* (2010) 523, 524; V. Heiskanen, 'And Others: Mass Claims in ICSID Arbitration', in M. Kinnear, G. Fischer, J. Almeida, L. Torres, and M. Bidegain (eds), *Building International Investment Law: The First 50 Years of ICSID* (2015) 615; G. Kaufmann-Kohler, G. de Chazournes, V. Bonnin, and M. Mbengue, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', 21 *ICSID Review – Foreign Investment Law Journal* (2006) 63; G. Kaufmann-Kohler, 'Multiple proceedings – New Challenges for the Settlement of Investment Disputes', in A. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation – The Fordham Papers 2013* (2014) 3-6; M. Kinnear, 'Consolidation of Cases at ICSID', in N. Kaplan and M. Moser (eds), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* (2018) 243, 244; C. Lamm, H. Pham and A. Meise Bay, 'Consent and Due Process in Multiparty Investor-State Arbitrations', in C. Binder, U. Kriebaum, A. Reinisch, and S. Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) 54; A. Parra, 'Desirability and Feasibility of Consolidation: Introductory Remarks', 21 *ICSID Review - Foreign Investment Law Journal* (2006) 132, 133; M. Pryles and J. Waincymer, 'Multiple Claims in Arbitration Between the Same Parties', in A. Van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference* (2009) 437, 438; A. Reinisch, 'The Issues Raised by Parallel Proceedings and Possible Solutions' in M. Waibel, A. Kaushal, K. Chung, and C. Balchin (eds), *The Backlash against Investment Arbitration* (2010) 113, 114; E. Romero, 'Consolidation and Parallel Proceedings', in M. Kinnear, G. Fischer, J. Almeida, L. Torres, and M. Bidegain (eds), *Building International Investment Law: The First 50 Years of ICSID* (2015) 600, 601; C. Schreuer, 'Multiple Proceedings', in A. Gattini, A. Tanzi, and F. Fontanelli (eds), *Principles of Law and International Investment Arbitration* (2018) 152; M. Waibel, 'Coordinating Adjudication Processes', in Z. Douglas, J. Pauwelyn, and J. Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (2014) 501; H. Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration* (2013) 17, 18; H. Wehland, 'The Regulation of Parallel Proceedings in Investor-State Disputes', 31 *ICSID Review – Foreign Investment Law Journal* (2016) 576, 577; K. Yannaca-Small, 'Consolidation of Claims: A Promising Avenue for Investment Arbitration?', in OECD (ed.), *International Investment*

3. Claimants may choose two procedural scenarios in this case: either to pursue their claims collectively from the outset or to initiate parallel arbitrations individually, which potentially raises question of whether parallel proceedings can be consolidated.[2] If a party objects to the joint resolution of multiple claims in either of these scenarios, the tribunal has to establish whether the scope of the arbitration agreement allows adjudication of related disputes in a single arbitration.[3]

4. Joint resolution of disputes arising out of the same facts is commonly viewed as one of the tools for precluding parallel proceedings, which can promote the efficiency and integrity of arbitration by saving resources and avoiding incoherency within the application of investment treaty standards.[4]

5. Multiparty investment arbitration evolved in three major stages corresponding with the three types of multiparty investment arbitration from the perspective of the principles and methods applied for the interpretation of consent with regard to the multiparty aspect:

1) Multiparty arbitration *ab initio*;

2) Mandatory consolidation *stricto sensu*;

Perspectives (2006) 226; K. Yannaca-Small, 'Parallel Proceedings', in P. Muchlinski, F. Ortino, and C. Schreuer (eds), *The Oxford Handbook of International Investment Law* (2008) 1009, 1010; G. Zarra, *Parallel Proceedings in Investment Arbitration* (2017) 2, 3.

[2] Cremades, 'Parallel Proceedings in International Arbitration', above n. 1, 509; Hansen, above n. 1, 528; V. Heiskanen, '8 Aristotle's Statistics: Consistency and Accuracy in International Mass Claims', in A. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation – The Fordham Papers 2013* (2014) 112, 113; Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 64, 65; Kaufmann-Kohler, 'Multiple proceedings – New Challenges for the Settlement of Investment Disputes' above n. 1, 4; C. Lamm, E. Hellbeck, and O. Saka, 'Mass Claims in Investment Arbitration', in B. Hanotiau and E. Schwartz (eds), *Class and Group Actions in Arbitration* (2016) 115; Schreuer, *The ICSID Convention: A Commentary* (2009) 163; C. Schreuer, above n. 1, 156, 157; Lamm, above n. 1, 55;

[3] B. Cremades, 'Parallel Proceedings in International Arbitration', above n. 1, 507, 508.

[4] B. Cremades, ibid., 534; Hansen, above n. 1, 548; Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 81-85; Kaufmann-Kohler, 'Multiple proceedings – New Challenges for the Settlement of Investment Disputes' above n. 1, 6, 7; C. Knahr, 'Consolidation of Proceedings in International Investment Arbitration', in C. Knahr, C. Koller, W. Rechberger, and A. Reinisch (eds), *Investment and Commercial Arbitration – Similarities and Divergences* (2010) 4; Lamm, above n. 1, 68, 69; L. Low and J. Pryce, 'Consolidation of Proceedings in Investor-State Arbitration: From the Iran-U.S. Claims Tribunal to the NAFTA', in C. Drahozal and C. Gibson, *The Iran-U.S. Claims Tribunal at 25: The Cases Everyone Needs to Know for Investor-State & International Arbitration* (2007) 136; L. Radicati di Brozolo and F. Ponzano, 'Representative Aspects of "Mass Claim" Proceedings in Investor-State Arbitration', in B. Hanotiau and E. Schwartz (eds), *Class and Group Actions in Arbitration* (2016) 129; Schreuer, above n. 2, 383; Y. Shany, '*Consolidation and Tests* for *Application*: Is *International Law Relevant*?', 21 *ICSID Review – Foreign Investment Law Journal* (2006) 135, 136;

3) Mass claims investment arbitration.

6. The purpose of this thesis is to identify the methods and principles applied for the interpretation of consent in various multiparty scenarios (as this is the central consideration in deciding whether related claims can proceed on a collective basis). The focus of this thesis will be centred on the following research questions:

1) How does the nature of the decision on the joint adjudication of related claims (whether it is a matter of jurisdiction, procedure, or admissibility) affect the interpretation of consent, subject to the type of multiparty investment arbitration?

2) What are the methods and approaches to the interpretation of consent and related issues depending on the type of multiparty investment arbitration?

7. The scope of this thesis is limited to the collective resolution of related *treaty* claims that have been submitted to *investment* tribunals, with the exclusion of domestic litigation and commercial arbitration whereby investor-state disputes can be resolved in parallel with treaty arbitration. Thus, the respective treaty tools for coordination of the parallel proceedings (*e.g.*, umbrella clause, fork-in-the-road provision) shall not be addressed in this study; recent publications on parallel proceedings in investment arbitration [5] discussed these tools in detail, whereas the specific issue of consent did not receive an adequate attention.

Structure

8. Corresponding to the issues that must be addressed in order to answer the chosen research questions, this thesis' structure aims to highlight how the approaches to interpretation of consent evolved and varied depending on the type of multiparty investment arbitration.

9. ***The first (introductory) chapter*** is an overview of the ***basic concepts and rules*** that are of relevance in each type of multiparty investment dispute. The existing ***consensus on***

[5] S. Strong, *Class, Mass, and Collective Arbitration in National and International Law* (2013); Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*, above n. 1; G. Zarra, above n. 1.

admissibility of multiparty claims in investment arbitration as a matter of principle will be explained within this chapter.

10. ***The nature of the decision*** to authorise a collective dispute resolution will be discussed next, since the interpretation of consent is contingent upon a tribunal's standing or direct instructions in the applicable rules on whether it is a matter of jurisdiction, procedure, or admissibility.

11. ***The typology of consent*** to the joinder of claims depends on its form (*explicit and implied*) and time of effectuation (*general and specific*);[6] this shall be discussed further as it predetermines the methods of interpretation as well.

12. ***The second chapter*** presents how the above concepts were understood and applied by tribunals for determining the scope of consent (depending on the type of multiparty arbitration).

13. ***The third chapter*** highlights specific issues identified with regard to each type on the basis of case law with a focus on the analysis and critical assessment off the most controversial procedural aspects.

14. To outline the contents of the ***descriptive and analytical*** chapters in more detail, the ***first type of multiparty cases*** represents the most common scenario; where related disputes are adjudicated jointly by the same tribunal ***from the outset*** (***multiparty arbitration ab initio***). Claimants in these cases were involved in the same investment project and/or affected by the same state measure.

15. This line of cases established the basic criteria for deciding whether related claims can be adjudicated jointly and ascertained the role, legal nature, and methods of determining consent in multiparty investment arbitration. Most importantly, it was established that the joint resolution of claims is the question of the scope of *consent* and, as such, is a *matter of jurisdiction*.

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[6] Cremades, 'Parallel Proceedings in International Arbitration', above n. 1, 535, 536; Lamm, above n. 1, 55-57; K. Nakajima, 'Beyond *Abaclat*: Mass Claims in Investment Treaty Arbitration and Regulatory Governance for Sovereign Debt Restructuring', 19 *Journal of World Investment and Trade* (2018) 219; S. Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator', 23 *Leiden Journal of International Law* (2010) 411; A. Steingruber, 'Abaclat and Others v Argentine Republic: Consent in Large-scale Arbitration Proceedings', *27 ICSID Review – Foreign Investment Law Journal* (2012) 238-243*;* A. Steingruber, *Consent in International Arbitration* (2012) 212-215.

16. The focus of the analysis will be centred on factors considered for establishing a particular type of consent discussed in the first chapter (such as, connectivity of claims, efficiency, compatibility of the applicable procedural rules and/or investment treaties). It will demonstrate that the application of these criteria requires a differentiation between the types of connectivity between the claimants (same investment, group of companies, joint ventures, claims arising out of the same state measure but pursued under different BITs). It will also be identified whether and to what extent the respondent's objection to multiplicity of claimants can affect the reasoning of the tribunal.

17. To contrast the collective pursuit of related claims *ab initio* to separate concurrent arbitrations with non-identical tribunals and governed by different procedural rules, the most discussed attempt to seek consolidation of such arbitrations in *CME* and *Lauder* will be addressed further. In these cases, the alternative legal instruments for avoiding duplication of proceedings (*res judicata* and *lis pendens* defences) were rejected which resulted in the contradictory awards illustrating the most undesirable outcome of parallel proceedings on policy level.

18. These conflicting rulings revived the discussion of ***mandatory consolidation stricto sensu*** – ***the second type of multiparty investment arbitration*** which will be discussed in further detail in the following section. In this scenario, the decision on consolidation is viewed as a *procedural matter,* in which a consolidation tribunal is empowered by the applicable rules to order consolidation within the procedural discretion. Thus, parallel proceedings can be consolidated upon the request of only one party, that is, in the absence of the parties' unanimous agreement.

19. The practice of mandatory consolidation is represented so far by the two NAFTA cases (*Canfor* and *Softwood*) whereby consolidation tribunals reached opposing decisions on the respondent's request for consolidation.

20. Although the parties' consent was not formally required, the claimants' objections to consolidation were considered by both consolidation tribunals to a certain extent. It is important in the context of this study to outline the specific concerns of the claimants that were factored by the tribunals in deciding whether a consolidation request can be granted. Particularly, the tribunals discussed (although approached differently) various controversial issues such as, confidentiality, party autonomy, risk of inconsistent awards, appointment of arbitrators, and desynchronisation of consolidated proceedings.

21. It will be demonstrated further how a tribunal's duty to balance the two fundamental opposing values of arbitration: party autonomy, on the one hand and efficiency and fairness of dispute resolution, on the other – was implemented by the consolidation tribunals.

22. In order to put the NAFTA consolidation in context, an overview of non-NAFTA consolidation rules will illustrate whether and how some of the issues raised in the NAFTA cases are addressed in other instruments of investment law (including a novel consolidation provision in the recent Proposals for Amendment of the ICSID Rules).

23. Lastly, the sections dealing with the ***third type of multiparty arbitration*** address ***mass claims*** as the latest development in multiparty investment arbitration illustrated by the *Abaclat* case. Approaching consent to mass claims as a matter of *admissibility* (and not of jurisdiction) in this case, was an innovative method of interpreting consent which therefore allowed the first ICSID mass arbitration to proceed as such.

24. The central question raised by the 'mass' element was how the procedural implications of permitting mass claims (de-individualized treatment of claims and non-participation of the claimants in the proceeding) affect the determination of consent to a *mass* arbitration.[7]

25. These deviations from the 'normal' multiparty cases will be discussed predominantly from the perspective of the respondent's consent, in order to ascertain whether the state's general implied consent to such adaptations by consenting to ICSID arbitration can be established as a matter of admissibility.

26. The non-participation of the claimants in the proceedings raised concerns about consent of the claimants. Investors with relatively small claims could only resort to the ICSID arbitration by authorising a representative to act on their behalf in the arbitration. The condition for representation was the waiver of the claimants' right to participate in the proceeding and to sue the representative. Whether such limitations as well as establishing jurisdiction over the claimants on a group basis (instead of individual determination of

[7] Nakajima, above n. 6, 217, 218; E. Obadia, 'Mass Arbitrations in International Investment Cases', in B. Hanotiau and E. Schwartz (eds), *Class and Group Actions in Arbitration* (2016), 106; M. Waibel, above n. 1, 506, 507.

jurisdiction *ratione personae*), are compatible with the ICSID Convention, is another issue to be tackled.

27. By means of the comparative analysis, it is appropriate to outline how the issues caused by the above procedural adaptations are resolved in other comparable types of international arbitration (mass claims tribunals and class arbitration) conducted – contrary to *Abaclat* – under specialised institutional or *ad hoc* rules. The lack of this fundamental element in *Abaclat* must be factored in the interpretation of consent to mass arbitration under the ICSID Convention. This obvious *lacuna* also gives an idea whether an ICSID tribunal may authorise such adaptations as a matter of procedural discretion and thereby determine that they fall within the scope of the respondent's consent.

Methodology

28. This research is conducted under the standard methodology applied for academic research in international law based on the analysis of relevant awards rendered by investment tribunals, other legal sources (investment treaties and procedural rules governing investment arbitration) and academic literature.

29. It is appropriate for the subject matter of the present research to apply the method of comparative analysis to ascertain whether and to what extent the tools for resolving consent-related issues of multiparty proceedings in other types of dispute resolution (such as domestic litigation, commercial arbitration, and mass claims commissions) can be imported into the domain of investor-state arbitration.

30. From the comparative perspective, it will also be highlighted how the identified approaches to interpreting consent in multiparty investment disputes cater for the unique two-faceted nature of investment arbitration, combining the elements of private and public law (especially, in procedural matters). The findings of this study, hence, can be a useful source of reference also in investor-state disputes administered by arbitral institutions under procedural rules that were originally designed for private arbitration with a view to accommodate the *sui generis* nature of treaty arbitration and particularly its public element.

Chapter 1: Conceptual Issues Underlying the Interpretation of Consent to Multiparty Investment Arbitration

31. An overview of the pertaining arbitration practice must be preceded with an explanation of the conceptual issues, which are factored into the interpretation of consent in every type of multiparty investment arbitration. Depending on whether some of these issues arise throughout the course of an arbitration, they are usually addressed by a tribunal in the same sequence of which they are discussed in this chapter.

32. The starting point in establishing the scope of consent regarding a multiparty aspect, is the absence of multiparty provisions in the ICSID Convention[8] and in the applicable BIT.[9] This *lacuna* is the primary reason of controversies and ambiguities underlying the interpretation of consent to an aggregation of similar claims.[10]

33. Secondly, another problematic aspect of consent in multiparty cases is the nature of the respective decision: is it a matter of jurisdiction, procedure, or admissibility? These concepts should be discussed both in the context of investment arbitration in general and, in particular, the role they play in multiparty cases.[11]

34. Thirdly, as elaborated on further, the *typology of consent* must also be taken into account in deciding whether multiple claims can be adjudicated in a single arbitration. Thus, depending upon the mode of expression, consent is either given by the parties after the initiation of the proceedings or can only be deconstructed based upon the parties' conduct and contractual arrangements, surrounding their investments (***explicit*** and ***implied*** consent, respectively).[12] This classification, in turn, predetermines the methods of interpretation of consent in any given case. The differentiation between ***general*** (pre-dispute) and ***specific*** (related to a concrete investment)[13] consent serves the same practical purpose.

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[8] See paras 123, 126, 129 *infra*.

[9] See paras 126, 128 *infra*.

[10] See para. 35 *infra*.

[11] See paras 46 *et seq. infra*, 313 *et seq. infra.*

[12] See para. 88 *infra*.

[13] See para. 82 *et seq. infra.*

1.1 Lack of Multiparty Provisions in the ICSID Convention and in BITs

35. Unlike most of the modern arbitration rules, the ICSID Convention does not include provisions regulating multiparty proceedings which is 'an evident *lacuna* in the ICSID procedural system'.[14] Moreover, the jurisdictional Article 25(1) of the Convention describes the investor as 'a national of another Contracting State' in singular form, which is commonly a starting point in the debate on the possibility and desirability of multiparty investment arbitration.[15] The term 'parties to the dispute' in plural does not bring certainty either as it is not clear whether the word 'parties' refers to bi- or multipartite disputes.[16]

36. Nowadays, it is beyond doubt that – as a matter of principle – multiple claimants may pursue their claims under the ICSID Convention in a single arbitration.[17] Already at the stage of *traveaux preparatoires* an expert suggested that '[…] there might well be more than just two parties to a dispute […]', however, this proposition was not reflected in the final text.[18]

37. Another indication that the term 'national' encompasses multiple claimants is the definition of 'National of another Contracting State' in Article 25(2), as 'any natural person […] *and* […] any juridical person which had the nationality of a Contracting State other than the State party to the dispute […] *and* any juridical person which had the

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[14] Zarra, above n. 1, 80.

[15] Schreuer, above n. 2, 163; Lamm, above n. 1, 60; Lamm, above n. 2, 117; Di Brozolo, above n. 4, 128, 129; Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 248; Romero, above n. 1, 602; Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 91; A. Crivellaro, 'Consolidation of Arbitral and Court Proceedings in Investment Disputes', 4 *The Law and Practice of International Courts and Tribunals* (2005) 385.

[16] Article 25(1) of the ICSID Convention: 'The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally'.

[17] Schreuer, above n. 2, 163; Obadia, above n. 7, 107; Lamm points to the consistent practice of ICSID tribunals with regard to admissibility of multiparty claims under BITs that are silent on multiparty arbitration in the context of the *Abaclat* mass proceeding:

'The ICSID Convention does not specifically mention any type of collective redress proceedings, nor does it contain any rules on multiparty proceedings. Article 25 merely requires the parties' written consent to submit the dispute to ICSID arbitration. While this requirement arguably bars opt-out representative proceedings, in which members of the class have not expressed their consent in writing, or may not even be aware of the proceeding, it does not exclude multiparty proceedings in which each party has consented in writing.

The practice of investment tribunals confirms this understanding. Thus, various tribunals have affirmed jurisdiction over claims of multiple and unaffiliated parties […]'. Above n. 2, 117.

[18] Schreuer, above n. 2, 163.

nationality of the Contracting State party to the dispute […] which […] the parties have agreed should be treated as a national of another Contracting State'.[19] Bishop comments to this effect that '[t]he issue of multiple parties is implicitly addressed by the *rationae personae* requirements' embedded in this provision:

'Because of this formulation, the possibility exists for both the local company and its foreign shareholder, or multiple foreign shareholders, to bring a claim together in the same ICSID case, so the general framework seems to permit a range of potential claimants to bring ICSID claims. At a minimum, the general legal framework certainly does not clearly define a single proper claimant'.[20]

38. In support of the interpretation favouring claims by multiple investors, Crivellaro cited the following sentence in Article 25(1) of the ICSID Convention: 'When the parties have given their consent, no party may withdraw its consent unilaterally'. This sentence '[…] provides that such consent, once given, is binding, and that it becomes irrevocable once it is accepted by the other party' so that '[…] at least a temporary consolidation is achieved when both parties have expressed their consent to this form of dispute resolution […] and no other forum is competent'.[21]

39. The same authority also argues that '[…] Article 26 seems to achieve consolidation at least temporarily as it provided that only one procedure may be pending in relation to a certain dispute':[22]

'Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting

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[19] Article 25(2) of the ICSID Convention. Emphasis added. The provision reads as follows: "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

[20] R. Bishop, 'Multiple Claimants in Investment Arbitration: Shareholders and Other Stakeholders', in PCA (ed), *Multiple Party Actions in International Arbitration* (2009) 240, 241.

[21] Crivellaro, above n. 15, 385.

[22] Ibid.

State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention'.[23]

40. Kinnear comments on the phrase 'to the exclusion of any other remedy' in a similar way:

'As a result, once the parties have given their consent to ICSID arbitration, they could no longer seek relief from another national or international forum'.[24]

41. Although this provision is designed to prevent adjudication of treaty disputes in parallel proceedings outside the ICSID system (for example, in domestic courts or by means of commercial arbitration),[25] it still can be seen as an expression of the general principle favouring aggregate resolution of related disputes.

42. The above statements have been confirmed in practice of ICSID and non-ICSID tribunals that will be discussed further in the second chapter.[26] The pertaining cases demonstrate that, if consent is based on the BIT(s) and the respondent objects to multiplicity of claimants, the tribunal's task is to establish whether the scope of the state's general consent incorporates multiparty arbitration. Tribunals consistently confirmed that the term 'national' in the singular form in the ICSID Convention also covers multiple investors.[27] Hence, '[a]s long as each individual participating in the claim meets the applicable jurisdictional requirements, there is no bar to registering such cases'.[28]

43. The recent comments summarising the practice of investment tribunals confirm admissibility of multiparty proceedings in general. For example, Di Brozolo observed that:

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[23] Article 26 of the ICSID Convention.

[24] Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 248, referring to Dimsey, above n. 1, 127-128; J. Voss, *The Impact of Investment Treaties on Contracts Between Host States and Foreign Investors* (2011) 298-301.

[25] Schreuer, above n. 2, 351.

[26] See paras 123 *et seq*., 342 *infra*.

[27] Schreuer, above n. 2, 163; Lamm, above n. 1, 59; Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 249, 250; See also Proposals for Amendment of the ICSID Rules, Working Paper 1, Volume 3 (2 August 2018) available at: https://icsid.worldbank.org/sites/default/files/publications/WP1_Amendments_Vol_3_WP-updated-9.17.18.pdf (last visited 23 December 2021) 833: 'Tribunals have consistently found that the ICSID Convention […] allow multiparty proceedings and current procedural rules have accommodated such claims. the ICSID Convention and its procedural rules 'allow multiparty proceedings and current procedural rules have accommodated such claims'.

[28] Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 245.

'The conclusion that can be drawn from investment jurisprudence is therefore that there is no obstacle of principle to multiple claimants bringing the same arbitration, unless there is an explicit exclusion of this possibility in the relevant instruments'.[29]

44. The acceptance of multiparty claims within the ICSID framework was confirmed in the Proposals for Amendment of the ICSID Rules '[…] that clarified current practice in multiparty cases and reaffirm that the rules apply in the same manner to a single claimant or respondent as they do to multiple claimants or respondents'.[30] In particular, the proposed rules stipulate that: '[t]he Request may be filed by one or more requesting parties, or filed jointly by the parties to the dispute'[31], as well as, '[…] a requesting party may notify the Secretary-General in writing of the withdrawal of the Request or, if there is more than one requesting party, that it is withdrawing from the Request'.[32]

45. Such an affirmative stand on multiparty arbitration in the ICSID system can be contrasted with non-ICSID investment arbitration, especially when the related claimants of different nationalities resort to arbitration under several BITs with different arbitration rules. In this case, where investors choose to file their claims separately under each BIT, there is no tenable solution to avoid duplication of proceedings. This regulatory *lacuna* bears the risk of inconsistent awards if a party is opposed to consolidation as most strikingly demonstrated in *CME/Lauder* disputes.[33]

1.2 Nature of the Decision on the Joint Adjudication of Claims (Jurisdiction, Procedure, Admissibility)

46. The modalities of tackling a multiparty element of consent are contingent upon the approach to the *nature* of the respective decision – namely, whether it is a matter of jurisdiction, procedure, or admissibility. Therefore, the interplay between these three concepts must be discussed in more detail to identify the most adequate approach towards

[29] Di Brozolo, above n. 4, 133.

[30] 2018 Proposals for Amendment of the ICSID Rules, above n. 27, 835.

[31] Proposals for Amendment of the ICSID Rules, Working Paper 6 (12 November 2021), Rule 1(2) of the ICSID Institution Rules, available at: https://icsid.worldbank.org/sites/default/files/documents/amended_rules_en.pdf (last visited 23 December 2021), 19.

[32] Ibid., Rule 8, 23.

[33] See paras 31 *et seq. infra.*

each type of multiparty arbitration and/or highlight the respective problematic aspects related to consent based on the tribunals' practice.

47. In principle, consent – along with *ratione personae* and *ratione materiae* – is *per se* one of the elements of jurisdiction.[34] Its fundamental role in establishing jurisdiction of the investment tribunals was described by Schreuer as follows:

'Like any form of arbitration, investment arbitration is always based on an agreement. Consent to arbitration by the host State and by the investor is an indispensable requirement for a tribunal's jurisdiction. Participation in treaties plays an important role in the jurisdiction of tribunals but cannot, by itself, establish jurisdiction. Both parties must have expressed their consent'.[35]

48. The prevailing jurisdictional approach,[36] illustrated by the case overview, is in line with this basic notion of consent. The question of whether the scope of *general consent* in the treaty covers claims by multiple investors was addressed as a matter of jurisdiction by default (*i.e.*, without articulating it or explaining why). However, when a *specific consent* regarding the concrete claimants and investments needs to be established, tribunals may view it as a matter of procedure (*Noble Energy*)[37] or admissibility (*Abaclat*).[38]

49. The tribunal in *Erhas* was even split over the nature of the decision to dismiss the collective claim, in that the dissenting arbitrator pointed that 'entirely unrelated claims' were inadmissible although the tribunal had jurisdiction.[39] The majority of the tribunal viewed it as the jurisdictional matter of consent, which did not exist because the 'claims

[34] Schreuer, 'Consent to Arbitration', in Muchlinski, above n. 1, 830 *et seq.*; D. Williams, 'Jurisdiction and Admissibility', in Muchlinski, above n. 1, 871; Z. Douglas, *The International Law of Investment Claims* (2009) 74; P. Dupuy, 'Preconditions to Arbitration and Consent of States to ICSID Jurisdiction', in Kinnear, *Building International Investment Law: The First 50 Years of ICSID*, above n. 1, 218, 219.

[35] Schreuer, ibid., 831.

[36] See also para. 313 *infra*.

[37] *Noble Energy, Inc. and Machalapower Cia. Ltda. v The Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008, para. 188.

[38] *Abaclat and Others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, paras 489-492.

[39] Di Brozolo, above n. 4, 131.

being entirely unrelated, raised by unrelated claimants, and in relation to different unrelated investments […] could not be heard jointly'.[40]

50. In practice, the departure from the jurisdictional approach allows a tribunal to treat the requirement of consent as optional (*Noble Energy*)[41] and even to bypass the task of examining the fulfilment of other jurisdictional requirements under the ICSID Convention as a pre-condition for competence of the tribunal (*Abaclat*).[42]

1.2.1 Procedure *vs* Jurisdiction

51. In *Noble Energy*, the tribunal ruled that, whether the claims under different instruments with an ICSID arbitration clauses can be adjudicated together, is the question of the conduct of the proceeding by analogy with consolidation and can be decided by the tribunal '[…] in the exercise of its general procedural powers'.[43] Although the tribunal noted *a contrario* that the consent was present 'in any event', it viewed consent as a 'controversial issue' and not as the key prerequisite for the tribunal's competence:[44]

'It is a controversial issue whether the consent of the parties is required to consolidate separate proceedings. Whether or not consent is required to consolidate separate proceedings can be left open here. In the present case, there is in any event an implied consent to have the pending disputes arising from the same overall economic transaction resolved in one and the same arbitration'.[45]

52. Under this approach, not only the existence of consent but also whether it is required at all, is left for the tribunal to decide. However, in the absence of consent of all parties to the joinder of claims, procedural approach is problematic from the perspective of a tribunal's competence (although, at least in one instance, it is advocated in literature in

[40] Obadia, above n. 7, 110, referring to *Erhas Dis Ticaret Ltd. Sti and others v Turkmenistan*, Award, 8 June 2015, unpublished.

[41] See paras 51, 52, 314 *infra.*

[42] See paras 58, 279, 280, 579-581 *infra.*

[43] *Noble Energy*, above n. 37, paras 188, 190; see also Obadia, above n. 7, 108.

[44] See also paras 314, 318-320 *infra.*

[45] *Noble Energy*, above n. 37, para. 194.

the context of the ICSID mass claims concerning sovereign debt restructuring).[46] For example, the tribunal in *UPS*[47] emphasised that jurisdiction must be established before the tribunal may rely on its procedural discretion by rejecting an attempt of *amici curiae* petitioners[48] to invoke the respective provision in the UNCITRAL Arbitration Rules:[49]

'While the provision is plainly important, it is about the procedure to be followed by an arbitral tribunal in exercising the jurisdiction which the parties have conferred on it. It does not itself confer power to adjust that jurisdiction to widen the matter before it by adding as parties persons additional to those which have mutually agreed to its jurisdiction or by including subject matter in its arbitration additional to what which the parties have agreed to confer'.[50]

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[46] See Nakajima, above n. 6, 245: '[…] Article 44 of the ICSID Convention should be re-interpreted to allow mass and collective procedures, but with the mechanism of stay of proceedings that can be triggered when a debt restructuring is duly negotiated. Such a reinterpretation is possible by way of the context created by recent IIAs containing a public debt annex, and/or of the general principles of law derived from private bankruptcy law as one of the 'relevant rules of international law.' With the conception that investment treaty arbitration constitutes a supplementary leverage to secure an orderly formation of debt restructuring, it is argued that arbitration may play a complementary but indispensable role in the governance of sovereign debt workouts. While recognising that this approach will not constitute a panacea providing an integral solution to the problems arising out of sovereign defaults, it still pursues an adaptation of the mechanism within the existing system of international law of foreign investment and of sovereign debt, however incomplete they may be'.

[47] *United Parcel Service of America Inc. v Government of Canada*, ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001, para 3; Lamm, above n. 1, 59.

[48] Although the distinction between procedural discretion and jurisdiction as explained in *UPS* and *Methanex* is relevant for the discussed multiparty scenarios, in general, it should be noted that participation of third parties through the mechanism of *amicus curiae* is outside the scope of this research, albeit it can be addressed as one of the topics within a broader understanding of multiparty investment arbitration; See, for example: Obadia, 'Extension of Proceedings Beyond the Original Parties: non-Disputing Party Participation in Investment Arbitration', 22 *ICSID Review - Foreign Investment Law Journal* (2007).

[49] The invoked Article 15 of the 1976 UNCITRAL Arbitration Rules reads as follows: '1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case'.

[50] *UPS*, above n. 47, para 39; The *UPS* tribunal quoted in this regard the statement of the *Methanex* tribunal with which it was fully in accord: 'As a procedural provision ... [article 15(1)] cannot grant the Tribunal any power to add further disputing parties to the arbitration, nor to accord to persons who are non-parties the substantive status, rights or privileges of a Disputing Party. ... The Tribunal is required to decide a substantive dispute between the Claimant and the Respondent. The Tribunal has no mandate to decide any other substantive dispute or any dispute determining the legal rights of third persons. The legal boundaries of the arbitration are set by this essential legal fact. It is thus self-evident that if the Tribunal cannot directly, without consent, add another person as a party to this dispute or treat a third person as a party to the arbitration or NAFTA, it is equally precluded from achieving this result indirectly by exercising a power over the conduct of the arbitration. Accordingly, in the Tribunal's view, the power under Article 15(1) must be confined to procedural matters. Treating non-parties as Disputing Parties or as NAFTA Parties cannot be matters of mere procedure; and such matters cannot fall within Article 15(1) of the UNCITRAL Arbitration Rules.' *Methanex Corp. v United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", 15 January 2001, paras 27, 29.

53. The *UPS* tribunal cited the reasoning of the *Methanex* tribunal (which also had to rule on the participation of non-parties by drawing the line between jurisdiction and procedure):

> 'Article 15(1) is intended to provide the broadest procedural flexibility within fundamental safeguards, to be applied by the arbitration tribunal to fit the particular needs of the particular arbitration. As a procedural provision, however, it cannot grant the Tribunal any power to add further disputing parties to the arbitration, nor to accord to persons who are non-parties the substantive status, rights or privileges of a Disputing Party'.[51]

54. As Kaufmann-Kohler observes on the nature of the decision on consolidation, the fundamental difference between jurisdictional and procedural ruling is that the former is essentially an award (*i.e.*, a final decision on jurisdiction or merits that can be challenged by a party). In contrast, a procedural ruling is aimed at organising proceedings by the tribunal upon its own discretion and cannot be overruled (unless it is a part of an award).[52] Thus, the main practical distinction between procedural and jurisdictional decision is its effect – namely, whether 'the decision can be challenged in courts', 'enforced judicially', or 'binds the arbitral tribunal that rendered it'.[53] The ruling of the tribunal in *Noble Energy* was issued in the form of the 'decision on jurisdiction', clearly demonstrating its effect which goes beyond a procedural order.

55. More importantly in the context of this research, the decision on consolidation cannot determine the 'scope of the arbitration agreement'[54], whereas the *Noble Energy* tribunal dealt exactly with this question.[55]

56. Finally, consolidation '[…] does not put an end to the proceedings and is not capable of doing so […]', as the related proceedings continue in case the request for consolidation with respect to them is rejected.[56] The decision on the lack of jurisdiction, on the contrary,

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[51] *Methanex*, ibid., para. 27; See also Lamm, above n. 1, 59.

[52] Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 100, 101.

[53] Ibid., 99, 100.

[54] Ibid., 101.

[55] *Noble Energy*, above n. 37, para. 51 *supra*.

[56] Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 102.

puts an end to the dispute in general or in relation to the parties that are not covered by consent to arbitration.[57]

1.2.2 Admissibility *vs* jurisdiction

57. In the arbitration practice, there is no consistency on the question of distinction between jurisdiction and admissibility,[58] and tribunals '[…] rather often tended to avoid it'.[59]

58. In *Abaclat*, however, this distinction was substantial for establishing consent in the novel type of multiparty claims with unprecedently large number of claimants that did not allow to establish consent with regard to *each* claimant.[60] The majority of the tribunal ('Majority') ruled that the respondent's consent in the BIT incorporates 'arbitration in the form of collective proceedings' as long as this is the '[…] form of arbitration necessary to give efficient protection and remedy to the investors and their investment'.[61] The 'mass aspect' was viewed as the question of whether the procedural adaptations required 'to give efficient protection' can be adopted by the tribunal within procedural discretion, which is a question of admissibility.[62]

59. In principle, this approach to a multiparty element is in line with the earlier practice to classify non-jurisdictional restrictions as the matters of admissibility.[63] At the same time, it is problematic from the perspective of the scope of a tribunal's competence in investment arbitration and is novel not only in arbitration[64] but also in international law

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[57] Ibid.

[58] Williams, above n. 34, 919; See also on the distinction between jurisdiction and admissibility: V. Heiskanen, 'Ménage à trois? *Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration', 29 ICSID Review – Foreign Investment Law Journal* (2013); Lamm, above n. 2, 116-118.

[59] Heiskanen, ibid., 231.

[60] *Abaclat*, above n. 38, paras 491, 492: '[…] with regard to the "mass" aspect of the present proceedings, the Tribunal considers that the relevant question is not "has Argentina consented to the mass proceedings?", but rather "can an ICSID arbitration be conducted in the form of 'mass proceedings' considering that this would require an adaptation and/or modification by the Tribunal of certain procedural rules provided for under the current ICSID framework? […] Consequently, the Tribunal is of the opinion that the "mass" aspect of the present proceedings relates to the modalities and implementation of the ICSID proceedings and not to the question whether Respondent consented to ICSID arbitration. Therefore, it relates to the question of admissibility and not to the question of jurisdiction'.

[61] *Abaclat*, above n. 38, para. 490.

[62] Ibid., para. 492.

[63] Williams, above n. 34, 920-924.

[64] On approaching mass element as an issue of admissibility in *Abaclat* see: Lamm, above n. 2, 118-122; A. Reinisch, 'Jurisdiction and Admissibility in International Investment Law', 16 *The Law and Practice of International Courts and*

in general. Against this background, it is useful to briefly outline the interplay between jurisdiction and admissibility to clarify the context in which the admissibility approach must be assessed in multiparty cases.

60. Investment tribunals are far from reaching consensus, '[…] on the classification of particular matters as pertaining to jurisdiction or admissibility […]'.[65] The very existence of the distinction can be questioned or characterised as 'fluid'.[66]

61. In *Pan American,* the Tribunal sceptically observed that '[…] there is no need to go into the possible – and somewhat controversial – distinction between jurisdiction and admissibility'.[67]

62. Williams contrasted the lack of consistent approach to the distinction between jurisdiction and admissibility in investment arbitration with the '[…] ICJ jurisprudence, which has developed a clear distinction between the two concepts'.[68] Notably, both terms are mentioned separately in the ICJ Rules of Court:

'Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing as soon as possible, and not later than three months after the delivery of the Memorial'.[69]

63. Academic commentaries mostly do not contradict – and rather supplement each other – but are still quite far from providing one clear and practical definition of admissibility

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Tribunals (2017) 23, 36, 37; H. van Houtte and B. McAsey, 'Abaclat and others v Argentine Republic: *ICSID, the BIT and Mass Claims', 27 ICSID Review – Foreign Investment Law Journal* (2012*)* 233, 234; S. Wordsworth, 'Abaclat and Others v Argentine Republic Jurisdiction, Admissibility and Pre-conditions to Arbitration', 27 *ICSID Review – Foreign Investment Law Journal* (2012) 257-259; Heiskanen, above n. 1, 615, 616.

[65] M. Waibel, 'Investment Arbitration: Jurisdiction and Admissibility', in M. Bungenberg, J. Griebel, S. Hobe, A. Reinisch (eds), *International Investment Law* (2015) 1274.

[66] Ibid., 1214; Reinisch, above n. 64, 23; Heiskanen, above n. 58, 231; J. Paulsson, 'Jurisdiction and Admissibility', in G. Aksen and R. Briner (eds), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (2005) 608 *et seq*.

[67] *Pan American Energy LLC, and BP Argentina Exploration Company v Argentine*, ICSID Case No. ARB/03/13 and *Pan American Production Company, Pan American Sur SRL, Pan American Fueguina, SRL and Pan American Continental SRL v The Argentine Republic,* ICSID Case No. ARB/04/8, Decision on Preliminary Objections, 27 July 2006, para. 54; Reinisch, above n. 64, 22.

[68] Williams, above n. 34, 919.

[69] Article 79 (1) ICJ Rules of Court.

and explaining how exactly it interplays with jurisdiction. For example, Waibel describes admissibility as follows:

'Admissibility refers to the power of the tribunal to examine a case at a given point in time. It concerns the exercise of the tribunal's adjudicative power in relation to one or several specific claims submitted to it (*conditions de recevabilité*)'.[70]

64. The 'classic statement'[71] explaining the difference between jurisdiction and admissibility, was made by Fitzmaurice based on the ICJ case law:

'[T]here is a clear jurisprudential distinction between an objection to the jurisdiction of the tribunal, and an objection to the substantive admissibility of a claim. The latter is a plea that the tribunal should rule the claim to be inadmissible on some ground other than its ultimate merits; the former is a plea that the tribunal itself is incompetent to give any ruling at all whether as to the merits or as to the admissibility of the claim'.[72]

65. In his frequently cited[73] definition Brownlie explains the difference using similar terms:

'Objections to jurisdiction, if successful, stop all proceedings in the case, since they strike at the competence of the Tribunal to give rulings as to the merits or admissibility of the claim. An objection to the substantive admissibility of a claim invites the Tribunal to reject the claim on a ground distinct from the merits – for example, undue delay in presenting the claim. In normal cases the question of admissibility, especially those concerning nationality of the claimant and the exhaustion of local remedies, may be closely connected with the merits of the case'.[74]

66. According to Williams, the distinction between jurisdiction and admissibility is the following:

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[70] Waibel, above n. 65, 1216. Footnotes omitted.

[71] Douglas, above n. 34, 146.

[72] G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points', 33 *British Yearbook of International Law* (1957) 203; See also A. Steingruber, 'Some Remarks on Veijo Heiskanen's Note 'Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration', 29 *ICSID Review – Foreign Investment Law Journal* (2014) 681.

[73] See, for example, Williams, above n. 34, 920; Heiskanen, above n. 58, 233, 237.

[74] I. Brownlie, *Principles of Public International Law* (2008) 475.

'[A]n objection to the admissibility of a claim is the equivalent of pleading that the tribunal should rule the claim to be inadmissible on a ground other than its ultimate merits, whereas an objection to jurisdiction is the equivalent of pleading that the tribunal is incompetent to give any ruling at all, whether that ruling relates to the admissibility of the claim or its merits'.[75]

67. Rosenfeld summarises the above elaborate definitions:

'The concept of admissibility concerns the question whether a court or tribunal may decline to render a decision on the merits for reasons other than a lack of jurisdiction'.[76]

68. Whereas Shany suggests a more functional application of the concept of admissibility:

'If jurisdiction reflects legal power – that is, the power to adjudicate a dispute – then I propose to treat rules of admissibility as pertaining to the terms permitting an international court to decline to exercise its legal powers. In other words, international courts may be authorized not only to decide a legal case, but also to decide not to decide it'.[77]

69. When narrowing down the interplay between admissibility and jurisdiction to investment arbitration, it is necessary to consider its *sui generis* nature, as explained by Waibel:

'Whether a matter pertains to admissibility or jurisdiction may also vary by field. For example, the nationality of claims concerns admissibility in diplomatic protection, but is jurisdictional in investment arbitration'.[78]

70. Heiskanen draws the line between the two concepts in investment arbitration as follows:[79]

'[…] whereas jurisdiction is about the scope of the tribunal's authority, based on the State's consent to arbitrate, admissibility is about the particular claim raised by the claimant. Stated differently, while jurisdiction is about the scope of the State's consent to

[75] Williams, above n. 34, 919.

[76] F. Rosenfeld, 'Arbitral Praeliminaria – Reflections on the Distinction between Admissibility and Jurisdiction after *BG v Argentina*', 29 *Leiden Journal of International La*w (2016) 146.

[77] Y. Shany, *Questions of Jurisdiction and Admissibility before International Courts* (2016) 47.

[78] Waibel, above n. 65, 1218.

[79] Heiskanen, above n. 58, 237.

arbitrate, admissibility is about whether the claim, as presented, can or should be resolved by an international tribunal, which otherwise has found jurisdiction'.[80]

71. With reference to the respective case law, Reinisch observes that investment tribunals uphold this approach and formed a consensus that '[…] while jurisdiction goes to the power of an investment tribunal to decide a case, admissibility relates to the claims put forward in investment arbitration proceedings'.[81]

72. Despite the ambiguous dichotomy of jurisdiction and admissibility characterised by Paulsson as a 'twilight zone',[82] the issues falling within the scope of admissibility can be identified and categorised based on the pertaining case law. For example, Heiskanen suggests applying the test of jurisdiction (*ratione temporis*, *ratione personae*, and *ratione materiae*) to deal with non-jurisdictional issues that are still the prerequisites for a tribunal's competence[83] ('structural analogy'[84]). For example, as illustrated in practice, admissibility *ratione temporis* is understood as the exhaustion of local remedies or 'cooling-off' period as the pre-conditions for filing a treaty claim. Admissibility *ratione personae* hinges upon the issue of effective nationality of the claimant in the context of complex corporate structure and *ratione materiae* relates to the illegality of the investment from the perspective of public policy (*e.g.*, if an investment is tainted by corruption or violation of law).[85]

73. In addition, other authorities mention similar categories of the matters that are dealt with by tribunals from the perspective of admissibility, noting the lack of coherence[86] which may result in erroneous attribution of jurisdictional issues to admissibility. Thus, Rosenfeld observed that '[…] conditions to consent must be interpreted as limitations to jurisdiction' and not as the issues of admissibility which was done by tribunals '[…] on

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[80] Ibid. Footnote omitted.

[81] Reinisch, above n. 64, 23-25.

[82] Paulsson, above n. 66, 609; also referenced to in Waibel, above n. 65, 1219; L. Gouiffès and M. Ordonez, 'Jurisdiction and Admissibility: Are We Any Closer to a Line in the Sand?', 31 *Arbitration International* (2015) 108.

[83] Heiskanen, above n. 58, 237-242.

[84] Ibid., 242.

[85] Ibid., 238-242.

[86] Reinisch, above n. 64, 30 *et seq.*; Waibel, above n. 65, 1213, 1214; Steingruber, above n. 72, 680.

the basis of erroneous definitions, unsupported assumptions or mere policy considerations'.[87]

74. A further complication on the subject is that the ICSID Convention does not mention admissibility which, as summarised by Reinisch, '[…] has led some tribunals to consider the distinction not relevant for ICSID arbitration […]'.[88] The Convention only uses the terms 'jurisdiction of the Center' and 'competence of the Tribunal'[89] that according to Heiskanen, can be contrasted as follows:

'i) 'Jurisdiction' is a general concept; it refers to the tribunal's jurisdictional 'field' ratione temporis, personae or materiae, whereas 'competence' is a particular or specific concept; it refers to the tribunal's competence in a particular case.

(ii) The relationship between the two concepts is asymmetric in the sense that, while competence requires a prior finding of jurisdiction, a finding of jurisdiction does not necessarily entail competence'.[90]

75. In other words, as Steingruber puts it, '[…] there might be cases where a dispute is within the 'jurisdiction of the Centre', but not within the 'competence of the Tribunal'.[91]

76. Clearly, this dichotomy between jurisdiction and competence is effectively identical to the above citations on the distinction between jurisdiction and admissibility. Hence, logically, competence and admissibility can be used interchangeably.[92] Rule 41(2) of the ICSID Arbitration Rules can also be cited in support of this view:

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[87] Rosenfeld, above n. 76, 143, 144.

[88] Reinisch, above n. 64, 26. Footnote omitted.

[89] Article 41 of the ICSID Convention provides as follows:

(1) The Tribunal shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

[90] Heiskanen, above n. 58, 235, 236.

[91] Steingruber, above n. 72, 679.

[92] Heiskanen notes in this regard: '[W]hen taking a decision whether or not a purportedly international claim is admissible, whether *ratione temporis*, *ratione personae* or *ratione materiae*, an international court or tribunal is effectively taking a decision on its competence – and *vice versa*, when taking a decision on its competence, an international court or tribunal effectively determines whether the claim brought before it is admissible in terms of time, person or subject matter'. Above n. 58, 243.

'Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible'.

77. Some tribunals '[…] have considered the reference to "for other reasons" that may lead a tribunal to conclude that a dispute is not within its competence to include issues of admissibility'.[93]

78. In opposition Steingruber, by relying on the ICJ practice,[94] argues that competence and admissibility are distinct due to the principle of Kompetenz-Kompetenz:

'[…] while a Tribunal is competent to decide on its own competence, even when there is no valid arbitration agreement (doctrine of competence-competence), the same Tribunal can only decide on the admissibility/inadmissibility of an investment claim/counterclaim once the Tribunal is competent, *i.e.* when there is a valid arbitration agreement covering the jurisdictional requirements of Article 25 of the ICSID Convention and those contained in the investment treaties which circumscribe/delimit the scope of consent'.[95]

79. Under this approach, '[…] competence is related to an *arbitration agreement* [and] admissibility is related to a specific *claim or counterclaim*'[96], so that jurisdiction encompasses competence.[97]

80. Thus, under both approaches – whether competence is equated with admissibility or with jurisdiction – admissibility is distinguished from jurisdiction and thereby from consent, which is a component of the latter. This conclusion must be accounted for when the approach to admissibility and consent to mass claims in *Abaclat* is discussed[98] and analysed.[99]

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[93] Reinisch, above n. 64, 26. Footnote omitted.

[94] Steingruber, above n. 72, 681.

[95] Ibid.

[96] Ibid.

[97] Ibid., 683.

[98] See paras 277 *et seq. infra.*

[99] See paras 539 *et seq. infra.*

1.3 Types of Consent

81. Methods and factors considered in deciding on the collective treatment of claims are also contingent upon the *type of consent* that must be determined in each given case. Therefore, the typology of consent warrants a closer look in order to put the notion of consent to multiparty arbitration into the context of the notion of consent in investment arbitration in general.

1.3.1 General and Specific Consent

82. Consent in multiparty investment disputes is closely linked with the unique temporal structure of effectuating consent within this domain of international arbitration. Two different points in time correspond with the two different types of consent (***general and specific***), both of which must be established by a tribunal; Steingruber explained that *the first type of consent* is 'general and abstract' (*general consent*) and is reached through 'mutual consent with another State'. This represents a 'standing offer to foreign investors', expressed in the treaties with other states to 'use arbitration as a dispute resolution mechanism in investment disputes with investors of its counterpart(s)'.[100]

83. Thus, at the first stage, the offer of consent is provided by a state to an *unlimited and unidentified number* of investors (prospective consent,[101] general offer,[102] standing offer of consent[103]). At this stage, only the host state's general consent exists – a phenomenon named by Paulsson 'arbitration without privity'.[104]

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[100] Steingruber, *Consent in International Arbitration*, above n. 6, 230.

[101] Steingruber, 'Abaclat and Others v Argentine Republic: Consent in Large-scale Arbitration Proceedings', above n. 6, 238.

[102] Steingruber, *Consent in International Arbitration*, above n. 6, 190.

[103] Lamm, above n. 2, 117, also mentioning an alternative approach to the general consent that the general offer of consent is binding upon the state even before the acceptance by the investor with reference to *İçkale İnşaat Limited Şirketi v Turkmenistan*, ICSID Case No. ARB/10/24, Award, 8 March 2016, para. 244: 'The BIT is not a contract; it is a treaty concluded by two States, and consequently the arbitration agreement concluded between one of the State parties and an investor of the other State party is not an arbitration agreement concluded on the basis of privity of contract, that is, on the basis of an "offer" and "acceptance." On the contrary, the State's consent, which is addressed to an anonymous class of foreign investors meeting the relevant nationality requirements, and not specifically to any particular foreign investor, is expressed in a binding manner even before any dispute has arisen, whereas the investor's consent is usually –including in the present case – expressed only after the dispute has arisen, often with a considerable time interval […]'.

[104] J. Paulsson, 'Arbitration Without Privity', 10 *ICSID Review – Foreign Investment Law Journal* (1995) 247.

84. It must be emphasised that the scope of the respondent's general consent must be interpreted based on the rules of public international law (*i.e.*, the rules of interpretation under the Vienna Convention on the Law of Treaties – VCLT); in contrast with commercial arbitration where national law of the seat of arbitration governs an arbitration agreement.[105] As further illustrated by the case law, this distinctive feature of investment arbitration must not be overlooked should the principles of private law become relevant in multiparty cases, when the contract(s) regulating a specific investment are factored within the interpretation of consent.[106]

85. *The second type of consent* is the state's consent to investors from its counterpart(s), 'to resolve an individual and concrete investment dispute through arbitration'[107] (*specific consent*) after 'individual and concrete consent'[108] is given by a foreign investor through filing of a claim. Thus, privity is created 'at the time of initiating arbitration', at which point the arbitration agreement starts to exist.[109] This method of *reaching consent*, as Paulsson puts it, 'would be nonsense in the traditional context of international arbitration'.[110]

86. In accordance with this temporal structure, tribunals must determine if the parties agreed to multiparty arbitration at two points in time:

(i) when a host state expressed its consent in the investment treaty in relation to unidentified investors and investments and

(ii) when the dispute emerged and various factors surrounding a specific investment and dispute can be identified and factored in the reasoning on consent.

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[105] Ibid., 128, 129; It must be noted, though, that the VCLT was not necessarily invoked in each of the discussed cases which might be in line with the recent trend mentioned by Steingruber in the context of interpretation of consent in investment arbitration: 'Although the use of the VCLT has been seen as the usual tool for the interpretation of investment treaties, a recent study came to the conclusion that far less awards than supposed contain references to the VCLT and only a handful made active use of the VCLT as interpretive guidance'. Steingruber, *Consent in International Arbitration*, above n. 6, 232. Footnotes omitted.

[106] Steingruber, ibid., 224.

[107] Ibid.

[108] Ibid.

[109] Ibid., 197; see also Paulsson, above n. 104, 247; On arbitration without privity see also Dimsey, above n. 1, 17-19.

[110] Paulsson, ibid.; This phenomenon is also referred to as 'unilateral arbitration', Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*, above n. 1, 52.

87. A multiparty aspect complicates the task of establishing consent and requires particular diligence, given the imminent risk of 'violation of the principle of party autonomy and the freedom of contract'.[111] The main question would be whether the respondent's consent covers claims by multiple investors given that the *scope* of consent in treaty arbitration is defined by a state and it is usually the respondent who objects to the joint resolution of related claims. Based on the temporal dichotomy of consent, this question can be split in two depending on the source of consent and factual circumstances:

(i) whether the respondent state gave consent to multiparty arbitration in relation to *future* disputes with *unidentified* claimants (***general consent***);

(ii) whether the respondent state gave consent to multiparty arbitration in a particular dispute with *certain* investors (***specific consent***).[112]

1.3.2 Explicit and Implied Consent

88. Consent to multiparty arbitration can be formulated either *explicitly* or *implicitly* before or after the outbreak of the dispute.[113] This is in line with the general approach to interpretation of an arbitration agreement in multiparty disputes that, as formulated by Born, '[…] the various terms of an agreement to arbitrate can be implied, as well as express – a principle which extends fully to issues of consolidation, joinder and intervention'.[114]

89. Thus, theoretically, ***explicit consent*** can be expressed in the direct agreement of the parties, allowing multiparty arbitration[115] (in general or in relation to a specific dispute). However, such explicit consent appears in practice only as an exception in the form of *de facto* consolidation, when parties agree to the joinder of separately initiated arbitrations through appointment of identical tribunals in the underlying cases.[116]

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[111] Lamm, above n. 1, 55.

[112] Steingruber, *Consent in International Arbitration*, above n. 6, 230.

[113] Ibid.

[114] G. Born, *International Commercial Arbitration* (2021) 2766.

[115] Ibid.

[116] See paras 95 *et seq. infra*, 337 *et seq. infra.*

90. An ***implied consent*** can be easily established if multiple claims proceed as such from the outset in the absence of the respondent's objection.[117] However, the respondent may object to multiplicity of claimants so that implied consent must be construed based on the applicable BIT(s) (general consent) and/or investment contract(s) together with the circumstances surrounding the investment project (specific consent).[118]

91. For instance, *general implied consent* can be expressed through the treaty which contains multiparty provisions,[119] the most prominent example of which (and, so far, the only one tested in practice) is Article 1126 of NAFTA on consolidation of parallel proceedings. Related disputes can be consolidated '[…] in the interests of fair and efficient resolution of the claims […]' if they '[…] have a question of law or fact in common […]'[120], upon request of a disputing party to establish a consolidation tribunal that should be submitted to the ICSID Secretary General.[121]

92. Consolidation under NAFTA is 'unique among multilateral investment treaties', primarily because setting up of a 'super tribunal' for consolidation on a *mandatory* basis is 'novel and bold'.[122] In principle, the possibility of mandatory consolidation within traditional arbitration system is exceptional given 'private, consensual context of international commercial arbitration', but can be justified as long as it is allowed under the treaty.[123] Thus, an agreement to arbitrate under NAFTA means that parties implicitly consented to consolidation pursuant to the NAFTA procedure and additional (specific) consent is not required.[124]

93. A similar procedure (through the request to the ICSID Secretary General to establish consolidation tribunal) is foreseen under Article 33 of the US Model BIT[125] and

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[117] See paras 118 *et seq. infra*.

[118] See paras 124124 *et seq. infra*.

[119] Lamm, above n. 1, 55, 56; Knahr, above n. 4, 8, 9.

[120] Article 1126(2) NAFTA.

[121] Article 1126(3) NAFTA.

[122] H. Alvarez, 'Arbitration Under the North American Free Trade Agreement', 16 *Arbitration International* (2000) 414.

[123] Ibid.

[124] Lamm, above n. 1, 57.

[125] Article 33(1) United States Model BIT (2012) stipulates: 'Where two or more claims have been submitted separately to arbitration under Article 24(1) and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order […]'.

Article 32 of the Canadian Model Foreign Investment Protection Agreement.[126] Consolidation provisions were also included in the number of Mexico's BITs (*e.g.*, Mexico-Switzerland BIT,[127] Mexico-Italy BIT,[128] Mexico-Germany BIT,[129] Mexico-Netherlands BIT[130]). Free Trade Agreements may also provide for consolidation of disputes (*e.g.*, New Zealand-Malaysia FTA,[131] Japan-Peru FTA[132]).

[126] Article 32(2) Canadian Model Foreign Investment Protection Agreement stipulates: 'Where a Tribunal established under this Article is satisfied that claims submitted to arbitration […] have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

(a) assume jurisdiction over, and hear and determine together, all or part of the claims; or

(b)assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.'

[127] Article 6 Mexico-Switzerland BIT (1995).

[128] Article 5 Mexico-Italy BIT (1999).

[129] Article 15 Mexico-Germany BIT (2001).

[130] Article 7 Mexico-Netherlands BIT (1999).

[131] Article 10.27 New Zealand-Malaysia FTA (2009).

[132] Article 215 Japan-Peru FTA (2011).

Chapter 2: Overview of the Case Law on Establishing Consent in Multiparty Investment Arbitration

94. In this chapter, the previously discussed types of consent as well as approaches to the nature of the decision on the joint resolution of related disputes, will be exemplified by the respective case law depending on the type of multiparty investment arbitration (multiparty arbitration *ab initio*, mandatory consolidation, and mass claims).

2.1 Multiparty Arbitration *Ab Initio*

95. The purpose of this section is to illustrate how the interpretation of the concepts and notions described in the previous chapter, have been tackled when they were first introduced in investment arbitration. This earliest type of multiparty investment arbitration comprises multiple claims that were arbitrated by the same tribunal from the outset (*ab initio*).

2.1.1 Explicit Consent through *De Facto* Consolidation

96. If investors filed separate but related claims against the same state, upon invitation of the ICSID Secretariat or party request, parties may agree to establish a single tribunal for all claims. In literature, this mechanism is referred to as *de facto* consolidation,[133] identical tribunals,[134] *quasi* consolidation,[135] or voluntary consolidation.[136] From the perspective of the temporal typology, this is a *specific* consent given after a dispute has arisen.[137] Examples of *de facto* consolidation are summarised below. As a general observation, it should be noted first that voluntary consolidation is an exception in the ICSID practice

[133] Lamm, above n. 1, 66; Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 74, 75; Yannaca-Small, 'Consolidation of Claims: A Promising Avenue for Investment Arbitration?', above n. 1, 232; Crivellaro, above n. 15, 385, 386; Zarra, above n. 1, 84, 85.

[134] Schreuer, above n. 2, 385; Waibel, above n. 1, 526, 527.

[135] Zarra, above n. 1, 84, 85; Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*, above n. 1, 110.

[136] Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 245.

[137] See Lamm, above n. 1, 64: 'In addition to the possibility of obtaining party consent for the management of a multiparty arbitration prior to the inception of the dispute, parties may agree to a multiparty mechanism after the initiation of the proceedings'.

rather than a preferred method for coordination of parallel proceedings as noted by the ICSID Secretariat:

'ICSID does not have statistics on this, but our review of past cases suggests that voluntary coordination has been agreed upon in a small number of the cases in which it could conceivably have been implemented'.[138]

Pan American

97. In *Pan* American, two ICSID claims by American investors and their local subsidiaries have been registered[139] within a couple of months after Argentinean government adopted a series of laws in the energy sector[140], which affected the claimants' investments in the oil and gas production and trade.[141] The second group of claimants requested that their claim be adjudicated jointly with the previously registered request since '[…] the two cases were substantially identical and concerned investments in the hydrocarbon

[138] Proposals for Amendment of the ICSID Rules, Working Paper 2, Volume 1 (March 2019) 210, available at: https://icsid.worldbank.org/sites/default/files/amendments/Vol_1.pdf (last visited 23 December 2021).

[139] *Pan American*, above n. 67, paras 1-3; 12-18; Ibid., paras 12-18: '[…] Pan American Energy LLC ("PAE") is a company incorporated under the laws of the State of Delaware, United States of America, with a branch registered in the Republic of Argentina ("PAE Branch"). […] BP Argentina Exploration Company ("BP Argentina") is also a company incorporated under the laws of the State of Delaware. […] BP America Production Company ("BP America") is an entity incorporated under the laws of the State of Delaware, as well; it owns and controls BP Argentina. […] BP America and BP Argentina are hereafter collectively referred to as "BP". […] BP America indirectly, and BP Argentina directly, own the majority of the equity interests of PAE. […] PAE owns all of the equity interests of: Pan American Continental SRL ("PAE Continental"), Pan American Sur SRL ("PAE Sur") and Pan American Fueguina SRL ("PAE Fueguina"). Each of these entities is a limited liability company (sociedad de responsabilidad limitada) incorporated under Argentine law. […] The Claimants own close to 20% of the shares of Central Dock Sud SA ("Dock Sud") and 16% of Gas Nea SA. PAE is also engaged in electric power generation by having acquired a non-controlling interest in Dock Sud, which had built and operated a thermal power plant in Buenos Aires'. See also Schreuer, above n. 2, 385; Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*, above n. 1, 111; Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 251, 252.

[140] *Pan American*, ibid., paras 1, 3, 18-30; Ibid., para. 27: 'According to the Claimants, the measures included a series of laws, decrees, resolutions and communications […] and affecting: the exemption of hydrocarbon exports from export dues, with the express purpose to compensate the banking sector for asymmetrical "pesification", *i.e.* the mandatory conversion of dollar obligations into peso-denominated ones at a rate of 1:1; the limitation of the royalty rate to 12%; the right freely to export hydrocarbons and to transfer funds abroad; the right to effect sales and purchases in dollars, terminated by "pesification"; the freedom to contract impeded by the elimination of adjustment mechanisms; the ability to depreciate, for tax purposes, investments funded in dollars at the same level as prior to "pesification"; and, more generally, the possibility to mitigate losses caused by that process through tax measures'.

[141] Ibid., para. 19: 'The Claimants' claims have arisen from their investments in Argentina. The Argentine Companies were the second largest oil and gas producer in Argentina, and their production was sold domestically and abroad. The Argentine Companies are holders of a number of hydrocarbon (*i.e.* oil and gas) production concessions, exploration permits and production contracts in Argentina […] as well as natural gas export permits […] . The Argentine Companies carry out operations in the Argentine Provinces of Tierra del Fuego (both on-shore and off-shore), Santa Cruz, Chubut, Neuquén and Salta, as well as off-shore Argentina in the South Atlantic'.

industry'.[142] All claimants informed the ICSID Secretariat about their consent to have both cases heard by the tribunal appointed in the earlier registered case and consisting of Albert Jan van den Berg, Brigitte Stern, and Lucius Caflisch as president of the tribunal.[143] The claimants and the respondent also agreed that '[…] the two cases would be considered to form one set of proceedings and that the Tribunal would issue a single decision on jurisdiction for both proceedings'.[144]

RFCC, Salini

98. In *RFCC* and *Salini*, the disputes concerned non-fulfilment of the payment obligations under the concession agreement with the government for the construction of the highway in Morocco to be decided under the same BIT as all claimants were Italian nationals.[145] Upon invitation of the ICSID Secretariat, the claimants in *Salini* appointed the same arbitrators as the parties in *RFCC* did (Bernardo Cremades and Ibrahim Fadlallah), who

[142] Ibid., para. 3.

[143] Ibid., paras 2, 4.

[144] Ibid., para. 7.

[145] *Consortium R.F.C.C. v The Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision on Jurisdiction, 16 July 2001, paras 1-6; *Salini Costruttori SpA v Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, paras 2-5; *Salini*, ibid., paras 2-6: 'The Societe Nationale des Autoroutes du Maroc (hereinafter "ADM"), incorporated in 1989 as a limited liability company, builds, maintains and operates highways and various road-works, in accordance with the Concession Agreement concluded with the Minister of Infrastructure and Professional & Executive Training, acting on behalf of the State. In August 1994, within the context of this Agreement, ADM issued an international invitation to tender for the construction of a highway joining Rabat to Fes. The above-mentioned Italian companies submitted a joint tender for the construction of section No.2 Khemisset-Meknes Ouest […], which is approximately 50 kilometres long. The construction of this section was awarded to the Italian companies […]. The negotiations that followed the award of section No.2 resulted in the signature of Contract […] on October 17, 1995. […] The two Claimants created the Groupement d'Entreprises Salini-Italstrade (hereinafter "the Group") for the performance of the contract giving rise to the present dispute. The Group is not a legal entity. As a result, the Italian companies take part in the present arbitration as joint Claimants. […] A provisional Taking Over of the work took place on July 31, 1998. The works were completed on October 14, 1998. The works therefore took 36 months to complete, 4 months longer than stipulated in the contract (32 months). The final Taking Over took place on October 26, 1999. […] A draft of the final account was sent to the Italian companies by ADM. They signed it on March 26, 1999 (with reservations). On April 29, 1999, the Italian companies sent ADM's Head Engineer a memorandum setting out the reasons for the reservations put forward: technical reservations, exceptionally bad weather, project upheaval, modifications concerning the dimensions of the work, extension of contractual time limits, financial burdens, unforeseeable fluctuations of the value of the Yen. On September 14, 1999, following the rejection of all of their claims by ADM's Head Engineer, the Italian companies sent a memorandum relating to the final account to the Minister of Infrastructure, in accordance with Article 51 of the Cahier des Clauses Administratives Generales [Book of General Administrative Clauses]. No reply was received from either the Minister of Infrastructure or ADM. […] On May 1, 2000, the Italian companies filed a Request for Arbitration against the Kingdom of Morocco with ICSID. The Secretary-General registered the Request on June 13, 2000. The Italian companies claimed ITL 132'639'617'409, as compensation for damages suffered'.; Schreuer, above n. 2, 385; Crivellaro, above n. 15, 385, 386; Yannaca-Small, 'Parallel Proceedings', above n. 1, 1037; Lamm, above n. 1, 67.

then selected Robert Briner as president of the tribunal which then rendered similar jurisdictional awards for each case.[146]

Sempra, Camuzzi

99. In *Sempra* and *Camuzzi*, investors incorporated, respectively, in the US and Luxembourg held shares in the same gas distribution companies as the result of the privatization program in Argentina[147] and filed two ICSID claims after the cancellation of the tariff incentives in gas industry.[148] The parties agreed on the composition of identical tribunals for both cases without formally merging the disputes, whereby the president of the tribunal had to be appointed by the ICSID Secretary General.[149] Thus, following the appointment of Marc Lalonde and Sandra Morelli Rico by the parties, Francisco Orrego Vicuña was appointed as the president of the tribunal.[150]

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[146] *R.F.C.C.*, ibid., para 8; *Salini*, ibid., para. 7; Crivellaro, ibid.; Schreuer, ibid.; Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 250, 251.

[147] *Sempra Energy International v The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005, para. 5: 'On March 4, 2003, the Claimant and the Respondent agreed to set up a single Tribunal to hear Sempra's request for arbitration and another request submitted concurrently by Camuzzi International S.A. ("Camuzzi"), also a shareholder in the gas distribution companies. Camuzzi's request would be decided on separately. The parties also agreed that the Tribunal would comprise one arbitrator appointed jointly by Sempra and Camuzzi, one arbitrator appointed by the Argentine Republic, and a third arbitrator, who would serve as the President of the Arbitral Tribunal, who would be appointed by the Secretary-General of ICSID'.

[148] *Sempra Energy International v The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, paras 1, 100-105; *Sempra*, above n. 147, para. 1: ' […] The request relates to disputes with the Argentine Republic regarding measures adopted by the Argentine authorities which, it is argued, have changed the general regulatory framework established for foreign investors in a way which the Claimant asserts severely affects Sempra's investment in two natural gas distribution companies which together serve seven Argentine provinces'.; See also the identical wording in relation to Camuzzi's in *Camuzzi International S.A. v The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objection to Jurisdiction, 11 May 2005, para. 1.

[149] *Sempra*, ibid., Award, paras 9, 10; *Camuzzi*, ibid., para. 4: 'On March 4, 2003, the Claimant and the Respondent agreed to set up a single Tribunal to hear the request for arbitration of Camuzzi International S.A. and another request submitted concurrently by Sempra Energy International […] , also a shareholder in the gas distribution companies. Sempra's request has been decided separately. The parties also agreed that the Tribunal would comprise one arbitrator appointed jointly by Sempra and Camuzzi, one arbitrator appointed by the Argentine Republic, and a third arbitrator, who would serve as the President of the Arbitral Tribunal, who would be appointed by the Secretary-General of ICSID'.; See also: Waibel, above n. 1, 526, 527; Lamm, above n. 1, 64, 65; Schreuer, above n. 2, 385; Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 251; Crivellaro, above n. 15, 385, 386.

[150] *Sempra*, above n. 147, paras 6, 7; *Camuzzi*, ibid., paras 5, 6.

Suez, Aguas, Interagua

100. In *Suez*, members of the consortium from the UK, Spain, and France holding a concession to operate water distribution and waste water systems in Argentina[151] filed three claims with the ICSID for a series of state measures, including non-compliance with the agreed adjustments for tariff calculations.[152] Upon agreement of the parties, the same arbitrators heard all three claims under the ICSID Convention and the UNCITRAL Arbitration Rules in relation to one of the claimants (AWG) in accordance with the UK-Argentina BIT.[153] However, the parties could not reach an agreement on the number of arbitrators and method of their appointment. For this reason, the tribunal was composed according to the

[151] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006, para. 1: '[…] On April 17, 2003, the International Centre for Settlement of Investment Disputes […] received a Request for Arbitration […] against the Argentine Republic […] from Aguas Argentinas S.A.("AASA"), Suez, Sociedad General de Aguas de Barcelona S.A. ("AGBAR"), Vivendi Universal S.A. ("Vivendi") and AWG Group Ltd ("AWG"), […]. AASA is a company incorporated in Argentina. Suez, and Vivendi, both incorporated in France, AGBAR, incorporated in Spain, and AWG, incorporated in the United Kingdom, were shareholders in AASA. The Request concerned the Claimants' investments in a concession for water distribution and waste water treatment services in the city of Buenos Aires and some surrounding municipalities and a series of alleged acts and omissions by Argentina, including Argentina's alleged failure or refusal to apply previously agreed adjustments to the tariff calculation and adjustment mechanisms'.; *Suez*, ibid., footnote 1: 'On the same date, the Centre received two further requests for arbitration under the ICSID Convention regarding water concessions in Argentina from (i) Aguas Cordobesas S.A., Suez, and Sociedad General de Aguas de Barcelona, S.A. and (ii) Aguas Provinciales de Santa Fe, Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales del Agua, S.A. regarding similar investments and disputes. As explained below, these requests would later be registered by the Centre and submitted by agreement of the parties to one same Tribunal'.

[152] *Suez*, ibid., paras 1, 2; ibid., paras 23-25: '[…] In 1999, the Argentine Republic began to experience a severe economic and financial crisis that had serious consequences for the country, its people, and its investors, both foreign and national. In response to this continuing crisis, the government adopted a variety of measures to deal with its effects in the following years. In 2002, it enacted a law that abolished the currency board that had linked the Argentine Peso to the U.S. dollar, resulting in a significant depreciation of the Argentine Peso. Claiming that these measures injured their investments in violation of the commitments made to them in securing the concession, the Claimants sought to obtain from the Argentine government adjustments in the tariffs that AASA could charge for water distribution and waste water services, as well as modifications of other operating conditions. […] After a fruitless period of negotiations, the Claimants in April 2003 submitted their dispute with the Argentine Republic for settlement by arbitration to ICSID under the ICSID Convention pursuant to the Argentina-France and the Argentina-Spain BITs and, in the case of Claimant AWG, under UNCITRAL Arbitration Rules pursuant to the Argentina-U.K BIT. In their Memorial, the Claimants allege that the Argentine Republic is legally responsible under the above-mentioned BITs for its wrongful actions, which expropriated Claimants' investments in violation of Article 5(2) of the Argentina-France BIT, Article V of the Argentina-Spain BIT, and Article 5(1) of the Argentina-U.K. BIT and which failed to treat Claimants' investments fairly and equitably in breach of Article 3 and 5(1) of the Argentina-France BIT, Article IV(1) of the Argentina-Spain BIT, and Article 2(2) of the Argentina-U.K. BIT. As a result, pursuant to the applicable BITs, Claimants seek compensation for their alleged loss. The Claimants at the initiation of this proceeding consisted of AASA […], the concession company, and four of its non-Argentine shareholders: Suez, a French company holding 39.93% of AASA shares; Vivendi, also a French Company, holding 7.55% of AASA shares; AGBAR, a Spanish Company holding 25.01% of AASA shares, and AWG, a U.K. company holding 4.25% of AASA shares. […] In addition, the shareholders hold various other financial obligations made by AASA'. Footnotes omitted; *Aguas Cordobesas S.A., Suez, and AGBAR v Argentine Republic*, ICSID Case No. ARB/03/18; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua S.A. v Argentine Republic*, ICSID Case No. ARB/03/17; See also Lamm, above n. 1, 68; E. Romero, above n. 1, 385, 386; Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 252.

[153] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic*, ibid., paras 2, 7; Ibid., para. 4: 'Argentina did not agree to extend ICSID jurisdiction to the claims of AWG but it did agree to allow the case, although subject to UNCITRAL rules, to be administered by ICSID'.

ICSID procedure so that each party appointed one arbitrator and the president was appointed by the Center.[154] Accordingly, a three-member tribunal comprising Gabrielle Kaufmann-Kohler, Pedro Nikken, and Jeswald W. Salacuse (US) was appointed (although the claims were not formally merged).

Electricidad Argentina, EDF International

101. In *EDF International*, the claim was filed by three members of the consortium that owned a controlling stake in the former state-owned company and signed a concession agreement for the transmission and distribution of electricity.[155] The dispute governed by the France-Argentina BIT arose after the government introduced emergency measures, including a freeze of tariffs in the aftermath of the economic crisis.[156] One month earlier, EDF filed a similar claim together with its local subsidiary.

102. ICSID informed the parties that both requests '[…] largely mirror each other in all material respects, and on this basis, […] recommended – and all constituents approved –

[154] *Suez*, ibid., paras 5, 6: 'The parties could not reach an agreement on the number of arbitrators to comprise the arbitral tribunal nor on the method for their appointment. Accordingly, on 22 September 2003, the Claimants requested the Tribunal to be constituted in accordance with the formula set forth in Article 37(2)(b) of the ICSID Convention; *i.e.* one arbitrator appointed by each party, and the third arbitrator, who would serve as president of the tribunal, to be appointed by agreement of the parties. The Claimants appointed Professor Gabrielle Kaufmann-Kohler, a Swiss national, as arbitrator. The Argentine Republic in turn appointed as arbitrator Professor Pedro Nikken, a national of Venezuela. […] In the absence of an agreement between the parties on the name of the presiding arbitrator, on October 21, 2003 the Claimants, invoking Article 38 of the ICSID Convention and Rule 4 of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), requested the Centre to make this appointment. With the agreement of both parties, the Centre appointed Professor Jeswald W. Salacuse, a national of the United States of America, as the President of the Tribunal'.

[155] *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, paras 68, 69, 71: 'A consortium company, SODEMSA, was formed between local co-investors and the French companies, EDFI, SAURI, and Crédit Lyonnais (former parent to Claimant León) to consolidate their respective interests in bidding for the purchase of 51% of EDEMSA's Class "A" shares. […] On 10 April 1998, Claimants EDFI and SAURI respectively acquired 45% and 15% interests in SODEMSA. On 20 April 1998, Crédit Lyonnais acquired a 70% interest in an Argentine company, MEDINVERT, which in turn purchased 40% of SODEMSA shares. […] The Government of Mendoza and EDEMSA signed a formal agreement on 15 July 1998. On 27 July 1998, the Mendoza Congress subsequently approved the transaction and Claimants' consortium was officially awarded ownership over 51% of EDEMSA's Class "A" shares. SODEMSA assumed control of EDEMSA and commenced operations on 1 August 1998'.

[156] Ibid., paras 1, 8, 50, 200-203; Ibid., para. 199: 'Claimants' position is that from the very outset of their investment in EDEMSA in 1998, the Province, by way of the Pre-Emergency Measures affecting the Concession, wrongfully chipped away at the Concession Agreement's legal framework until completely unraveling it with the enactment of the Emergency Tariff Measures in early 2002, at that time radically transforming the "rules of the game" for Claimants and consequently crippling EDEMSA's financial stability. […] All the while the pesification and freeze of tariffs together with the repeal of the convertibility system destroyed EDEMSA's enterprise value the Emergency Tariff Measures explicitly obligated full compliance of the Concession Agreement throughout the duration of the Renegotiation Process, which Claimants argue was engaged in good faith on their part but turned out to be nothing more than a mere formality. […] As a result, the agreed upon economic and financial equilibrium contemplated under the Concession Agreement was never restored'.; Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 252, 253.

that a common tribunal should address both proceedings'.[157] The parties agreed to proceed as suggested and appointed Gabrielle Kaufmann-Kohler and Jesús Remón as arbitrators, with the Centre appointing William W. Park as the president.[158] The earlier filed case was suspended by the agreement of the parties and the award was rendered only in one case.[159]

Gemplus, Talsud

103. In *Gemplus* and *Talsud*, investors from France, Argentina, and Mexico, who were members of the consortium of bidders in the tender for setting up of the National Registry of Motor Vehicles in Mexico, filed two requests for arbitration following the revocation of the concessions.[160] The requests were submitted to ICSID simultaneously and '[…] it was agreed that the cases would be determined by the same tribunal and would be heard and dealt with together in as far as it remained practicable to do so'.[161] Upon the claimants' request, the parties agreed to have a single award issued in both cases. The parties appointed L. Fortier, E. Gómez, and V. Veeder as president of the tribunal.

Kardassopoulos, Fuchs

104. In *Kardassopoulos* and *Fuchs*, the claimants were shareholders in the joint venture with the state enterprise that was created for the development of an oil transportation pipeline

[157] *EDF*, ibid., para. 8, footnote 1.

[158] Ibid., para. 5.

[159] Ibid.

[160] *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v The United Mexican States*, ICSID Case No. ARB(AF)/04/3; *Talsud S.A. v The United Mexican States*, ICSID Case No. ARB(AF)/04/4, Award in the matter of two conjoined arbitrations (ICSID Cases Nos ARB (AF)/04/3 & ARB (AF)/04/4), 16 June 2010, paras 1-1 - 1-5; 2-13 – 2-16; 4-17, 4-33; Ibid., para 4-16, 4-41: 'In December 1997, President Zedillo's Federal Government introduced a bill to create the National Registry of Motor Vehicles. […] The Consortium incorporated a Mexican legal person which was to become the Concessionaire on 6 September 1999, controlled by three groups of shareholders: Mr Henry Davis Signoret, Talsud and Gemplus. Each group was selected to contribute to the Consortium: Gemplus was a leading manufacturer of smart cards worldwide and would supply the vehicle registration cards; Talsud contributed its technical experience as having operated vehicle registries in Central and South America […]'.; Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 253, 254.

[161] *Gemplus*, Ibid., paras 1-15, 1-16: 'On 10 August 2004, the Gemplus Claimants and Talsud simultaneously filed two Requests for Arbitration with the International Centre for Settlement of Investment Disputes […]. Both Requests were registered by the ICSID Secretariat on 29 September 2004. Following the constitution of the Tribunal on 9 March 2005, it was agreed that the cases would be determined by the same tribunal and would be heard and dealt with together in as far as it remained practicable to do so. […] The Claimants request a single award in these two cases, to which the Respondent has consented as to form'.

in Georgia.[162] Following the alleged expropriation of their rights under concession,[163] they filed two ICSID claims under the Georgia-Greece BIT, the Energy Charter Treaty, and the Israeli-Georgia BIT.[164] *Fuchs* submitted his request one and a half years after *Kardassopoulos*[165], and after the tribunal in the latter case had already held its first session.[166] The parties then informed the ICSID Secretary General that they agreed on the method of constitution of the tribunal in the *Fuchs* case, and requested that it will be decided by the tribunal appointed in *Kardassopoulos*.[167] The tribunal composed of F. Vicuña, A. Watts, and L. Fortier as a president pursuant to the parties' agreement issued one award for both cases.[168]

Von Pezold, Border

105. *Von Pezold* and *Border* concerned an alleged unlawful expropriation of their agricultural investments in Zimbabwe,[169] and were registered with ICSID under the Germany-

[162] *Ioannis Kardassopoulos v The Republic of Georgia*, ICSID Case No. ARB/05/18 and *Ron Fuchs v The Republic of Georgia*, ICSID Case No. ARB/07/15, Award, 3 March 2010, paras 4, 73, 74, 77: 'The Claimants, two highly resourceful oil traders, were virtual pioneers at the time of their investment in Georgia, with a relatively modest yet important proposal to trade oil and rehabilitate and complete the existing pipeline infrastructure crossing Georgia from Azerbaijan to the Black Sea, in order to secure a transit route for land-locked oil reserves. […] The Georgian Minister of Industry signed a Power of Attorney on 4 September 1991 with Mr. Fuchs through the company Tramex (International) Ltd. […], in which Mr. Fuchs held equal shares with Mr. Kardassopoulos […]. […] Two months following this first meeting, on 8 November 1991, the Georgian Cabinet of Ministers adopted Resolution No. 834 "About Some Activities Related to the Oil and Gas Production and Refining in the Republic of Georgia". This Resolution authorized the joint venture between [Georgian State-owned oil company SakNavtobi] and Tramex for the purpose of exploiting the Georgian oil fields of Ninotsminda, Manavi and Rustavi, as well as the export of oil under license. […] In the spring of 1992, on 3 March 1992, Tramex and SakNavtobi signed a Joint Venture Agreement […] which created GTI Ltd. […], a joint venture vehicle owned in equal shares by Tramex and SakNavtobi […]. The JVA provided for an initial term of 25 years, automatically renewable for a second 25-year term unless either Party notified its intention to terminate the agreement to the other Party within six months of the expiry of the agreement'.

[163] Ibid., paras 2, 4: 'Within a few years of the Claimants initial investment, the Azerbaijan International Oil Company […], a consortium of multinational oil companies, also began operating in the region as vast quantities of crude oil in the Caspian were confirmed. […] The investment dispute between the parties in these arbitrations arose during the years following Georgia's emergence as a sovereign State. In essence, it concerns actions on the part of Georgia in respect of the interests held by Mr. Ioannis Kardassopoulos and Mr. Ron Fuchs […] in an investment vehicle devoted to the development of an oil pipeline for the transport of oil from the Azeri oil fields on the Caspian Sea through Georgia to the Black Sea, known as the "Western Route".

[164] Ibid., paras 1, 2, 7, 8; Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 254.

[165] Ibid., para. 8.

[166] Ibid., paras 9, 10.

[167] Ibid., paras 11, 12.

[168] Ibid., para 9.

[169] *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No. ARB/10/15; *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v Republic of Zimbabwe*, ICSID Case No. ARB/10/25; *Von Pezold*, ibid., Award, 28 July 2015, paras 118, 471: 'The measures allegedly taken by the Respondent against the von Pezold Claimants relate to three large properties located in Zimbabwe, namely the Forrester Estate, the Border Estate and theMakandi Estate […] . The measures allegedly taken by the Respondent

Zimbabwe BIT and the Swiss-Zimbabwe BIT. The *Border* claimants filed their request half a year after *Von Pezold*[170] had been initiated and agreed to appoint the same arbitrators as the *Von Pezold* claimants did. The identical tribunals were composed of L. Fortier as president, D. Williams, and A. Mutharika.[171]

106. The parties agreed to the joint hearings, however without formal consolidation and with separate awards to be rendered in each case.[172] The parties also agreed on the procedure proposed by the claimants, according to which the claimants '[…] will submit joint pleadings, but will separately address those issues within a pleading where circumstances distinct to particular Claimants and/or case necessitate separate treatment'; '[e]ach 'witness statement and expert report shall state whether it applies to one case or the other case'; '[t]he Tribunal shall issue separate awards in relation to each case but may nevertheless discuss these arbitrations in any award or procedural order as a single set of proceedings, except where circumstances distinct to particular Claimants necessitate separate treatment'.[173]

107. Later in the proceeding, the claimants confirmed their request for separate awards with a view to protect the rights of the *Pezold* claimants:

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against the Border Claimants relate exclusively to the Border Estate. […] The Zimbabwean Properties were directly expropriated as of 14 September 2005, when the Constitutional Amendment vested in the State title to the 10 Forrester Properties, 21 of the 28 Border Properties, and six of the nine Makandi Properties. The Claimants note that, without title, they are no longer able to sell or otherwise realise the properties, they face criminal prosecution for continuing to occupy them, and certain parts of the Estates are now controlled by Settlers/War Veterans […]. The Residual Properties were indirectly expropriated as of 14 September 2005 by the Constitutional Amendment, as they are not viable without the directly expropriated properties. The Claimants say that the operations of the Residual Properties would be disjointed and economically unviable when compared to their original unified investment, which used scale to produce returns, and their rights in the assets have been rendered useless […]'. Footnotes omitted.

[170] *Von Pezold*, ibid., paras 2, 9-12.

[171] Ibid., para. 5: '[…] two identically composed Tribunals were constituted to hear disputes in two separate arbitrations: ICSID Case No. ARB/10/15 and ICSID Case No. ARB/10/25. During the Joint First Session of the two Tribunals on 7 February 2011, the Parties to ICSID Case No. ARB/10/15 and ICSID Case No. ARB/10/25 agreed that these cases would be heard together, although they would not be formally consolidated, and that the two Tribunals would render two separate Awards in relation to each case. […] By letters of 28 December 2010 and 3 January 2011, the Parties agreed that the Tribunal in the Border Arbitration, ICSID Case No. ARB/10/25, was to consist of three arbitrators, one appointed by each Party and the third, presiding arbitrator, appointed by agreement of the Parties. The Parties further agreed that the composition of the Tribunal in ICSID Case No. ARB/10/25 was to be identical to the one constituted in ICSID Case No. ARB/10/15. The Tribunal in the Border Arbitration was constituted on 20 January 2011 in accordance with Article 37(2)(a) of the ICSID Convention and the ICSID Arbitration Rules. On the same day, Ms. Frauke Nitschke was appointed as Secretary to the two Tribunals'.

[172] Ibid., paras 5, 16; ibid., para. 7: 'As a result of these unique conjoined and intertwined proceedings, each Tribunal now renders a separate Award which contains not only the decision of each Tribunal on every question submitted to it, together with the reasons upon which each decision is based, but also the decision of the other Tribunal on every question submitted to it, together with the reasons upon which those decisions are based'.

[173] Ibid., paras 22, 23.

'[I]n the event of a single award, during the enforcement phase cooperation between all of the Claimants would be necessary. Such cooperation is likely to be impossible in the event that the Respondent takes control of the Border Company Claimants, which it may do in order to jeopardise the enforcement of a single award or for other reasons'.[174]

108. The respondent insisted on a single award[175] but the tribunal upheld the claimants' position:

'While it is true that the matters in issue in these proceedings are intertwined in that they arise from substantially the same events, many of the claims are advanced on different bases and, as such, require separate treatment. Indeed, it may well be that a claim advanced by one set of claimants prevails while the same or a similar claim advanced by the other set of claimants fails or succeeds only in part by reference to the relief sought'.[176]

109. The tribunal was also of the view that it is possible '[…] to reliably distinguish the quantum of costs and fees associated with each case in two separate awards',[177] and that separate awards would also facilitate enforcement.[178] The tribunal finally decided '[…] on every question submitted to it, together with the reasons upon which each decision is based'.[179]

Churchill Mining, Planet Mining

110. In *Churchill Mining* and *Planet Mining*, two ICSID claims were filed separately with a time gap of one month based, respectively, on the UK-Indonesia BIT and the Australia-Indonesia BIT by investors in the coal mining industry, in response to the revocation of exploitation licenses in Indonesia.[180] Upon the *Planet Mining's* initiative, Indonesia

[174] *Von Pezold*, Procedural Order No 13, 23 December 2014, para. 5, referring to the Claimants' Submissions on Costs, 1 December 2014.

[175] Ibid., para. 6.

[176] Ibid., para. 10.

[177] Ibid., para. 11.

[178] Ibid., para. 12.

[179] *Von Pezold*, above n. 169, para. 7.

[180] *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016, paras 4, 5, 34-37; ibid., para. 6: 'On 26 November 2012, Planet Mining Pty Ltd […] filed a Request for Arbitration with ICSID pursuant to Article 36 of the ICSID Convention and the Australia-Indonesia BIT. This request, which concerned a dispute between Planet and Indonesia arising out of Planet's alleged investment in Indonesian companies in the coal mining industry, was expressly made in connection with that filed by Churchill against Indonesia on 22 May 2012. As noted in the Decisions on Jurisdiction, the facts upon which both requests are based are essentially the same'.; Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 255.

agreed that both cases within one consolidated proceeding will be heard by the tribunal appointed in *Churchill Mining* composed of A. Van den Berg, M. Hwang, and G. Kaufmann-Kohler as president of the tribunal.[181]

111. The parties first disagreed as to whether joint or separate awards should be issued, and the tribunal decided to rule on the issue on its own.[182] Later in the proceeding, the parties agreed to a single award but were split on whether a single decision should be rendered also at the jurisdictional stage. The tribunal decided to issue two decisions on jurisdiction.[183]

Yukos

112. In three *Yukos ad hoc* arbitrations, claims under the Energy Charter Treaty were filed separately with the Permanent Court of Arbitration (PCA) by three shareholders of the (then) largest Russian oil company Yukos[184] for the alleged expropriation of their

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[181] *Churchill Mining PLC v Republic of Indonesia*, Decision on Jurisdiction, 24 February 2014, para. 51; *Planet Mining Pty Ltd v Republic of Indonesia*, Decision on Jurisdiction, 24 February 2014, para. 53.

[182] *Churchill Mining*, above n. 180, para. 7: 'Having agreed in principle that the two disputes would be heard in a consolidated case, Churchill, Planet, and Indonesia agreed at a common session on 1 March 2013 to join the two proceedings in all respects, but disagreed as to whether the Tribunal should render one joint decision/award in respect of both Churchill and Planet or two separate decisions/awards, one in respect of each claimant. In Procedural Order No. 4 of 18 March 2013, the Tribunal confirmed the content of the common session and noted that it would decide whether to render one or two decisions/awards at a later stage, after consultation with the Parties'. Footnotes omitted.

[183] *Churchill Mining*, above n. 181, paras 6, 58: 'Pursuant to Procedural Order No. 4 of 18 March 2013, the present arbitration was consolidated with ICSID arbitration ARB/12/40 initiated by Planet Mining Pty Ltd, an Australian mining company wholly owned by Churchill. It was left open whether the Tribunal would render one or two decisions on jurisdiction or awards. The Tribunal has decided to issue two separate decisions […]. The facts and the procedural history are largely identical in both cases. […] The Tribunal and the Parties in ICSID Cases No. ARB/12/14 and No. ARB/12/40 held a common session by video link on 1 March 2013, which was sound and video recorded. Besides serving as the first session in ICSID Case No. ARB/12/40 pursuant to Rule 13 of the ICSID Arbitration Rules, the common session addressed consolidation. Having secured the agreement in principle of the Parties that the two disputes be heard in a consolidated case, the Tribunal heard the Parties on the modalities of consolidation. The Tribunal noted that the Parties agreed to join the two proceedings in all respects, but disagreed on whether the Tribunal should render one joint decision/award in respect of both Churchill and Planet or two separate decisions/awards, one in respect of each claimant'.; *Churchill Mining*, above n. 180, paras 230, 231: 'Procedural Order No. 4 provided that the Tribunal would decide whether to issue one or two awards after further consultation with the Parties. Lacking an agreement on the number of decisions/awards, the Tribunal resolved to issue two decisions on jurisdiction. […] Following an invitation of the Tribunal to provide their views in relation to the present ruling, the Parties consented on 27 September 2016 to the issuance of a single decision/award. On this basis, the Tribunal renders a single award'. Footnotes omitted.

[184] *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014, paras 1, 2, 65-69: 'In February 2005, three controlling shareholders of OAO Yukos Oil Company […] – Hulley Enterprises Limited ("Hulley"), a company organized under the laws of Cyprus, Yukos Universal Limited ("YUL"), a company organized under the laws of the Isle of Man, and Veteran Petroleum Limited ("VPL"), a company organized under the laws of Cyprus […] – initiated arbitrations against the Russian Federation […]. […] The three arbitrations were heard in parallel with the full participation of the Parties at all relevant stages of the proceedings. Mindful of the fact that each of the three Claimants maintains separate claims in separate arbitrations that require separate awards […], the Tribunal nevertheless shall discuss these arbitrations as a single set of proceedings, except where circumstances distinct to particular Claimants necessitate separate treatment. […] The three Claimants in these related

investments by the state.[185] Identical tribunals were set up for all cases comprising S. Schwebel, C. Poncet, and Y. Fortier as chairman who then rendered separate but almost identical awards.[186]

BSGR UK, BSGR Guinea

113. In the pending *BSGR UK* dispute, the claim was brought against Guinea by the investor from the UK concerning the taking of its mining investment in Guinea (made directly and through its subsidiaries BSGR Limited and BSGR Sàrl).[187] Over a year later, the subsidiaries filed their claim arising out of the same events and informed the ICSID Secretariat that all three companies of BSGR group will request consolidation of the concurrent arbitrations.[188] The cases were consolidated by issuance of the procedural order documenting the parties' agreement to consolidate both claims, whereby the claimants in the second arbitration (that was discontinued) joined to the first arbitration. Thus, the consolidated case is to be decided by the tribunal appointed earlier by BSGR

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cases are all part of the Yukos group of companies, which had at its center Yukos, headed by Chief Executive Officer Mr. Mikhail Khodorkovsky. […] Claimant in PCA Case No. AA 226, Hulley, was incorporated in the Republic of Cyprus on 17 September 1997 and was a 100 percent owned subsidiary of YUL. […] Claimant in PCA Case No. AA 227, YUL, was incorporated on 24 September 1997 in the Isle of Man (a Dependency of the United Kingdom). […] Claimant in PCA Case No. AA 228, VPL, was incorporated in the Republic of Cyprus on 7 February 2001. […] Hulley held approximately 56.3 percent, YUL held approximately 2.6 percent and VPL held approximately 11.6 percent of the outstanding shares in Yukos. Collectively therefore, Claimants approximately had a 70.5 percent shareholding in Yukos'.

[185] *Yukos*, ibid., paras 11, 63: 'Claimants alleged that Respondent had expropriated and failed to protect Claimants' investments in Yukos, resulting in "enormous losses," and sought all available relief in respect of those losses. […] The measures complained of include criminal prosecutions, harassment of Yukos, its employees and related persons and entities; massive tax reassessments, VAT charges, fines, asset freezes and other measures against Yukos to enforce the tax reassessments; the forced sale of Yukos' core oil production asset; and other measures culminating in the bankruptcy of Yukos in August 2006, the subsequent sale of its remaining assets, and Yukos being struck off the register of companies in November 2007. Claimants contend, and Respondent denies, that Respondent failed to treat Claimants' investments in Yukos in a fair and equitable manner and on a non-discriminatory basis, in breach of Article 10(1) of the ECT, and that Respondent expropriated Claimants' investments in breach of Article 13(1) of the ECT'.

[186] *Yukos*, ibid., para. 12; *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Final Award, 18 July 2014, para. 12; *Veteran Petroleum Limited (Cyprus) v The Russian Federation*, UNCITRAL, PCA Case No. AA 228, Final Award, 18 July 2014, para. 12; Zarra, above n. 1, 85, 86.

[187] *BSG Resources Limited. v Republic of Guinea*, ICSID Case No. ARB/14/22, Request for Arbitration, 1 August 2014, paras 2, 89, 90, 108-112; Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 255, 256.

[188] *BSG Resources (Guinea) Limited and BSG Resources (Guinea) SARL. v Republic of Guinea*, ICSID Case No ARB/15/46, Request for Arbitration, 13 October 2015, para. 4: 'The underlying background facts giving rise to this arbitration also give rise to a claim brought by the Claimants' parent company in ICSID Case No. ARB/14/22, *BSG Resources Limited v Guinea* (the "First ICSID Arbitration"). The Claimants in this arbitration, and BSGR as Claimant in the First ICSID Arbitration, will in due course make an application for the consolidation of this arbitration and the First ICSID Arbitration'.; ibid., paras 9, 13-23.

UK and Guinea comprising G. Kaufmann-Kohler as president, A. van den Berg, and P. Mayer, and the award shall deal with the claims raised in both cases.[189]

Bayview

114. In *Bayview*, forty-six US nationals (individuals and enterprises) who owned and controlled farms and irrigation facilities in Texas filed a NAFTA claim against Mexico under the ICSID Additional Facility Rules.[190] The dispute arose out of the alleged '[…] course of purposeful and systematic capture, seizure, and diversion of the water belonging to Claimants while it was located in Mexican territory, for use by farmers located in Mexico'.[191] The tribunal was appointed by the parties' agreement and comprised of Ignacio Gomez-Palacio, Edwin Meese III, and Vaughan Lowe as president.

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[189] *BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SARL v. Republic of Guinea*, Procedural Order No 5, 14 February 2016, paras 1.1, 1.2, 8.1: 'The Tribunal recalls that BSG Resources Limited ("BSGR Ltd"), BSG Resources (Guinea) Limited ("BSGR (Guinea) Ltd"), BSG Resources (Guinea) SARL ("BSGR (Guinea) SARL"), and the Republic of Guinea ("Guinea") have all agreed that the dispute between BSGR Ltd and Guinea, on the one hand, and the dispute between BSGR (Guinea) Ltd, BSGR (Guinea) SARL and Guinea, on the other hand, be adjudicated by the same Tribunal in one consolidated ICSID proceeding […]. […] In view of the Parties' agreements and comments, it is hereby decided that:

1.2.1. There shall be one single consolidated case in which BSGR Ltd, BSGR (Guinea) Ltd, BSGR (Guinea) SARL will all be Claimants and Guinea will be the Respondent.

1.2.2. The consolidated case shall be referred to as *BSG Resources Limited, BSG Resources (Guinea) Limited, BSG Resources (Guinea) SARL v Republic of Guinea* (ICSID Case No. ARB/14/22).

1.2.3. *BSG Resources (Guinea) Limited and BSG Resources (Guinea) SARL v Republic of Guinea* (ICSID Case No. ARB/15/46) shall be discontinued.

1.2.4. The modified procedural calendar set in the Parties' joint proposal dated 12 January 2016 (reproduced in Annex 1), shall apply to the consolidated case.

1.2.5. Procedural Orders Nos. 1, 2, 3 and 4 shall continue to apply and be binding on all the Parties to ICSID Case No. ARB/14/22 as consolidated, subject to the modifications set out in this Procedural Order.

1.2.6. The Centre shall maintain only one case account and issue requests for advances on costs to the three Claimants jointly. ICSID's annual administrative fee shall be charged only once (*i.e.* to the consolidated case). […]

The Tribunal notes that all Parties agree to the full consolidation of ICSID Cases Nos. ARB/14/22 and ARB/15/46. They accept all procedural steps in ICSID Case No. ARB/14/22 to date, as amended by this Procedural Order, as forming part of the fully consolidated case. They also accept that any decision and award in the consolidated case deal with claims raised in both ICSID Cases Nos. ARB/14/22 and ARB/15/46'.

[190] *Bayview Irrigation District et al. v United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, 19 June 2007, paras 1, 2: 'The International Centre for Settlement of Investment Disputes […] received on 20 January 2005, under cover of a letter of 19 January 2005, a request for the institution of arbitration proceedings under the Additional Facility Arbitration Rules […] by Bayview Irrigation District et al. […] against the United Mexican States […] . The Request was filed by forty six Claimants including seventeen Irrigation Districts, sixteen individuals, two trusts, two limited partnership, two estates, four corporations and three general partnerships. 1 A list describing the nature of each Claimant, its address and place of incorporation, was attached to the Request. […] The Request for Arbitration states that each of the individual Claimants is or was a resident of Texas and a national of the United States of America […] and not a national of Mexico, and that each of the legal persons was organized and exists under the law of Texas'.

[191] Ibid., para. 40: 'The Claimants submitted a Counter-Memorial on Jurisdiction dated 23 June 2006. In it they alleged that "[b]eginning in 1992, Mexico set about a course of purposeful and systematic capture, seizure, and diversion of the

115. The respondent agreed to the joint adjudication of claims in principle but did so in the context of the respondent's critical observation that the claimants did not prove Mexican nationality of *each*[192] claimant, which is against jurisdictional requirements under NAFTA and the ICSID Additional Facility Rules:

'[…] nothing prevents several claims from being consolidated into one single notice or request, but this does not presuppose that the requirements of the NAFTA or the ICSID Additional Facility Rules may be avoided, nor that individuals have the right to consolidate multiple claims on their own – the consolidation may be carried out by agreement between the disputing parties, as occurred in the present case […]'.[193]

Canadian Cattlemen

116. In *Canadian Cattlemen*, 109 Canadian nationals engaged in beef and cattle businesses filed Notices of Arbitration against the US under NAFTA and in accordance with the UNCITRAL Rules after the enactment of prohibitions and restrictions on Canadian livestock and beef products.[194] The parties agreed to the informal consolidation of the claims before a single tribunal at the outset of the arbitration.[195] The parties appointed a tribunal comprised of James Bacchus, Lucinda A. Low, and Karl-Heinz Böckstiegel as chairman.

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water belonging to Claimants while it was located in Mexican territory, for use by farmers located in Mexico". Footnotes omitted.

[192] Ibid., paras 121, 122.

[193] *Bayview*, above n. 190, Mexico's Memorial on Jurisdiction, 19 April 2006, para. 126.

[194] *Consolidated Canadian Claims v United States of America*, under Chapter Eleven of the North American Free Trade Agreement (NAFTA) and the UNCITRAL Arbitration Rules, Award on Jurisdiction, 28 January 2008, para. 2: 'Effective May 20, 2003, the United States has maintained prohibitions and restrictions on Canadian-origin livestock and beef products. These U.S. measures have included: […] an absolute ban on the transport, shipment and sale of certain Canadian-origin livestock from May 20, 2003 to July 14, 2005; […] an absolute ban on the transport, shipment and sale of certain Canadian-origin cattle 30 months of age and older; […] an absolute ban on the transport and sale of all Canadian-origin pregnant heifers; […] the implementation of a costly, onerous, and discriminatory certification process; and […] a ban on the transportation and sale of bovine meat products derived from bovines 30 months of age and older in the United States'.; Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 259.

[195] *Consolidated Canadian Claims*, ibid., paras 6, 7; *Consolidated Canadian Claims*, Procedural Order No. 1, 20 October 2006, paras 4.1, 4.2: 'The Parties have agreed that all claims of Canadian citizens and corporations referred to in the "Notices of Arbitration and Statement of Claim" submitted between March 16 and June 2, 2005 and listed by name and address in Claimants' "Litigants List", and listed as well by Respondent on its website as "Cases Regarding the Border Closure due to BSE Concerns", shall be consolidated before and decided by this Tribunal'.

Lao Holding, Sanum

117. *Lao Holding* and *Sanum* are referenced in literature as the latest ICSID cases exemplifying voluntary consolidation.[196] Lao Holding, a Dutch company, filed an ICSID claim. On the same date, its subsidiary Sanum established under the laws of Macau (China), initiated an *ad hoc* arbitration against Laos for the alleged expropriation of their investment in the gambling industry.[197] The parties appointed identical tribunals for both cases which comprised J. Kalicki, K. Reichert, and president L. de Chazournes. The parties also agreed that '[…] the Tribunal will run the proceedings in tandem (if not formally consolidated), for reasons of efficiency and cost' and that '[…] any subsequent submissions and rulings in the two cases shall be presented in a single document bearing both case headers'.[198]

2.1.2 Non-objection to Multiplicity of Claimants as an Expression of Consent

118. In addition to separately filed related claims, investors may decide to act collectively from the outset of arbitration. In fact, about 40% of all ICSID cases concern claims from multiple investors[199] *ab initio,* and respondents have rarely objected to the institution of

[196] Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 256.

[197] *Lao Holdings N.V. v Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/16/2, Notice of Arbitration, 14 August 2012, paras 6, 7, 8-10: 'This claim arises out of governmental conduct occurring after the conclusion of a Deed of Settlement between the Parties on or about 15 June 2014, which also included as a party the wholly-owned investment enterprise of the Claimant, Sanum Investments Limited ("Sanum"). […] Whilst purporting to exercise its governmental authority in unilateral compliance with the terms of the Settlement Deed, Respondent has committed multiple breaches of its obligations under the Treaty, including its admitted expropriation of Claimant's largest investment without the payment of prompt, adequate and effective compensation, as well as the discriminatory imposition of tax burdens less favourable than had been imposed on similarly situated enterprises. These actshave caused Claimant significant harm and threaten to deprive it of the entirety of the value of its remaining investments in Laos. […] Lao Holdings N.V. […] is an enterprise established under the laws of Aruba, Netherlands on 28 January 2011 […] .[…] On 17 January 2012, the Investor acquired 100% of all of the shares of Sanum […]. […] Sanum is an enterprise established under the laws of Macau on 14 July 2005 […]. […] Savan Vegas & Casino Co., Ltd. ("Savan Vegas") is an enterprise established under the laws of the Lao PDR on 24 August 2007 […]. […] Savan Vegas was 80% owned by Sanum and 20% by Laos'.

[198] *Sanum Investments Limited v Lao People's Democratic Republic*, ICSID Case No. ADHOC/17/1, Procedural Order No 1, 16 May 2017, para. 25.1: 'The parties have agreed that ICSID shall administer under the Additional Facility Rules, and this same Tribunal shall be appointed to hear, a parallel *ad hoc* arbitration by Sanum Investments Limited against the Lao People's Democratic Republic, invoking the bilateral investment treaty between China and the Lao People's Democratic Republic (the "Sanum Investments Case"). To the extent feasible, the parties and the Tribunal intend to run the proceedings in tandem (if not formally consolidated), for reasons of efficiency and cost. The parties and the Tribunal may consider adjustments to the procedural timetable in Annex A to account for the time needed for initial steps in the Sanum Investments Case'.; *Lao Holdings*, ibid., Procedural Order No 1, 16 May 2017, para. 25.1; Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 256.

[199] 2018 Proposals for Amendment of the ICSID Rules, above n. 27, 833.

arbitrations with multiple claimants.[200] The majority of such cases '[…] have involved no more than two or three claimants and have not posed difficulties from a procedural or case management perspective'.[201] Some examples of such cases are listed below.

Funnekotter

119. In *Funnekotter*, over a dozen Dutch and Italian investors in large commercial farms in Zimbabwe collectively filed an ICSID claim because of the losses caused by the Land Acquisition Program.[202] The multiplicity of claimants was not among jurisdictional objections raised by the respondent.[203]

OKO Pankki

120. In *OKO Pankki*, claimants were one German and two Finish banks.[204] The dispute arose out of the loans granted to the joint venture established by a Finish company and Estonian state enterprise for building the fish-processing factory in Tallinn.[205] After failed negotiations with the government concerning the repayment of the loan,[206] the banks filed

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[200] Ibid., 834.

[201] Ibid., 833.

[202] *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009, paras 1, 3; paras 19-21: 'Claimants submit that each of them had direct or indirect investments in large commercial farms in Zimbabwe. They contend that they have been deprived of their property in violation of the bilateral investment treaty (the BIT) concluded on 11 December 1996 between the Netherlands and Zimbabwe. They request the Tribunal to declare Zimbabwe responsible for its unlawful action and to order Zimbabwe to compensate them for all the damages suffered. […] In this context, they first describe the land acquisition program developed by the Government of Zimbabwe from 1992 and "the political issues that led Respondent to commit the violations of the Dutch investment agreement against" them. […] The Claimants state that, in March 1992, the Land Acquisition Act authorized the Government of Zimbabwe to acquire compulsorily any rural land when the acquisition was deemed reasonably necessary for agricultural settlement purposes'. Footnotes omitted; Lamm, above n. 1, 60.

[203] *Funnekotter*, ibid., para. 93.

[204] *Oko Pankki Oyj, VTB Bank (Deutschland) AG, Sampo Bank Plc v Estonia*, ICSID Case No ARB/04/6, Award, 19 November 2007, para. 2.

[205] Ibid., paras 17, 18: '[…] On 6 April 1988, a legal entity called Estrôbprom (the Estonian Industrial Shipping Company, established in the Estonian Soviet Socialist Republic of the USSR), and a Finnish company called Valio Oy […] established a joint venture company by the name of ESVA. The purpose of ESVA was to build a fish-processing factory in Tallinn, in the Estonian SSR, then part of the USSR. […] On 4 January 1989, the Banks granted to ESVA an interest-bearing loan in accordance with the terms of a loan agreement (here called "the Loan Agreement") […]'.

[206] Ibid., paras 37, 43, 58, 59, 60: '[…] On 17 September 1993, RAS Ookean and the Banks signed an agreement on the rescheduling and repayment of the Banks' debt due under the Loan Agreement, here referred to the "Payment Agreement". […] On 4 March 1994, a mortgage contract […] was concluded by RAS Ookean relating to the six vessels which were to be sold pursuant to the Payment Agreement. According to that contract (here called "the Mortgage Contract"), RAS Ookean undertook to mortgage the vessels and present the relevant application to the Estonian Ship Registry. […] On 5 December 1997, the District Court annulled the decision of the Tallinn City Court and declared valid and binding the Payment Agreement and Mortgage Contract between the Banks and RAS Ookean. […] After a number

a joint claim under the Estonia-Finland BIT and the Estonia-Germany BIT.[207] The respondent did not object to arbitration under two BITs and the parties managed to agree on the composition of the tribunal.[208]

Anderson

121. In *Anderson*, the claim based on at least ten different investment treaties was filed under the ICSID Additional Facility Rules by the investors in a currency exchange enterprise in Costa Rico,[209] following revocation of the operation license after accusation of a fraudulent business scheme.[210] ICSID registered the request for arbitration only from 137 claimants of the same (Canadian) nationality after amendments made by the claimants upon the request of the ICSID Secretary General.[211]

Piero Foresti

122. In *Piero Foresti*, the claim was filed against South Africa by seven nationals of Italy and one national of Luxembourg, based on the South Africa's BITs with Italy and Belgo-

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of appeals and other numerous legal skirmishes, the Supreme Court of Estonia, on 16 November 2001, declared the Payment Agreement and Mortgage Contract invalid. […] The balance of the Loan was not repaid to the Banks and remains unpaid'. Footnotes omitted.

[207] Ibid., paras 6, 60.

[208] Ibid., para. 8.

[209] *Alasdair Ross Anderson et al v Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010, para. 2: 'On May 10, 2004, a large number of individuals and companies from several different nationalities submitted a single Request for Arbitration […] to the International Centre for Settlement of Investment Disputes […] against the Republic of Costa Rica […], alleging violations of their rights under at least ten different bilateral investment treaties. Upon receipt of the Request, the Centre requested additional information and sought clarifications regarding a series of errors and defects contained in the Request for Arbitration'. Footnotes omitted; paras 6-21, 25.

[210] Ibid., paras 17, 18, 26-28: 'Luis Enrique Villalobos Camacho and his brother Osvaldo Villalobos Camacho […] at the time of the incidents giving rise to this case were Costa Rican nationals engaged in various business activities in Costa Rica. In particular, they owned and operated a currency exchange, known first as Casa de Cambio Hermanos Villalobos […] and later renamed Casa de Cambio Ofinter S.A. ("Ofinter"). […] Sometime prior to 1996, the Villalobos brothers developed and instituted a scheme whereby individuals and companies would place funds with the brothers in return fora high interest rate on their deposits, as well as the repayment of the principal amount under stipulated conditions. […] The Villalobos brothers did not openly undertake a public solicitation of funds, nor did they explain to their clients how they would use the funds raised. Instead, they conducted this part of their business on a highly confidential basis and would accept contributions only from persons introduced to them through recommendations from acquaintances. […] the Trial Court of the First Circuit of San José found Osvaldo Villalobos Camacho guilty of aggravated fraud and illegal financial intermediation for his participation in operating the brothers' financial scheme. […] The Claimants, considering that they have lost their deposits with the Villalbos brothers, commenced this arbitration against the Costa Rican government for compensation for their loss on the grounds that such loss had been caused by various actions or omissions of the government of Costa Rica in violation of the Canada-Costa Rica BIT'.

[211] Ibid., para. 3: '[A]fter significant revisions, the Secretary-General of ICSID registered the Request for Arbitration […] by one hundred thirty seven (137) individual nationals of Canada […]'.

Luxemburg Economic Unit[212] for the alleged expropriation of the mineral rights leased to the operating companies in which the claimants held shares.[213] After the constitution of the tribunal, the claimants obtained the respondent's consent to the joinder of three additional claimants of Italian nationality.[214] The respondent did not oppose to the multiplicity of claimants and BITs in its jurisdictional objections.[215]

2.1.3 General Implied Consent under the BIT in Relation to Unidentified Investors

123. As mentioned previously,[216] there is an academic consensus that the lack of multiparty provisions in investment treaties and in the ICSID Convention *per se*, does not preclude multiple claims from being pursued in one proceeding *as a matter of principle* as corroborated by the earliest multiparty arbitrations.[217] For example, in *Klöckner v Cameroon* the respondent unsuccessfully argued that the singular form of 'national' in

[212] *Piero Foresti, Laura de Carli & Others v The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Award, 4 August 2010, paras 1, 2: '[…] The Request was filed by eight Claimants including (i) five Italian nationals, members of the Foresti family of Carrara in Italy […] ; (ii) two Italian nationals, members of the Conti family of Carrara in Italy […] ; and (iii) a company, Finstone s.à.r.l., incorporated in Luxembourg […]. […] The proceedings were brought pursuant to the provisions of the Agreement between the Government of the Republic of South Africa and the Government of the Italian Republic for the Promotion and Protection of Investments […] and the Agreement between the Republic of South Africa and the Belgo-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments […]. […] The Request for Arbitration states that each of the individual Claimants is or was a national of Italy and not a national of South Africa, and that Finstone was organized and exists under the law of Luxembourg'.

[213] Ibid., para. 54: 'The Claimants alleged that the Respondent was in breach of the BITs' prohibitions on expropriation (Article 5 of both BITs) in two respects: […] By the coming into effect of the MPRDA on 1 May 2004, which extinguished certain putative old order mineral rights allegedly held by the Claimants; and […] By the coming into effect of the MPRDA, when combined with the Mining Charter […], introducing compulsory equity divestiture requirements with respect to the Claimants' shares in the Operating Companies'. Footnotes omitted.

[214] Ibid., para. 13: 'In their Memorial, the Claimants also submitted a request that the Respondent consent to join three additional claimants, namely, the three children of Claimants Piero Foresti and his wife Ida Laura De Carli […] as additional claimants in the arbitration. The Respondent consented to the Claimants' request and, subsequently, on 13 July 2009, the Secretary-General of ICSID approved access to the Additional Facility for the three additional Claimants'.

[215] Ibid., para. 46.

[216] See paras 35 *et seq. supra*.

[217] See paras 342 *et seq. infra*.

relation to a qualified investor bars multiparty arbitration.[218] In *Götz v. Burundi*, the tribunal accepted jurisdiction over six claimants.[219]

124. Nonetheless, tribunals still have to deal with the respondents' argument that consent to arbitration with multiple claimants supposedly given implicitly in the treaty is not sufficient and secondary consent to a specific arbitration is required. In this case, a tribunal must undertake a separate analysis for deciding whether the respondent's general consent provided in the treaty covers claims by multiple investors.[220]

125. In *Ambiente*, Argentina argued that '[…] the absence of express provisions for multi-party proceedings cannot be construed to implicitly allow for such actions, but that the absence of clear and express consent to multi-party proceedings leads to the opposite conclusion […]'.[221] The tribunal quoted the rules of interpretation under Article 31 of the VCLT in order to determine whether multiplicity of claimants falls within the scope of consent under the Argentina-Italy BIT:[222]

'[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their consent and in the light of its object and purpose'.

126. According to the tribunal, 'ordinary meaning' in the sense of this rule accommodates both interpretations (one investor and multiple investors).[223] The Argentina-Italy BIT should be interpreted accordingly, as it refers to investors both in singular and in plural form.[224] The fact that the drafters of the ICSID Convention mentioned the possibility of multiparty arbitration '[…] might weaken Respondent's claim that accepting multi-party arbitrations would extend the jurisdictional basis "way beyond the 'horizon of foreseeability' of the

[218] Schreuer, above n. 2, 163: 'Once the principle of multipartite arbitration is accepted, no question should 281 arise by virtue only of the number of co-claimants. In some pending cases, many thousands of individual investors holding bonds issued by Argentina or Argentine entities have collectively commenced proceedings against Argentina'. Footnote omitted.

[219] *Antoine Goetz and others v Republic of Burundi (I)*, ICSID Case No. ARB/95/3, Award, 10 February 1999, paras 84, 85; Schreuer, ibid.; Obadia, above n. 7, 107.

[220] Obadia, ibid., 107.

[221] *Ambiente Ufficio S.p.A. and others v Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, para. 128.

[222] Ibid., para. 129.

[223] Ibid., para. 130.

[224] Ibid., para. 131.

drafters of the ICSID Convention," *i.e.* to what the Parties could have foreseen at the time the treaty was concluded or consent was given'.[225]

127. The tribunal noted that (apart from the "sister cases" against Argentina – *Abaclat* and *Alemanni*) Argentina could not quote a single case in which the respondent or the tribunal would have considered '[…] the mere fact of several claimants instituting arbitral proceedings jointly an obstacle to jurisdiction, unless the respondent Government gives it specific consent to do so'.[226]

128. Similarly, in *Alemanni*, the tribunal rejected a contention that the absence of multiparty provisions or the usage of the term 'investor' in singular can be in any way indicative of the scope of consent:

'The standard set out in Article 31(1) of the Vienna Convention, that a treaty is to be interpreted in good faith 'in accordance with the ordinary meaning to be given to the terms of the treaty' […] can by no stretch of the imagination be read as imposing a sort of lexicographical literalism'.[227]

129. There can be more than one 'ordinary meaning' in a given case and the task of the interpreter is '[…] to decide which among them was intended by the negotiators, and for that purpose he must be guided by context (in its widest sense) and object and purpose, and also by the additional and where appropriate the supplementary means enumerated in Article 31(3) and (4) and Article 32'.[228] *A contrario*, were the plurality of claimants not foreseen under the ICSID Convention, then the relevant wording of Article 25(1) of the ICSID Convention would mean 'dispute between a Contracting State and one, but only one, national of another Contracting State'.[229] Neither primary nor secondary rules of interpretation under the VCLT would allow to import the phrase 'but only one' into the meaning of this provision.[230]

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[225] Ibid., para. 132.

[226] Ibid., para. 141.

[227] *Giovanni Alemanni and Others v The Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, 17 November 2014, para. 270.

[228] Ibid.

[229] Ibid.

[230] Ibid., paras 271, 272.

2.1.3.1 Respondent's familiarity with the mechanism of multiparty arbitration under the national legislation

130. In establishing consent under the treaty, provisions on multiparty arbitration in the national legislation of the host state points to the awareness of the respondent about the possibility of arbitration with multiple claimants. In *Ambiente*, the tribunal observed that '[…] the domestic laws of both Argentina and Italy were familiar with multiparty proceedings at the time when these countries gave consent to the ICSID Convention and the Argentina-Italy BIT'.[231] This fact cannot serve as an indication that multiparty arbitration is a general principle of international law in the sense of the Statute of the International Court of Justice.[232] However, it does prove that '[…] the admission of multi-party proceedings […] does not come as a surprise to the Respondent, but that it is well accustomed from its own legislation and legal tradition that instituting multi-party proceedings is perfectly possible under certain circumstances'.[233]

2.1.3.2 Lack of the respondents' objections in the earlier multiparty cases

131. In *Alemanni*, the tribunal observed that, after initiation of an arbitration, consent can be expressed not only in the agreement of the parties documented in the procedural documents but can be '[…] inferred by the respondent answering the claimants' claim and continuing with the arbitration without raising objection to the fact that there is a multiplicity of claimants'.[234]

132. There is consensus in practice that such lack of objections from a respondent must be interpreted as an implied consent. This rule though, does not entail conversely that, if such objection is raised, a tribunal shall automatically stipulate that multiparty arbitration falls outside the scope of the respondent's consent. In *Guaracachi*, Bolivia insisted that '[…] in these cases, the States did not object to the tribunal's jurisdiction on the basis of a lack of consent to the joinder of disputes', and hence, '[…] the "implied" State consent

[231] *Ambiente*, above n. 221, para. 133.

[232] Ibid., referring to the following wording of Article 38 of the Statute of the International Court of Justice, which lists the sources of international law: '[…] The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: '[…] the general principles of law recognized by civilized nations;'.

[233] Ibid., para. 134.

[234] *Alemanni*, above n. 227, para. 285.

in such cases cannot be applied to these proceedings to alter the scope of Bolivia's consent'.[235] The tribunal pointed out the contradiction that this argument poses to the respondent's submission that 'specific consent' to multiparty arbitration is required:

'Were such specific consent necessary, it would be impossible to accept, as the Respondent has argued, that all prior multi-party arbitrations were only allowed to proceed because of the implicit consent provided by the respondent States through their failure to raise any jurisdictional objection in this regard'.[236]

2.1.4 Specific Implied Consent in Relation to a Concrete Investment: Establishing Connectivity as the Basic Prerequisite for the Joint Treatment of Claims

133. The most controversial and complicated issues related to the interpretation of consent concern a *specific post-dispute consent* when a respondent challenges the tribunal's jurisdiction for the lack of the state's consent to the multitude of claimants in relation to a *specific* investment and/or investors. In this scenario, the main prerequisite for the joint adjudication of claims is the existence of common element(s) between them (*connectivity*).[237] The likelihood that related claims will be joined is contingent upon the number of common elements[238] which fall within two main categories:[239]

(i) the same *investment* made by related investors;

(ii) the same *state measure* affecting related or unrelated investors acting under the same or different BITs.

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[235] *Guaracachi America, Inc. and Rurelec PLC v The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award, 31 January 2014, para. 171.

[236] Ibid., para. 342.

[237] Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 85, 86.

[238] Obadia, above n. 7, 110.

[239] Other examples of common elements considered by the tribunals in deciding whether a multiparty claim can maintain cited in the 2018 Proposals for Amendment of the ICSID Rules:'(i) a single dispute exists; (ii) the investment is the same or was made jointly by the claimants; (iii) the underlying facts or the overall economic transaction are the same; (iv) the investors or the claims are affiliated; (v) the challenged measures are the same; (vi) the same respondents are named; or (vi) the remedies sought are aligned.' Above n. 27, 834.

134. In addition to connectivity, another prerequisite for the joinder of claims is *efficiency* of dispute resolution, accomplished through avoidance of parallel proceedings.

135. The following case overview is structured accordingly to formulate principles, methods, and factors, utilised for determining the above prerequisites in each of the multiparty scenarios. Since tribunals do not delve into the reasoning on consent to multiparty arbitration if a respective jurisdictional objection is not raised, only those cases are of relevance in which a respondent did oppose to the multiplicity of claimants.

136. Contrary to *general* consent, which focuses on the scope of consent expressed in the BIT and related to unidentified investors of certain nationality, the pertaining line of cases deals with the scope of consent in relation to a specific investment underlying a concrete dispute.

2.1.4.1 Connectivity in the Form of the Same Investment

137. Multiparty arbitrations *ab initio* were allowed to proceed as such when the claimants were involved in the ***same investment*** as members of the same group of companies or shareholders in the same company.[240] It has been argued that, in investment arbitration (as opposed to commercial arbitration), it has been argued that the 'unity of the economic transaction' affected by 'a same state measure' prevails over consent of the parties to have their disputes adjudicated together.[241] However, where *implied* consent has to be established, as the case overview below demonstrates, the 'unity of the economic transaction' can serve as an indication of the parties' respective intent, which is an element of consent and, as such, mitigates this antagonism.

Noble Energy

138. One of the multiparty scenarios is when foreign investors seek remedy based on the investment agreement(s) with the host state's government, often in combination with the

[240] Bishop, above n. 20, 246-249.

[241] Crivellaro, above n. 15, 416: '[T]he consolidation of related commercial arbitrations remains fully dependent on the consent of all the parties involved, whereas the consolidation of related investment arbitrations may be achieved by a tribunal's binding order. As seen above, the guiding consolidation principles in international investment law are the *unity of the economic transaction* affected by a *same State measure*. The same principles do not find application in international commercial arbitration'. Footnote omitted.

BIT(s). In this case, the question may arise whether third parties (non-signatories involved in the same investment project without having signed an agreement providing for investment treaty arbitration) may act as claimants.

139. In *Noble Energy*, the tribunal dealt with two questions in this regard: (i) whether the arbitration agreement in the contract with an ICSID arbitration clause can be extended to non-signatories[242] and (ii) whether the claims under different contractual and treaty instruments can be brought together.[243]

140. Claimants in this case were US companies Noble Energy and MachalaPower, incorporated in Cayman Islands with a representative office in Ecuador. Noble Energy owned MachalaPower indirectly through a US company Samedan Oil Corporation.[244] MachalaPower signed a concession contract for the construction of an electric power generation plant and dispatch of electricity with the Ecuadorian government, represented by a regulatory authority CONELEC.[245] On the same date, Samedan Oil Corporation signed an investment agreement with the Ecuadorian government providing for an ICSID arbitration. Under this agreement, MachalaPower was named a 'recipient company', and the concession contract was referred to as the 'basic contract'.[246]

141. Following a series of adverse state measures affecting MachalaPower,[247] Noble Energy and MachalaPower filed an ICSID claim against the Ecuadorian government and

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[242] *Noble Energy*, above n. 37, paras 85-118; Bishop, above n. 20, 249.

[243] *Noble Energy*, ibid., paras 185- 207; Schreuer, above n. 2, 383, 384; Obadia, above n. 7, 108.

[244] *Noble Energy*, ibid., paras 3, 4, 10: 'Noble Energy is a company incorporated and existing under the laws of the State of Delaware, United States of America. […] MachalaPower is a company incorporated and existing under the laws of the Cayman Islands. It has a branch in Ecuador […]. […] MachalaPower is an independent thermoelectric generator. Under the Electricity Act, it was allowed to sell the electricity it produces in the spot market and under power purchase agreements (PPAs). MachalaPower is indirectly owned by Noble Energy. Noble Energy also indirectly owns an oil and gas company, EDC Ecuador Ltd. […], which entered on 2 July 1996 into a production sharing contract with Petroecuador, the State entity active in the oil sector'.

[245] Ibid., para. 11: 'On 15 October 2001, MachalaPower and the Ecuadorian Government, represented by CONELEC, signed a concession contract […] for the construction, installation and operation of an electric power generation plant, the MachalaPower Plant Project. At that time, MachalaPower was a subsidiary of Samedan Oil Corporation, a company incorporated in the State of Delaware and a wholly-owned subsidiary of Noble Energy'.

[246] Ibid., paras 53, 110-113; paras 12, 51, 111: 'On 15 October 2001, Samedan Oil Corporation and the Ecuadorian Government signed an investment agreement […] which was to be executed together with the Concession Contract, referred to in the Investment Agreement as the Basic Contract. […] The Tribunal's competence is contingent upon the provisions of Article 25 of the ICSID Convention, the BIT, the Investment Agreement and the Concession Contract. […] The Parties Clause of the Investment Agreement specifies that Ecuador […], Samedan Oil Corporation (the Investor), and MachalaPower (the Recipient Company) are all parties to the agreement'.

[247] Ibid., paras 16-20; para. 15: 'According to the Claimants, these disputes arise out of a series of decrees, resolutions, decisions, policies, practices, acts and omissions of the Respondents, through which they fundamentally breached the

CONELEC. The claimants invoked the combination of the BIT and contractual instruments as a jurisdictional basis for the claim: the US-Ecuador BIT (in relation to Noble Energy), the investment agreement (in relation to both claimants), and the concession contract (in relation to MachalaPower).[248]

a. Non-signatory to the investment agreement

142. The respondents argued that Noble Energy cannot invoke the ICSID arbitration clause envisaged in the investment agreement which it did not sign initially but became a successor of the signatory Samedan Oil following the merger of the companies.[249] The respondents argued that legal consequences of the merger should be governed by the provisions on accession in the investment agreement, which referred to the special procedure under Ecuadorian law.[250] One of the claimants' arguments was that Noble Energy is a proper claimant due to 'the reality of the investment and the actual parties in interest', and that '[…] parent company ought to be a party to the contract through its participation in the performance'.[251] The claimants emphasised that tribunals '[…] are

obligations they had assumed towards the Claimants by altering the economic, regulatory, legal, and contractual framework that had been specifically designed to induce investment, and upon which Claimants had relied in making their investment in Ecuador […]. The Claimants invoke more particularly the following events'.

[248] Ibid., para. 14: 'The Claimants have submitted the following disputes to the Tribunal: a dispute between Noble Energy and the Respondents under the US-Ecuador bilateral investment treaty, a dispute between the Claimants and the Respondents under the Investment Agreement, and a dispute between MachalaPower and the Respondents under the Concession Contract'.

[249] Ibid., paras 88, 90: 'On the basis of the certificate of ownership and merger of 17 December 2002 […], the Tribunal is satisfied that Samedan Oil Corporation was merged into Noble Energy and that Noble Energy is the surviving entity of the merger, it being understood that *"all property, rights, privileges, powers and franchises, and every other interest shall be thereafter as effectually the property of the surviving [...] corporation"* and that *"all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving [...] corporation"* (Section 259 of the Delaware General Corporation Law […]). In other words, Noble Energy has absorbed Samedan Oil Corporation and succeeded to all its rights and obligations'.

[250] Ibid., paras 90, 91: 'The Respondents contend that Noble Energy is not a party to the Investment Agreement. They consider that Ecuadorian law and the terms of the Investment Agreement govern this issue and argue that the absorbing company in a merger does not automatically acquire all of the absorbed company's rights over the assets. Specifically, they submit that Noble Energy should have complied with the applicable procedures set forth in the Investment Agreement […] for it to acquire all the rights of Samedan Oil Corporation. […] Articles 7 and 8 of the Investment Agreement provided for procedures for the assignment of all or part of the investment and the accession to the Investment Agreement in accordance with certain provisions of Regulatory Decree No. 1132 issued under the Law on Promotion and Guarantee of Investments […]. Article 10 (b) of the Regulations provided that transfers or assignment needed to be registered with the Central Bank of Ecuador or with the Ministry of Foreign Trade, Industrialization, Fishing, and Competitiveness […]'.

[251] Ibid., para. 96.

not formalistic when they assess their competence and review the circumstances surrounding the case, in particular the relationships among the companies involved'.[252]

143. The tribunal agreed with the claimants that '[…] in economic terms the *persona* is essentially unchanged when the parent replaces (absorbs) a wholly-owned subsidiary',[253] whereas the references to Ecuadorian law were '[…] mere formalities and not […] conditions precedent to the acquisition of the rights of a party in the specific circumstances of this case'.[254]

144. The respondent also objected to the tribunal's jurisdiction over MachalaPower under the investment agreement, as it was named a 'recipient' of the investment and not a foreign investor itself.[255] The tribunal rejected this argument because, although MachalaPower did not sign the investment agreement, it was named as a party to it and the agreement, '[…] leaves no doubt when it provides that the "Investor and/or the Recipient Company" shall seek to resolve disputes through consultations and negotiations and failing so, by arbitration'.[256] The claimants argued that the waiver of an option to bring the claims in local courts in favour of arbitration was "incorporated by reference" from the concession contract, which MachalaPower actually signed. Hence, '[…] ICSID arbitration was the only dispute resolution method available under the Agreements'.[257]

145. In deciding that the company has the right to invoke the investment agreement, the tribunal also considered that MachalaPower '[…] undertook various contractual obligations, such as the commitment to make the investment in the power plant', and

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[252] Ibid.

[253] Ibid, para. 107.

[254] Ibid., para. 108.

[255] Ibid., para. 110.

[256] Ibid., para. 112.

[257] Ibid., paras 114, 115: 'Furthermore, as the Claimants stress, Clause 11 (c) of the Investment Agreement incorporated by reference Clause 22.5 of the Concession Contract. By virtue of such clause, the parties waived their right to bring any disputes arising out of the Investment Agreement before the local courts since they had agreed to submit and resolve their disputes according to arbitration proceedings […]. As a consequence of this express waiver, ICSID arbitration was the only dispute resolution method available under the Agreements. […] Accordingly, the Tribunal has no hesitation concluding that MachalaPower is entitled to rely on the ICSID arbitration provision contained in the Investment Agreement'.

'[…] the State provided certain guarantees, for example legal and tax stability […], to both the Investor and the Recipient Company, MachalaPower'.[258]

b. Consent to decide disputes under different instruments in one arbitration

146. The claims under different instruments in *Noble Energy* represented different disputes, and the question arose, whether the scope of the parties' consent accommodates the resolution of all disputes 'in one single arbitration'.[259] Connectivity between the disputes as a primary requirement[260] for joinder was established by the tribunal: They held the 'same facts, the same overall economic transaction, and the same measures' as well as 'significant similarities' between the measures complained of and the relief sought under different instruments.[261]

147. The economic approach also allowed the tribunal to infer an '[…] implied consent to have the pending disputes arising from the same overall economic transaction resolved in one and the same arbitration'.[262] The factors that allowed the tribunal to arrive at this conclusion were a close link between the underlying contracts[263] and the same dispute resolution forum in all relevant instruments.[264]

148. The tribunal emphasised the importance of the parties' 'reasonable and legitimate expectations in interpreting arbitration agreements' that should be established 'in view of the agreement or the transaction as a whole'.[265] The test of legitimate expectations was met for the following reasons: Firstly, the disputes are closely related as they '[…] arise out of the same investment project and the same overall economic transaction'.[266] Secondly, the concession contract and the investment agreement are closely linked as

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[258] Ibid., para. 113.

[259] Ibid., para. 14; para. 185: 'The parties have debated the scope of their consent to arbitration, specifically as to whether they agreed to resolve all these disputes submitted to this Tribunal in one single arbitration […]'.

[260] Ibid., para. 192.

[261] Ibid.

[262] Ibid., para. 194.

[263] Ibid., para. 199.

[264] Ibid., para. 200.

[265] Ibid., para. 197.

[266] Ibid., para. 198.

they were signed on the same date and have many cross-references.[267] Thirdly, the dispute resolution clauses are 'coordinated' in all instruments insofar as they all provide for the ICSID arbitration.[268] Fourthly the state is a party to all three jurisdictional instruments, including the concession contract in which it was represented by CONELEC, '[…] acting as the competent public entity on behalf of the State'.[269] Fifthly, the definition of an investment dispute in the BIT demonstrates that the state agreed that the disputes under the BIT and related contracts can be decided together: investment dispute is *inter alia* '[…] a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company'.[270] Lastly, the Ecuadorian domestic laws on protection of foreign investments enabled investors to submit ICSID claims both under the treaty and under the contracts with the state.[271]

149. Focusing on the expectations of the parties is a common phenomenon in multiparty cases where '[…] in making an arbitration agreement, parties do not ordinarily give conscious thought to whether their future arbitrations can or should be consolidated, or whether additional parties can be joined, and if so when'.[272] Therefore, the task of determining the scope of the parties' arbitration agreement is 'somewhat artificial' and '[…] turns on presumptions regarding their expectations'.[273]

Holiday Inns

150. *Holiday Inns* is another example of extending an ICSID arbitration clause to non-signatories.[274] Two US investors – Holiday Inns (HI) and Occidental Petroleum Corporation (OPC) – established two subsidiaries to carry out a hotel construction project

[267] Ibid., para. 199.

[268] Ibid., para. 200.

[269] Ibid., para. 201.

[270] Ibid., para. 202.

[271] Ibid., paras 203, 204.

[272] Born, above n. 114, 2765, 2766.

[273] Ibid.

[274] *Holiday Inns S.A. and others v Morocco*, ICSID Case No. ARB/72/1, Decision on Jurisdiction, 12 May 1974 (unpublished) as summarised in P. Lalive, 'The First World Bank Arbitration (*Holiday Inns v Morocco*) – Some Legal Problems', 51 *The British Yearbook of International Law* (1980); See comment on the multiparty aspects of the case in: Bishop, above n. 20, 247, 248; B. Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class* (2005) 85, 170; Lamm, above n. 1, 60, 61.

in Morocco: a Swiss company Holiday Inns S.A., Glarus (HISA) and an American company Occidental Hotels of Morocco (OHM).[275]

151. HI and OPC signed the Letter of Intent with the government concerning the construction of four Holiday Inns hotels and the Basic Agreement – a main contract regulating the project.[276] The Basic Agreement provided for the detailed description of the rights and obligations of the investors (HI and OPC) and of the Moroccan government.[277] However, formally, the signatories were HISA and 'a subsidiary of OPC' (OHM), which at the date of signing of the agreement was in the process of creation.[278] Only the Basic Agreement provided for ICSID arbitration, contrary to ICC arbitration, stipulated in the Letter of Intent.[279] The Moroccan government also insisted on signing of the letter of guarantee, whereby HI and OPC undertook 'to assume all responsibilities of guarantors to warrant all commitments and liabilities and the true and complete fulfilment of all obligations' of the signatories to the Basic Agreement.[280]

152. After the government refused to finance construction of the hotels in breach of its initial obligations, two subsidiaries filed an ICSID claim based on the Basic Agreement on behalf of (*inter alia)* the parent companies.[281] Morocco objected to the tribunal's jurisdiction over the parent companies as they were non-signatories to the Basic Agreement.[282]

153. The claimants insisted that the 'economic realities' of the construction project should prevail over formalistic approach.[283] HI and OPC, as the guarantors of their subsidiaries, are subrogated to their rights, including the rights under the arbitration clause in the Basic Agreement.[284] Alternatively, the arbitration clause can be assigned under the provision of the Basic Agreement stipulating that it can be assigned at any time to any affiliated

[275] Lalive, ibid., 127.

[276] Ibid., 126.

[277] Ibid., 126, 127.

[278] Ibid., 128.

[279] Ibid.

[280] Ibid.

[281] Ibid., 137

[282] Ibid., 147, 148, 150.

[283] Ibid., 148.

[284] Ibid., 148, 149.

corporation they may jointly own or designate.[285] The assignment occurred through additional agreements modifying the Basic Agreement that were concluded between the government and the parent companies.[286] In doing so, the respondent confirmed that HI and OPC can benefit from the Basic Agreement.[287] Thus, as long as the dispute falls within the scope of the arbitration clause and all claimants are parties to the dispute (and not necessarily signatories to the original contract), consent in writing under the ICSID Convention exists.[288]

154. The argument was also put forward that the government's conduct in the proceeding contradicts to the spirit of the agreement and the principle of good faith whereby its '[…] whole attitude, its signature under several contractual texts, its correspondence, etc., had clearly represented that it was dealing and wanted to deal with the Group Holiday/Occidental'.[289]

155. The tribunal upheld the claimants' argument on the transfer of the arbitration clause to the parent companies by way of cession '[…] to the extent that they have carried out obligations contemplated by the Basic Agreement'[290] which gave '[…] the contracting companies a great amount of flexibility in the designation of the companies which would assume responsibility […]'.[291] The contractual relations as a whole show that the parent companies participated in the implementation of the undertakings, with respect to the chain of hotels.[292]

156. As a more general observation, the tribunal also rejected Morocco's attempts to defend a narrow interpretation of the scope of the state's consent, given that the 'general unity of an investment operation' was one of the fundamental principles that inspired the ICSID Convention:[293]

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[285] Ibid., 147.

[286] Ibid., 149, 150.

[287] Ibid., 150.

[288] Ibid., 150.

[289] Ibid. 154.

[290] Ibid., 151.

[291] Ibid.

[292] Ibid.

[293] Ibid., 159.

'It is well known, and it is being particularly shown in the present case, that investment is accomplished by a number of juridical acts of all sorts. It would not be consonant either with economic reality or with the intention of the parties to consider each of these acts in complete isolation from the others. It is particularly important to ascertain which is the act which is the basis of the investment and which entails as measures of execution the other acts which have been concluded in order to carry it out'.[294]

157. Similarly, Crivellaro commented on the case that the Basic Agreement was the 'charter of an investment', and the contracts were measures of execution, thus, forming 'the general unity of an investment operation'.[295]

c. Nationals of the host state as foreign investors

158. For the implementation of the project in *Holiday Inns*, four local companies were incorporated in Morocco and could not rely on the ICSID arbitration clause in the Basic Agreement as nationals of the host state. Therefore, the tribunal had to decide whether they qualify as foreign investors in the sense of Article 25(2)(b) of the ICSID Convention. Pursuant to this provision, a foreign investor is 'any juridical person which had the nationality of the Contracting State party to the dispute […] and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention'. This provision does not specify, whether the parties' agreement should be explicit and in writing or whether it can be implied from the parties' conduct.[296] The respondent argued that it never consented in writing to treat local companies as foreign nationals and, hence, ICSID jurisdiction cannot be extended to them.[297]

159. The claimants argued that the government's consent in relation to the local companies existed based on its conduct towards them. The companies were created after repeated requests of the government as a 'legal support' for the construction project (to facilitate financing under local regulations) and to enable the government's participation in the construction whereas the parent companies themselves had no interest in setting up local

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[294] Ibid., 159.

[295] Crivellaro, above n. 15, 390.

[296] For an overview of the case law on 'foreign exception' see Schreuer, above n. 2, 296 *et seq*.

[297] Lalive, above n. 274, 139.

subsidiaries.[298] The Basic Agreement mentioned the loan to be provided to a company nominated by the foreign signatories of the agreement. In the correspondence, the government factually treated the subsidiaries as identical to their foreign parent companies.[299] Hence, even if the 'foreign control' exception should have been made in the written form, the respondent was estopped from insisting that the local companies were not eligible for treating them as foreign investors.[300]

160. The tribunal was not convinced with this argument and observed that even if an agreement on foreign nationality does not require a written form, the threshold for establishing an implied consent was not met in relation to the local companies:

'[…] The question arises, however, whether such an agreement must be expressed or whether it may be implied. The solution which such an agreement intended to achieve constitutes an exception to the general rule established by the Convention, and one would expect that parties should express themselves clearly and explicitly with respect to such a derogation. Such an agreement should normally therefore be explicit. An implied agreement would only be acceptable in the event that the specific circumstances would exclude any other interpretation of the intention of the parties, which is not the case here'.[301]

161. The intention of the parties to treat local entities as foreign must be clear from the outset of an investment project. In *Holiday Inns*, though, as Lalive observed, '[…] it never seemed to have occurred to them that the creation of the [local] companies might one day give rise to an arbitration problem', and hence '[…] it could hardly be said that the Government had had any definite intention, to agree or to disagree, to consent or not to consent'.[302]

d. Representative claims

162. It is a common practice for foreign investors to join their efforts by setting up a consortium or a joint venture for the implementation of their investment project abroad.

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[298] Ibid., 140, 141.

[299] Ibid., 141.

[300] Ibid.

[301] Ibid.

[302] Ibid., 142.

In *Impregilo*, an unincorporated joint venture Ghazi-Barotha Contractors (GBC) was established through the joint venture agreement (JVA) under the laws of Switzerland. The GBC's role was to submit tenders for the construction of the hydroelectric power facilities in Pakistan.[303] Impregilo (of Italian nationality) was a majority shareholder with 57,8 % of shares and a 'leader' of the joint venture that represented it in all contractual matters.[304] Impregilo brought an ICSID claim on behalf of GBC and its participants, to which Pakistan raised a jurisdictional objection.[305]

163. GBC had a status of *'société simple'*, having neither legal personality under Swiss law nor the right to act in the proceeding in its own right.[306] Accordingly, it was clarified in the JVA that it did not '[…] constitute a partnership or other form of permanent company or organisation between the Parties under any applicable law'.[307] Impregilo argued that its status under the JVA and the Swiss law '[…] entitle, if not oblige, it to assert a claim for the full amount of the damages suffered by GBC'.[308]

164. The claimant relied on two ICC awards in which tribunals recognised the right of a partner to represent other partners[309] explaining that '[…] each member of a joint venture has a

[303] *Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, paras 8, 10, 11: 'According to the Claimant's Request, on 27 April 1995 a joint venture called Ghazi-Barotha Contractors ("GBC" or the "Joint Venture") was formed under the laws of Switzerland, in order to prepare and submit tenders for, and if successful to construct, hydroelectric power facilities in Pakistan known as the Ghazi-Barotha Hydropower Project (the "Project"). […] GBC was established pursuant to a "Joint Venture Agreement" ("JVA") concluded between five joint venture participants (comprising both Pakistani and non-Pakistani entities), as follows: (a) Impregilo; (b) Ed. Züblin AG (a German company); (c) Campenon Bernard SGE (a French company); (d) Saadullah Khan & Brothers ("SKB") (a Pakistani company); and (e) Nazir & Company (Private) Limited (a Pakistani company). […] Impregilo was selected as the Leader of the Joint Venture'.

[304] Ibid., paras 11, 27, 116.

[305] Ibid., para. 112.

[306] Ibid., para.119.

[307] Ibid., para. 117.

[308] Ibid., para. 125.

[309] Ibid., para. 130: 'Impregilo also contends that arbitral tribunals have "long recognized" the right of a joint venture partner to bring claims before an international arbitral tribunal on behalf of its partners in the Joint Venture. Impregilo relies on the following decisions in this regard: (a) Preliminary Award in ICC Arbitration Case No. 498362, in which Impregilo sought to assert claims on behalf of a joint venture. The Tribunal had to decide "[w]hether ... the arbitrators have jurisdiction to continue with the reference to this arbitration [with only Impregilo as the Claimant]" in the event that the other joint venture partner had to withdraw from the proceeding. It concluded that "the arbitrators are of the opinion that the Tribunal has jurisdiction to continue to hear the reference to arbitration with Impregilo S.p.A. [Claimant] as the only Claimant, because in their view, each member of a joint venture has a several right to go to arbitration." The tribunal reasoned that in an unincorporated joint venture of co-liable partners, each joint venture partner is liable for the entirety, and therefore each partner also has the right to act as a creditor for the entirety. (b) Interim Award in ICC Arbitration Case No 502963, in which the tribunal found "that company A [the leader of a joint venture] could validly submit the Contractor's claims against defendant in this arbitration in its own behalf and on behalf of the parties forming joint venture X...". The tribunal relied on the fact that the successive joint venture agreements between the partners gave the Leader

several right to go to arbitration'.[310] The leader in the joint venture has the '[…] authority to represent the joint venture in all matters pertaining to the Contract', because a joint venture '[…] creates an agency relationship and not an undertaking to exercise any rights arising under the Contract against defendant only jointly'.[311]

165. The ICSID tribunal, however, stressed that under Article 25(2)(b), a foreign investor must be a 'juridical person'.[312] The tribunal stated that '[…] for the purposes of the Convention the quality of legal personality is inherent in the concept of 'juridical person' and is part of the objective requirement for jurisdiction'.[313] Hence, consent to arbitration does not cover claims by GBC, as it is not a 'juridical person' in the sense of the ICSID Convention.[314] The fact that Impregilo pursues the claim on behalf of GBC does not make any difference, as it '[…] remains that of GBC, albeit advanced by Impregilo in some form of representative capacity'.[315] A contrary position would allow any party to have access to investment arbitration, by simply appointing a representative and thereby evade jurisdictional requirements under the ICSID Convention or under the BIT[316] (which, arguably, materialized in *Abaclat* where a 'mass' – in contrast to a 'multiparty' – investment arbitration was referred to ICSID[317]).

166. The representative function of Impregilo to file a joint claim is irrelevant because, '[…] it remains a fundamental proposition that the scope of the BIT cannot be expanded by a municipal law contract to which Pakistan is not a party'.[318] Contractual instruments can only regulate internal arrangements within the joint venture. Although '[…] Impregilo is

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the authority to represent the joint venture in all matters pertaining to the Contract. According to the tribunal, "[s]uch an agreement creates an agency relationship and not an undertaking to exercise any rights arising under the Contract against defendant only jointly." (c) McHarg, Roberts, Wallace, Todd v. Iran64, in which the Iran-U.S. Claims Tribunal found that some members of a partnership could assert a claim on behalf of the whole partnership, provided that (i) "the ownership interests of such [partners], collectively, were sufficient to control the [partnership];" and (ii) the partnership "is not itself entitled to bring a claim under the terms" of the agreement on which the jurisdiction of the tribunal is founded'.

[310] Ibid.

[311] Ibid.

[312] Ibid., para. 132.

[313] Ibid., para. 133.

[314] Ibid., para. 134.

[315] Ibid., para. 135.

[316] Ibid.

[317] See paras 627-629, 632 *infra*.

[318] *Impregilo*, above n. 303, para. 136.

entrusted with the duties to be fulfilled on behalf of the joint venture, including matters of management […]', these are 'internal GBC management issues' and '[…] GBC cannot be identified exclusively with Impregilo, nor characterized as "Impregilo's joint venture" […]'.[319] Not only an attempt to recover losses incurred by an unincorporated entity would go beyond Pakistan's consent to arbitration[320] but also representing each non-Italian member of the joint venture by Impregilo as an Italian national.

167. In other words, a national protected under the BIT cannot extend the state's consent to the nationals that are not, even if they are contractually involved in the same investment project:[321] 'There is nothing in the BIT to extend this to claims of nationals of any other state, even if advanced on their behalf by Italian nationals'.[322]

2.1.4.2 Connectivity in the Form of the Same State Measure: Multiplicity of the BITs

168. Along with the same *investment*, another type of connection between multiple claimants is where the same ***state measure*** affected investors protected under different BITs. A respondent may raise a jurisdictional objection on the ground that the scope of consent under each of the invoked BITs does not cover claims under (an)other BIT(s) or that the treaties are incompatible:

Guaracachi

169. In *Guaracachi, ad hoc* arbitration was initiated based on the UK-Bolivia BIT and the US-Bolivia BIT after nationalization of Guaracachi's and Rurelec's shares in the Bolivian electricity enterprise.[323] Under both treaties, arbitrations were to be administered by the

[319] Ibid., para. 137.

[320] Ibid.

[321] Ibid., paras 140-151, 153.

[322] Ibid., para. 148.

[323] *Guaracachi*, above n. 235, paras 1, 4: 'The Claimants in the present arbitration are Guaracachi America, Inc., a company incorporated in the United States of America, with its principal place of business at Loockerman Square 32, Suite L-100, Dover, Delaware, United States of America (hereinafter, "GAI"), and Rurelec Plc, a company constituted under the laws in force in the United Kingdom. […] The Claimants alleged that the nationalisation carried out by the Bolivian State of GAI's and Rurelec's 50.001% shareholding in Empresa Eléctrica Guaracachi S.A. (hereinafter, "EGSA"), a company incorporated under the laws of Bolivia, as well as the failure to obtain justice through the Bolivian court system, caused injury to the Claimants quantified at USD 142.3 million. Moreover, they argued that Bolivia seized

Permanent Court of Arbitration (PCA) and governed by the UNCITRAL Arbitration Rules.[324]

170. The tribunal rejected the respondent's interpretation of silence in the BITs regarding multiparty arbitration as the lack of the state's consent to multiple claims. The tribunal observed that '[…] the consent given by the Respondent is explicit and covers disputes involving investors from each of those two States'.[325] The '[…] parties to the Treaties could have limited such consent and, by extension, the jurisdiction of the Tribunal' but without such limitation '[…] one cannot use silence to limit the scope of the consent given'.[326] The BIT cannot be interpreted as limiting the '[…] scope preventing a claimant from submitting an arbitral claim together with another claimant when both claims are based on the same alleged facts and on the same alleged breaches although brought under different BITs, provided that each claimant provides its own independent matching consent to arbitration'.[327]

171. The fact that the claim was brought by two investors in a single arbitration was characterised by the respondent as *consolidation* – which is not foreseen under either of the applicable BITs.[328] The tribunal ruled that the analogy with consolidation is invalid, as the merger of two *separate* proceedings is not at issue since the claims were filed jointly *ab initio.*[329] Again, the tribunal mentioned factual connections between the two claims such as: the claims have been filed '[…] regarding the same dispute and involving the same set of facts […]'; '[…] the object of both claims is the same, since the allegedly

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further assets owned by Rurelec's subsidiary, Energía para Sistemas Aislados Energais S.A. (hereinafter, "Energais"), resulting in a further loss of USD 661,535. Therefore, they commenced these proceedings so as to obtain adequate and effective compensation from the Tribunal'.; See the case comment in Di Brozolo, above n. 4, 134, 135.

[324] *Guaracachi*, ibid., para 3: 'The Claimants commenced these proceedings by a Notice of Arbitration dated 24 November 2010 pursuant to Article 3 of the United Nations Commission on International Trade Law Arbitration Rules, as revised in 2010 […], Article IX of the Treaty between the Government of the United States of America and the Government of the Republic of Bolivia Concerning the Encouragement and Reciprocal Protection of Investment […], and Article VIII of the Agreement between the Government of the United Kingdom and Northern Ireland and the Government of the Republic of Bolivia for the Promotion and Protection of Investments'.; Ibid., paras 5, 11.

[325] Ibid., para. 341.

[326] Ibid.

[327] Ibid., para. 337.

[328] Ibid., para. 164: 'The Respondent claims it has not provided its consent for investors from the United States and investors from the United Kingdom to join or consolidate claims arising under different BITs into a single arbitration proceeding before a single tribunal. Likewise, it considers that it is for the Claimants to prove such consent on the part of the Respondent'.

[329] Ibid.

unlawful action by Bolivia was also a single one […]'.[330] Even if it were the case of two separate claims consolidated, the 'matching of consents' of all the parties involved in separate arbitrations has already occurred.[331]

Sempra, Camuzzi

172. In *Sempra* and *Camuzzi*, the question related to the multiplicity of the BITs was whether the claimants under different treaties can 'join' their shares in the same companies to prove a collective exercise of foreign control under Article 25(2)(b) of the ICSID Convention.[332]

173. Sempra (US) and Camuzzi (Luxemburg) owned, respectively, 43.09% and 56.91% in two Argentinean companies – Sodigas Sur S.A. and Sodigas Pampeana.[333] The latter had 90% and 86.09% of the shares in two companies, respectively, each holding licenses from the government to supply and distribute natural gas.[334] After the government suspended the licenses and introduced a number of other adverse measures towards Sempra's and

[330] Ibid.: 'In the Tribunal's view, the issue raised by the Respondent of whether express consent regarding the form of the present arbitration is required is also not an issue of "consolidation of proceedings". Indeed, in the instant case, the Claimants did not commence two separate arbitrations in respect of two independent arbitral claims that have subsequently been consolidated. The Claimants submitted, ab initio and in the same arbitration, two claims by two claimants against one respondent, regarding the same dispute and involving the same set of facts, albeit allegedly in violation of two different BITs concluded by the Respondent with the UK and the US, respectively. It is clear that the object of both claims is the same, since the allegedly unlawful action by Bolivia was also a single one, notwithstanding the fact that, in practice, the present case concerns two identical and overlapping claims by two claimants against the same respondent in the same arbitration proceeding'.

[331] Ibid., paras 339, 340: 'On the other hand, in cases of consolidation of proceedings, the matching of consents with respect to each of the arbitrations has already occurred. As such, the case law and literature hold – as both Parties in this proceeding have also affirmed – that consent is required from all parties involved in order to allow the merger of the two arbitrations into one. The Tribunal considers that there is, therefore, no valid analogy to be made between this case and cases of consolidation of proceedings. […] The Tribunal therefore considers that, even if it would have been possible for the Claimants to submit separate arbitral proceedings, nothing precludes them—given the obvious link between both Claimants and the identity of the facts alleged—from deciding to jointly submit a single arbitration case, albeit invoking different BITs'.

[332] Bishop, above n. 20, 246, 247.

[333] *Sempra*, above n. 147, para. 19: 'Sempra owns 43.09% of the share capital of Sodigas Sur S.A. […]. For its part, Camuzzi, the company which requested the concurrent arbitration proceedings mentioned above, owns 56.91% of Sodigas Sur and Sodigas Pampeana. The latter two Argentine companies, in turn, hold 90% and 86.09%, respectively, of the shares in Camuzzi Gas del Sur S.A. ("CGS") and Camuzzi Gas Pampeana S.A. ("CGP"), each of which, in its capacity as "Licensee" is a natural gas distribution company. Both CGS and CGP each holds a license granted by the Argentine Republic to both supply and distribute natural gas in seven provinces of that country'.; *Camuzzi*, above n. 148, para. 22.

[334] *Sempra*, ibid., para. 19; *Camuzzi*, ibid., para. 9.

Camuzzi's investments, they instituted ICSID proceedings based on Argentina's BITs with the Belgo-Luxemburg Economic Unit and the US[335].

174. The respondent argued that the dispute concerned the licenses held by domestic companies, which do not qualify as foreign investors under Article 25(2)(b) of the ICSID Convention. Their shareholders, partially owned by the claimants, cannot benefit from this provision either, since none of the claimants exercised foreign control in the sense of this provision. The respondent insisted that 'foreign control' implies *exclusive* control, enabling blocking changes in the company, effective control, or a dominant position. The participation of Sempra and Camuzzi did not reach that threshold and, hence, foreign control as the prerequisite for ICSID jurisdiction could not be established.[336]

175. The claimants argued that they exercised 'joint control' over their subsidiaries based on the Shareholders Agreement and other corporate by-laws.[337] Therefore, the question arose

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[335] *Sempra*, ibid., para. 1: 'On September 11, 2002, the International Centre for Settlement of Investment Disputes […] received […] a Request for Arbitration under the Convention for the Settlement of Investment Disputes between States and Nationals of other States […] on behalf of Sempra […] against the Argentine Republic. The request relates to disputes with the Argentine Republic regarding measures adopted by the Argentine authorities which, it is argued, have changed the general regulatory framework established for foreign investors in a way which the Claimant asserts severely affects Sempra's investment in two natural gas distribution companies which together serve seven Argentine provinces. In its request, Sempra invokes the provisions contained in the 1991 treaty between Argentina and the United States concerning the reciprocal encouragement and protection of investment […]'.; *Camuzzi,* ibid., para 1.

[336] *Sempra*, above n. 147, paras 22, 29, 30, 35: '[…] [F]or a juridical person incorporated in a State to be considered a national of another contracting State, it must be subject to foreign control in accordance with Article 25(2)(b) of the Convention. […] The Argentine Republic puts forward as an objection to jurisdiction, first, that Sempra does not meet the nationality requirement established in Article 25(2)(b) of the Convention because, in its capacity as minority shareholder in the companies participating in CGS and CGP, it cannot substitute itself in the latter's rights. Accordingly, the Respondent affirms, the denationalization referred to in that article does not occur. […] Referring to the Vacuum Salt case, which interpreted and applied the provisions of Article 25(2)(b) of the Convention as to the meaning of foreign control, the Respondent argues that what is meant is an "exclusive" control which enables at least blocking changes in the company, a circumstance which does not occur in this case. In the light of the background events and situations leading up to the Convention, it is also affirmed that that article must be understood as referring to foreign nationals that have a "dominant interest" and that, in response to proposals aimed at eliminating the control requirement, some delegations insisted that it be maintained. It is further noted that, in the opinion of one author, this concept presumes "effective control or a dominant position and not merely participation." […] The Argentine Republic rejects the theory of joint control, maintaining that neither of the two investors can demonstrate that it controls Sodigas and the licensee companies in the legal sense of forming the companies' will through effective control or a dominant influence; neither of the investors can make decisions by itself, but must resort to a vote and not even the veto can be considered to imply effective formation of the company's will. It is also pointed out that this would be even less likely to occur in the case of indirect investors'.; *Camuzzi*, above n. 148, paras 12, 19, 20, 25.

[337] *Sempra*, ibid., paras 32-34: '[…] Sempra and Camuzzi, the Claimant in the concurrent arbitration proceedings, have both separate and joint control in Sodigas and in the licensees, CGS and CGP. In the specific case of Sempra, its holding of 43.09 % in Sodigas enables it to exercise a "negative" control over both Sodigas and the licensees because it can effectively block their decisions; Camuzzi, for its part, can exercise a "positive" control. […] It is explained in this context that it was the Vacuum Salt case which considered the possibility of a shareholders' agreement or other modalities through which control could be exercised by means of positive or negative action over the company's future, concluding that the claimant in that case did not comply with any of these alternatives. 34. In the present case, it is also explained, the joint control of the two companies is expressed first in a Shareholders' Agreement between Sempra and Camuzzi and then in

whether the claimants' shares can be viewed jointly to establish foreign control over Argentinean subsidiaries under Article 25(2)(b).

176. Furthermore, only the BIT in *Sempra* (the US-Argentina BIT) provided for a 'foreign control' exception, whereas in *Camuzzi* the BIT was silent on this issue. Hence, another question was whether the agreement on foreign control in the *Sempra* BIT could be extended to Camuzzi in deciding whether the claimants exercised foreign control *together*.[338]

177. The respondent argued that the joint control requires an application of two BITs, '[…] combining the beneficiaries and the respective rules into a single whole, which is incompatible with the consent manifested individually in each treaty and with the personal and material application of each of them'.[339]

178. The tribunal partially agreed with the respondent to the extent that '[…] consent is expressed in each treaty individually, with a different personal and normative import, in such a way that the combining of various participations could result in situations that that consent did not have in mind and might not have intended to include'.[340] Therefore, should the joint control render such result, the claimants cannot combine their shares to meet the jurisdictional requirements as the applicable BITs '[…] would have to be measured on the basis of the individual intents'.[341]

179. However, in the context of their investments, Camuzzi and Sempra operated jointly and '[…] it is then presumable that their participation has been viewed as a whole, even though they are of different nationalities and are protected by different treaties'.[342] The joint participation was evidenced by the shareholding structure of the investment,

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the By-Laws of Sodigas and the licensees. This also means that important resolutions of the Meeting of Shareholders cannot be adopted without the affirmative vote of Sempra and Camuzzi. It is accordingly argued that, in this context, Sempra has a veto power over many resolutions and a substantive influence in the managing of the company'.; *Camuzzi*, ibid., paras 22-24.

[338] *Sempra*, ibid., paras 51, 52; *Camuzzi*, ibid., paras 31, 32, 38, 39; In this case, the question of foreign control was discussed only theoretically, because each Claimant separately had foreign nationality anyway and their shares in the local companies qualified as foreign investments for jurisdictional purposes. (*Sempra*, paras 46, 57; *Camuzzi*, para. 32). The question of control was rather discussed hypothetically, *i.e.,* under the presumption that a foreign investor should control a local company in order to meet the jurisdictional standards of Article 25(2)(b) of the ICSID Convention (*Sempra*, paras 45,46; *Camuzzi*, para. 32).

[339] *Sempra*, ibid., para. 36; *Camuzzi*, ibid., para. 26.

[340] *Sempra*, ibid., para. 52; *Camuzzi*, ibid., para. 39.

[341] *Sempra*, ibid.; *Camuzzi*, ibid.

[342] *Sempra*, ibid., para. 54; *Camuzzi*, ibid., para. 41.

including circumstances of the license purchase and operation as well as the shareholder agreement and the pertaining documentation.[343] Hence, '[…] when the dispute arose it was already a reality that could not be ignored for jurisdictional purposes'.[344]

180. The tribunal also emphasised the fact that the Argentinean government itself, through its competition authority, acknowledged that Sempra and Camuzzi exercised joint control over their subsidiaries when the acquisition by two enterprises was approved.[345]

Erhas

181. In *Erhas*, an *ad hoc* arbitration under the UNCITRAL Arbitration Rules, twenty-two Turkish claimants filed a claim against Turkmenistan after the new president had allegedly adopted an anti-Turkish policy.[346] The majority of the UNCITRAL Tribunal adopted jurisdictional approach to consent and the claim was declined for the lack of commonality between the claims given that the investments and investors were unrelated.[347]

Accession Mezzanine Capital

182. In *Accession Mezzanine*, the dispute was instigated by two groups of investors in two Hungarian radio stations, each holding an FM-broadcasting frequency which they lost as

[343] The elements proving that joint participation was actually the case were: 'Sempra's participation began in 1996, being added to that that Camuzzi started in 1992; the companies through which the investments were channeled progressively increased their shareholdings in the licensees, both by purchases from other shareholders and from the Argentine government itself, which auctioned blocks of shares up to and including the year 2000; the agreement of shareholders and the companies' By-Laws reflect the understandings for the administration and management of the operating companies'. (*Sempra*, ibid., para. 55; *Camuzzi*, ibid., para. 42).

[344] *Sempra*, ibid., para. 56; *Camuzzi*, ibid., para. 43.

[345] *Sempra*, ibid., para. 56, *Camuzzi*, ibid., para. 43: 'The Office of the Secretary of Defense of Competition and of Consumers of the Ministry of Economy of the Argentine Republic approved the complex share transaction carried out in 2000 by Sempra and Camuzzi, noting that said transaction meant "the assumption of control over the enterprises whose shares are being acquired." […] This was precisely a case of joint control'.

[346] *Erhas and others v Turkmenistan*, UNCITRAL, Award, 8 June 2015 (not public), referred to in Obadia, above n. 7, 110.

[347] Ibid.

a result of the tender conducted by the government.[348] The jurisdictional basis were Hungary's BITs with the Netherlands, Switzerland, and the UK.[349]

183. After the joint request for arbitration had been filed, Hungary objected to its registration with ICSID.[350] The ICSID Secretary General upheld the respondent's position and refused to register the request '[i]n the absence of consent by all disputing parties to join disputes relating to manifestly separate investments'.[351] The tribunal reminded that the '[…] jurisdiction of the Centre shall extend to any legal dispute arising directly out of *an investment*'.[352] The claimants then successfully filed two separate requests related to each investment.[353]

PCA arbitration under the UNCITRAL Arbitration Rules against the Czech Republic

184. Similarly, different BITs and unrelated investments and (for the most part) investors were the reason for the PCA to uphold the respondent's objection to the joinder of claims. The claims were brought by ten investors of different nationalities, all under the UNCITRAL Arbitration Rules.[354] The dispute arose out of certain measures in the photovoltaic industry introduced by the Czech Republic. The jurisdictional basis for the claims were the Energy Charter Treaty and the BITs with the Netherlands, Cyprus, Luxemburg, the

[348] *Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v Hungary*, ICSID Case No. ARB/12/3, Decision on Respondent's Objection under Arbitration Rule 41(5), 11 March 2013, paras 2-4: 'The dispute relates to the alleged unlawful expropriation or nationalization without compensation of the Claimants' investments in and related to Danubius Rádió Műsorzolgáltató Zrt. […], a Hungarian company, and a former licencee of one of the two nationwide FM radio-broadcasting frequencies in Hungary. […] The Claimants are Accession Mezzanine Capital L.P. […] and Danubius Kereskedőház Vagyonkezelő Zrt. […]. […] Mezzanine is a partnership organized under the laws of Bermuda with its principal place of business in Hamilton, Bermuda. DHSV is a company organized and existing under the laws of Hungary, allegedly majority owned by Mezzanine'.; *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v The Republic of Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, para. 2: 'The Claimants are Emmis International Holding, B.V. […], Emmis Radio Operating, B.V. […], and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. […]. Emmis International and Emmis Radio are both corporations organised and existing under the laws of the Netherlands. MEM is a company organised and existing under the laws of Hungary, controlled by Mr Jürg Marquard, a Swiss national'.; paras 27-29.

[349] *Accession Mezzanine*, Request for Arbitration, 28 October 2011, para. 19; *Emmis International*, Request for Arbitration, 28 October 2011, para. 19.

[350] *Accession Mezzanine*, Decision on Respondent's Objection, above n. 348, para. 8; *Emmis International*, Decision on Respondent's Objection, 11 March 2013, para. 8.

[351] *Accession Mezzanine*, ibid., para 9; *Emmis International*, ibid., para. 9.

[352] *Emmis International*, ibid.

[353] *Accession Mezzanine*, above n. 348, paras 9-11; *Emmis International*, ibid., paras 10, 11.

[354] Unpublished case, referred to in: C. Titi, 'Recent Developments in International Investment Law', in M. Bungenberg, C. Herrmann, M. Krajewski, and J. Terhechte (eds), *European Yearbook of International Economic Law* (2016) 726; Obadia, above n. 7, 110; Di Brozolo, above n. 4, 135.

UK, and Germany.[355] The Czech Republic appointed different arbitrators explaining that the dispute should be decided in six separate proceedings with identical tribunals in four of them under condition that the claimants will not seek consolidation.[356]

185. The claimants objected to the split of the proceedings and insisted that the respondent instead appoints one arbitrator for all claims and then challenges jurisdiction of the tribunal. Otherwise, the respondent's conduct should be viewed as a mere tactical instrument for creating procedural obstacles for the opponents.[357] The claimants requested the PCA to appoint one arbitrator for the respondent, but the request was denied.[358]

a. Efficiency and maintaining claims separately in one arbitration

186. In addition to establishing connectivity, tribunals have to ascertain whether the joint resolution of claims will facilitate *efficiency*, which must be reconciled with the need to address each claim separately. On the one hand, complex arbitrations require adjustments to the procedure to accommodate the divergent aspects of related claims, such as: 'tailor-made procedures for the handling of evidence, legal argument, jurisdictional objections, schedules, confidentiality, and the issuance of awards'.[359] On the other hand, addressing claims jointly should not be equated with *merger* of the disputes: each case must still be assessed on its own facts and merits.[360]

187. To this effect, the tribunal in *Noble Energy* emphasised that '[…] resolving different disputes in a single proceeding does not mean merging disputes, or applicable laws, or remedies', and '[…] the parties and the Tribunal will have to distinguish each dispute under its own applicable rules, even though facts, evidence and arguments may be common to all or some of them'.[361]

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[355] Obadia, ibid., 110.

[356] Di Brozolo, above n. 4, 135.

[357] Ibid.

[358] Ibid.

[359] Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 253.

[360] 2018 Proposals for Amendment of the ICSID Rules, above n. 27, 835.

[361] *Noble Energy*, above n. 37, para. 206.

188. In *Guaracachi*, the respondent put forward that the dispute resolution provisions in the applicable BITs are incompatible, since under the US-Bolivia BIT only investors may commence arbitration, whereas under the UK-Bolivia BIT any disputing party has this option.[362] With reference to *Noble Energy*, the tribunal noted that the respondent's '[…] assertion that differences exist between both BITs is irrelevant, given that the Tribunal is prepared to analyse each Claimant's claims – which are in essence one and the same claim – in accordance with the applicable BIT invoked by each Claimant'.[363] For the same reason, the tribunal decided that there was no '[…] fundamental incompatibility between the consents […]' in the treaties that would '[…] result in one or the other consent being violated by the mere fact of the claims being heard together'.[364]

189. Despite the initial mutual intent of the parties to distinguish between the claims under different instruments in a single arbitration, maintaining that agreement during the entire proceeding can prove to be a difficult task conflicting with the requirement of efficiency. In *Von Pezold*, the tribunal explained how the parties were not keen to respect their undertakings to argue their cases separately: '[…] during nearly four years of proceedings, the two cases were heard together and the Parties submitted joint pleadings and evidence, the Respondent in particular rarely specifying which arguments or submissions related to the von Pezold Claimants or to the Border Claimant'.[365] The respondent in its objection to the issuance of separate awards expanded on the matter:

> '[...] Claimants initiated two proceedings, prepared simultaneously yet filed weeks apart, which have been conducted as a single joint proceeding and which should result in a single award.
>
> [...] The discussion has taken place in a unified manner, without any clear distinction in issues, briefing or oral argument. Even the Exhibits were unified and not distinguished as between cases. The matters are so intertwined that it is appropriate to resolve all issues as a single award.

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[362] *Guaracachi*, above n. 235, para. 166: 'In addition, Bolivia deems the dispute settlement provisions in the Treaties to be incompatible, as under the US-Bolivia BIT only the national or company who is a party to a dispute against the State may commence arbitration, while the UK-Bolivia BIT allows either disputing party to do so. This means that Bolivia may file counterclaims against investors under the UK-Bolivia BIT, but lacks such power under the US-Bolivia BIT'.

[363] Ibid., para. 345.

[364] Ibid.

[365] *Von Pezold*, above n. 169, para. 6.

[...] Given that single-mass nature of submissions, issues and oral debate, there is no reasonably reliable manner to accurately distinguish the quantum of costs and fees in two separate awards […]'.[366]

190. Another negative implication of collective arbitration with respect to efficiency is the lack of instructions concerning certain procedural steps that could not be foreseen by the parties at the outset of the proceedings, such as, withdrawal of one of the claimants and its effect on other claimants. In *Suez*, after one of the claimants (AASA) informed the tribunal that it decided to withdraw its claim,[367] the respondent argued that the withdrawal of one claimant extinguished the claims of the rest and even deprived the tribunal of its jurisdiction: Considering that AGBAR and Interagua (claimants in the co-joint case) are shareholders in AASA, the withdrawal of the latter automatically eliminates the other claimants' procedural status in the case. In making this argument, Argentina relied on the domestic law that allows a shareholder to bring only derivative claims in the name of the company that incurred certain losses, but not in its own name for individual losses.[368]

191. In addition, Argentina argued that if both AASA and its shareholders will be compensated, such relief would constitute a double recovery and, given its selective nature, would prejudice other AASA's shareholders and creditors.[369] The claimants objected on the ground that jurisdiction in the dispute must be established based on international instead of domestic law.[370]

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[366] *Von Pezold*, above n. 174, para. 6.

[367] *Suez*, above n. 151, para. 16.

[368] Ibid., para. 46: '[…] the Respondent, drawing analogies to domestic corporation law, argues that any injury to the shareholders is derivative of the alleged injury to the company in which they hold shares, as opposed to a direct injury to the shareholders themselves. The alleged injury is done to the corporation, not to the shareholders whose shares, because of an alleged wrongful action done to the corporation, may have diminished in value. Thus, the shareholders have no right to bring an action on grounds that they have sustained a direct injury by virtue of the alleged wrongful actions of the Respondent. The right to bring an action for any alleged injury lies with the corporation itself, not its shareholders. […] [T]he Tribunal, at the request of APSF to withdraw from this case and without objection from the Respondent, ordered the discontinuance of the proceedings with respect to APSF. In its submissions of March 31, 2006, the Respondent argued that the Shareholder Claimants' claims were dependent or derivative of APSF's claim and that since APSF was no longer a party, the Claimant Shareholders had no right to bring a claim in ICSID arbitration in the absence of APSF'.

[369] Ibid.: '[…] [T]o award a monetary recovery to the Claimants in their capacity as shareholders, as well as to APSF as the entity directly wronged, would result in an unjust double recovery and moreover would grant a recovery to specific shareholders, thus prejudicing other APSF shareholders as well as its creditors'.

[370] Ibid., para. 47: '[…] the Claimants argue that the basis for a shareholder having standing to bring a case because of an alleged injury is to be found in international law, not domestic law. Specifically, it is to be found in the Argentina-France and Argentina-Spain BITs which were concluded by the countries concerned to protect the investors and investments of one State in the territory of another State'.

192. The tribunal exercised its procedural discretion and invoked Rule 44 of the ICSID Arbitration Rules on discontinuance in a bi-partite arbitration as 'the provision of closest relevance'.[371] The tribunal ordered discontinuance in relation to AASA as it '[…] was in accordance with the basic objective of the ICSID Convention of facilitating the settlement of investment disputes, of which ICSID Arbitration Rule 44 is a specific manifestation'.[372] The tribunal also noted that efficiency of the dispute resolution would not be impaired since '[…] the continued participation of AASA in this proceeding would serve no useful purpose in bringing about a fair and correct resolution of the present arbitration'.[373]

193. In the procedural order on discontinuance, the tribunal noted that whether withdrawal of one of the claimants affects jurisdiction over other claimants is a matter of jurisdiction,[374] which should be established based on the applicable BITs and not domestic law:

'Neither the Argentina-France BIT, the Argentina-Spain BIT, nor the ICSID Convention limit the rights of shareholders to bring actions for direct, as opposed to derivative claims. This distinction, present in domestic corporate law of many countries, does not exist in any of the treaties applicable to this case'.[375]

194. The potential procedural issues caused by the multiplicity of claimants extend to the post-award phase. For instance, enforceability of an award in relation to each claimant as one of the fundamental values and goals of arbitration can be impaired: In *Von Pezold*, the claimants had a specific concern that there was a risk that the respondent takes control over the co-claimants' company, thus potentially jeopardising the enforcement of the award due to the lack of cooperation between the claimants.[376] The tribunal ruled that

[371] Ibid., para. 17.

[372] Ibid.

[373] Ibid.

[374] *Suez*, above n. 151, Procedural Order No. 1 Concerning the Discontinuance of Proceedings with Respect to Aguas Argentinas S.A., 14 April 2006, page 3.

[375] *Suez*, above n. 151, Decision on Jurisdiction, para. 49.

[376] *Von Pezold*, above n. 174, para. 5: 'In their Submissions on Costs, dated 1 December 2014, the Claimants confirmed that, in their view, it is "imperative" that separate awards be rendered, submitting as follows:

"[…] [g]iven that the arbitrations were never formally joined, the Claimants have a right to separate awards for each arbitration and will request the Tribunals to act accordingly". There has not been a response to Steptoe's letter. In any event, the Claimants' position is unchanged to that as expressed in Steptoe's letter. […] Indeed, the issue of separate awards is not only a right in circumstances where there are separate proceedings, but also an imperative in these cases in order to protect the rights of the von Pezold Claimants, i.e. the claimants in ICSID Case No. ARB/10/15. The imperative

irrespective of the implications for the enforcement of a single award, '[…] from a practical perspective and as a matter of principle […]' the claimants are entitled to be able '[…] to pursue enforcement of any award independent of each other' as long as they decided to pursue their claims independently.[377]

b. Different arbitration rules in the applicable BITs

195. Compatibility or identity of procedural rules envisaged in different sources of consent is viewed as one of the prerequisites for the joint adjudication of claims.[378] It was argued that differences in arbitration rules (*e.g.*, seat of arbitration, different appointing authorities) can preclude *ex ante* consolidation due to the lack of 'identity of the mechanisms'.[379]

196. However, *Suez* shows that different arbitration rules do not necessarily exclude jurisdiction over multiple claimants as long as the tribunal and the parties are willing to apply the rules designated for each respective case. While the rest of the claimants invoked the BITs providing for ICSID arbitration, one of the claimants (AWG) invoked the UK-Argentina BIT according to which '[…] Argentina and the investor concerned may agree to refer their dispute either to ICSID arbitration or to arbitration under the [UNCITRAL Arbitration Rules] and that failing such agreement after a period of three months the parties are bound to submit their dispute to UNCITRAL Arbitration Rules arbitration'.[380] AWG invited Argentina to extend ICSID arbitration to AWG's claims after the three months period had elapsed without reaching an agreement.[381] The respondent did not agree to the extension but '[…] it did agree to allow the case, although

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arises because in the event of a single award, during the enforcement phase cooperation between all of the Claimants would be necessary. Such cooperation is likely to be impossible in the event that the Respondent takes control of the Border Company Claimants, which it may do in order to jeopardise the enforcement of a single award or for other reasons."

[377] Ibid., para. 12.

[378] Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 89.

[379] Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*, above n. 1, 118.

[380] *Suez*, above n. 151, para. 2.

[381] Ibid.

subject to UNCITRAL rules, to be administered by ICSID'.[382] Thus, two cases were to be administered under different arbitration rules by the same tribunal.

197. In the absence of the parties' agreement on the number of arbitrators and method of their appointment,[383] the procedure for composition of the tribunal had to somehow accommodate both rules. Whilst both applicable rules set forth that, in such a case, the number of arbitrators should be three, the methods of appointment of the presiding arbitrator differed: pursuant to the UNCITRAL Arbitration Rules, the third arbitrator had to be appointed by the two party-nominated arbitrators,[384] whereas under the ICSID Convention, the president had to be appointed by agreement of the parties.[385] In line with the ICSID procedure, the claimants relied on the parties' failure to agree on the president in their request to the ICSID Administrative Council for appointment of third arbitrator, and the respondent agreed on the candidate nominated by the Center.[386]

198. Given the respondent's acceptance of the Center's nomination, the ICSID Administrative Council, can be viewed as the appointing authority chosen by the parties in the sense of Article 7(3) of the UNCITRAL Arbitration Rules.[387] Hence, it is tenable to argue that the appointment procedure was coherent with the one foreseen under the UNCITRAL

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[382] Ibid., para. 4.

[383] Ibid., para. 5: 'The parties could not reach an agreement on the number of arbitrators to comprise the arbitral tribunal nor on the method for their appointment. Accordingly, on 22 September 2003, the Claimants requested the Tribunal to be constituted in accordance with the formula set forth in Article 37(2)(b) of the ICSID Convention; i.e. one arbitrator appointed by each party, and the third arbitrator, who would serve as president of the tribunal, to be appointed by agreement of the parties'.

[384] Article 7(1) UNCITRAL Rules (1976).

[385] Article 37(2)(b) ICSID Convention.

[386] *Suez*, above n. 151, paras 4-7: 'On that same date, the Acting Secretary-General, in accordance with Institution Rule 7, notified the parties of the registration of the Request and invited them to proceed, as soon as possible, to constitute an Arbitral Tribunal. […] The parties could not reach an agreement on the number of arbitrators to comprise the arbitral tribunal nor on the method for their appointment. Accordingly, on 22 September 2003, the Claimants requested the Tribunal to be constituted in accordance with the formula set forth in Article 37(2)(b) of the ICSID Convention; i.e. one arbitrator appointed by each party, and the third arbitrator, who would serve as president of the tribunal, to be appointed by agreement of the parties. The Claimants appointed Professor Gabrielle Kaufmann-Kohler, a Swiss national, as arbitrator. The Argentine Republic in turn appointed as arbitrator Professor Pedro Nikken, a national of Venezuela. […] In the absence of an agreement between the parties on the name of the presiding arbitrator, on October 21, 2003 the Claimants, invoking Article 38 of the ICSID Convention and Rule 4 of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), requested the Centre to make this appointment. With the agreement of both parties, the Centre appointed Professor Jeswald W. Salacuse, a national of the United States of America, as the President of the Tribunal. […] On February 17, 2004, the Deputy Secretary-General of ICSID, in accordance with ICSID Arbitration Rule 6(1), notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to be constituted and the proceedings to have begun on that date'.

[387] Article 7(3) UNCITRAL Rules (1976): 'If within thirty days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by an appointing authority […]'.

Arbitration Rules, pursuant to which the appointing authority selects a presiding arbitrator.[388]

[388] Ibid.

2.2 *CME* and *Lauder*: *Res Judicata* and *Lis Pendens* as Unfeasible Alternatives to Consolidation

199. In contrast to the above discussed ICSID practice, where the joint adjudication of related claims under different BITs and arbitration rules could be allowed even in the absence of the parties' consent, *CME* and *Lauder* represent an unsuccessful attempt to seek joinder of separately instituted non-ICSID arbitrations. These two cases demonstrate that the consolidation of parallel *pending* proceedings, in the absence of the parties' consent, is not possible unless it is explicitly permitted under applicable treaties and/or rules of procedure.

200. *CME* and *Lauder* are often cited as leading cases illustrating the risk of contradictory rulings issued by different tribunals with regard to essentially the same dispute, thereby, reviving the debate on the need for establishing consolidation mechanisms within the domain of investment arbitration.[389] In order to put the three main types of multiparty cases in the relevant context, it is appropriate to highlight the obstacles for consolidation of *pending* parallel arbitrations under different investment treaties, exemplified by *CME* and *Lauder*. From the contextual standpoint, the discussion of *CME* and *Lauder* should precede an overview of the NAFTA practice on mandatory rules-based consolidation.

201. Lauder (a US *citizen*) and a Dutch company CME (in which he was an ultimate owner as a controlling shareholder of its parent company) instigated two parallel *ad hoc* arbitrations governed by the UNCITRAL Rules: in London on 19 August 1999 and in Stockholm on 22 February 2000 under the US-Czech Republic BIT[390] and the Netherlands-Czech

[389] Knahr, above n. 4, 2, 3.

[390] *Ronald S. Lauder v The Czech Republic*, UNCITRAL, Final Award, 3 September 2001, paras 5, 11; paras 2-5: 'Various Bilateral Investment Treaties were concluded to create the necessary legal protection for new investments, among them the Treaty between the United States of America and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment […]. On 30 October 1991, a new Act on Operating Radio and Television Broadcasting […] was adopted. It provided for the creation of the Council of the Czech Republic for Radio and Television Broadcasting (the Media Council) to ensure the observance of the Media Law, the development of plurality in broadcasting, and the development of domestic and European audio-visual work. The Media Council was also competent to grant operating licences. In 1992, the Media Council commenced the necessary licensing procedures for nation-wide private television broadcasting, and, on 9 February 1993, it granted License No 001/1993 to Central European Television 21, CET 21 spol. s r.o. […], a company founded by a small number of Czech citizens. During the license application proceedings, CET 21 had worked closely with a foreign group, Central European Development Corporation GmbH (hereafter "CEDC"), in which Mr. Ronald S. Lauder […], an American citizen, had an important interest. At that time and since then, Mr. Lauder has among other activities been an important player in the audio-visual media in the former communist States of Central and Eastern Europe'.

Republic BIT,[391] respectively. The disputes arose out of damages suffered by the claimants as a result of the government's actions towards a local company holding a TV license in which CME owned shares.[392] In the *Lauder* final award, issued ten days before the *CME* partial award,[393] the tribunal upheld only one claim concerning the breach of the obligation to refrain from arbitrary and discriminatory measures and dismissed all other claims including the claims for damages.[394] On the contrary, the *CME* tribunal awarded the claimant compensation in the amount of the full market value of the investment.[395]

203. The Czech Republic objected to the duplication of arbitrations as it would be in violation of the principles of *lis pendens* or, alternatively, amounts to an abuse of process given the risk of conflicting findings.[396] It also rejected the claimants' proposal to coordinate parallel proceedings by appointing identical tribunals for both cases (*de facto* consolidation) and postponing the hearing in *CME* until after the issuance of an award in *Lauder*.[397]

204. Thus, *de facto* consolidation was not a feasible option for the coordination of the proceedings in the absence of the respondent's consent, although the *Lauder* tribunal was ready to approve this solution.[398] The tribunals were left with two other arguments against parallel proceedings: abuse of process and *lis pendens*. The abuse of process was not an issue, given that different claimants sought relief under separate treaties and, hence, the

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[391] *CME Czech Republic B.V. v The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, paras 3, 4: 'CME brought this arbitration as a result of alleged actions and omissions by the Czech Republic claimed to be in breach of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic […]. […] CME holds a 99 % equity interest in Česká Nezávislá Televizní Společnost […] ("ČNTS"), a Czech television services company. CME maintains that, among other things, CME's ownership interest in ČNTS and its indirect ownership of ČNTS' assets qualify as "investments" […]'. para. 40.

[392] Ibid, paras 8, 15-23.

[393] *CME*, above n. 391.

[394] *Lauder*, above n. 390, paras 74, 75.

[395] *CME*, above n. 391, para. 624.

[396] *Lauder*, above n. 390, paras 167-169; *CME*, above n. 391, Final Award, 14 March 2003, para. 428.

[397] *Lauder*, ibid., paras 16, 173, 178; *CME*, ibid., paras 426-428.

[398] In particular, the *Lauder* tribunal observed: 'It should furthermore be noted that the Respondent refused to allow the constitution of identical arbitral tribunals to hear both treaty cases. If the same tribunal would have been appointed in both cases the procedure could have been coordinated with the corresponding reduction in work and time and of cost to the Parties. The possibility of conflicting decisions would also have been greatly reduced'. *Lauder*, ibid., para. 178.

disputes were not the same.[399] As for *lis pendens*, the claimants argued that the only feasible risk was '[…] that damages be concurrently granted by more than one court or arbitral tribunal, in which case the amount of damages granted by the second deciding court or arbitral tribunal could take this fact into consideration when assessing the final damage'.[400]

205. The issue of *lis pendens* and *res judicata* was the most controversial in the *CME/Lauder* cases. The parties' positions in this regard were somewhat inconsistent: The claimants insisted on the lack of identity of the parties and causes of action being the prerequisite for *lis pendens* defence but requested the stay of proceedings in *CME* as long as *Lauder* was pending.[401]

206. The respondent dropped its initial *lis pendens* defence but continued to oppose to the duplication of the proceedings based on the abuse of process simultaneously objecting to the appointment of identical tribunals.

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[399] Ibid., paras 173, 174; 'There might exist the possibility of contradictory findings of this Arbitral Tribunal and the one set up to examine the claims of CME against the Czech Republic under the Dutch-Czech Bilateral Investment treaty. Obviously, the claimants in the two proceedings are not identical. However, this Arbitral Tribunal understands that the claim of Mr. Lauder giving rise to the present proceeding was commenced before the claims of CME was raised and, especially, the Respondent itself did not agree to a de facto consolidation of the two proceedings by insisting on a different arbitral tribunal to hear CME's case. […] Finally, there is no abuse of process in the multiplicity of proceedings initiated by Mr. Lauder and the entities he controls. Even assuming that the doctrine of abuse of process could find application here, the Arbitral Tribunal is the only forum with jurisdiction to hear Mr. Lauder's claims based on the Treaty. The existence of numerous parallel proceedings does in no way affect the Arbitral Tribunal's authority and effectiveness, and does not undermine the Parties' rights. On the contrary, the present proceedings are the only place where the Parties' rights under the Treaty can be protected'. (paras, 173, 174); *CME*, above n. 396, para. 431; *CME*, above n. 391, para. 412.

[400] *Lauder*, n. 390, para. 172; *CME*, above n. 396, para. 434; See also E. Wu, 'Addressing Multiplicity of Shareholders Claims in ICSID Arbitrations under Bilateral Investment Treaties: A 'Tiered Approach' to Prioritizing Claims?', 6 *Asian International Arbitration Journal* (2010), 140, discussing a 'tiered approach' to the allocation of damages awarded to shareholders in parallel investment arbitrations involving shareholders of the same group (the approach, however, implies the stay of concurrent proceedings): 'Damages awarded to the second-level shareholders can then be calculated by taking into account the increased value of the shareholding that may arise from damages already paid to first-level shareholders'.

[401] *Lauder*, ibid., para. 170: 'The Claimant argues that no principles of *lis alibi pendens* are applicable here. Should such principles apply, it would not deprive the Arbitral Tribunal of jurisdiction, since the other court and arbitration proceedings involve different parties, different claims, and different causes of action. However, if CNTS could obtain any recovery from the Czech courts, this may reduce the amount of damage claimed in the present proceedings […]'.; *CME*, ibid., para. 427: 'At the hearing the Respondent declined anew to accept any of the Claimant's alternative proposals, which were recapitulated in the Claimant's letter to the Tribunal of November 10, 2000, under the heading "Coordination of this proceeding with *Lauder v the Czech Republic*": (i) to have the two arbitrations consolidated into a single proceeding (ii), to have the same three arbitrators appointed for both proceedings, (iii) to accept the Claimant's nomination in this proceeding of the same arbitrator that Mr. Lauder nominated in the London proceeding (iv) to agree that the parties to this arbitration are bound by the London Tribunal's determination as to whether there has been a Treaty breach, (v) that after the submission of the parties' respective reply memorials and wit-ness statements in this arbitration, the hearing be postponed until after the issuance of an award in the London Arbitration'.

207. The CME tribunal noted in this regard that the respondent '[…] expressly and impliedly waived any *lis pendens* or *res judicata* defence'.[402] By refusing to consolidate the disputes as suggested by the claimant and asserting the right to separate adjudication of the claims, the respondent arguably agreed to the '[…] consequence that there will be two awards on the same subject which may be consistent with each other or may differ'.[403] Such interpretation of the respondent's position is questionable, given that consolidation would not have the same effect as *lis pendens* or *res judicata* as the tools for avoiding repeated adjudication of the same dispute:

> [I]t is arguable that the position of the Czech Government in the *CME/Lauder* cases, according to which no consolidation was warranted because the cases should have been viewed as similar proceedings and thus entailing mandatory blocking, was a tenable legal position […]. This is because a party exposed to parallel proceedings, which are essentially the same, is entitled, in principle, to insist that the repetitive claims be dismissed instead of consolidated, a solution which might entail greater costs and delays than outright dismissal'.[404]

208. The award in *Lauder* did not have *res judicata* effect in *CME* also due to the objective test of triple identity of disputes required for the application of *res judicata* (the same parties, subject matter, and cause of action) was not met: The parties were not identical, different BITs were invoked, and different facts could be presented in the two proceedings, although the same state measure was the cause of action in both.[405] Thus, the tribunal applied a strict approach to the identity test, whereby all three elements must be *fully* identical in substance, but a *mere* affiliation does not reach this threshold.

209. The Czech Republic relied on *lis pendens* and *res judicata* in the set aside proceedings at the Svea Court of Appeal, in relation to the *CME* partial award on the ground that '[…] the Stockholm Tribunal committed a procedural error by not dismissing CME's claim during

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[402] *CME*, ibid., para. 431.

[403] *CME*, above n. 391, para. 412; *CME*, above n. 396, para. 426.

[404] Shany, above n. 4, 140, 141. Footnote omitted.

[405] In particular, the Tribunal observed in how far the identity test is not met: 'Mr. Lauder is the controlling shareholder of CME Media Ltd, whereas in this arbitration a Dutch holding company being part of the CME Media Ltd Group is the Claimant. The two arbitrations are based on differing bilateral investment treaties, which grant comparable investment protection, which, however, is not identical. Both arbitrations deal with the Media Council's interference with the same investment in the Czech Republic. However, the Tribunal cannot judge whether the facts submitted to the two tribunals for decision are identical and it may well be that facts and circumstances presented to this Tribunal have been presented quite differently to the London Tribunal'. *CME*, above n. 396, para. 432.

the proceedings with reference to the principle of *lis pendens*, and after the issuance of the London award with reference to the principle of *res judicata*'.[406] The Court first noted that, pursuant to the Swedish procedural law, the CME's waiver of *lis pendens* defence in the arbitration deprived it of the right to invoke this same defence in the set aside proceedings. Yet, given that the abuse of process argument might accommodate *lis pendens* and *res judicata* as argued by the respondent, the Court dealt with this argument as well.[407]

210. The respondent argued that identity of the parties existed based *inter alia* on the concept of piercing the corporate veil in that Lauder, being a controlling (albeit minority) shareholder of the CME's parent company, could be equated with that company.[408] The Czech Republic attempted to introduce an economic approach to the concept of *res judicata* and *lis pendens* whereby '[…] strict legal distinctions, not reflecting the underlying economic realities, may be disregarded' and the same 'real party in interest' should prevail over the strict legal identity test.[409] This concept was upheld by investment tribunals through accepting jurisdiction over parent companies on the basis of an arbitration agreement signed by their subsidiaries.[410]

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[406] Judgment of Svea Court of Appeal, 15 May 2003, page 36.

[407] Ibid., pages 95-97: 'In the arbitration proceedings, the Republic expressly stated in its "Sur Reply" that it did not rely on the doctrines of *lis pendens* and *res judicata*. The statement was made in connection with the Republic's claim that the arbitral tribunal should declare that CME's claim was not acceptable and should not be adjudicated. Instead, the Republic argued that – even excluding the arbitration proceedings in London – it had been exposed to or affected by a large number of actions brought by Lauder and the CME companies and that this constituted a type of abuse of process by the initiation of similar cases. Accordingly, the Republic expressly waived raising an objection of *lis pendens* or res judicata. The aforesaid strongly supports the view that the right to challenge the Stockholm award is barred with respect to the allegation that the Stockholm tribunal acted erroneously in failing to take into consideration the principles of *lis pendens* and res judicata. In the present case, however, the Republic has argued that the objection during the arbitration proceedings regarding abuse of process constitutes an objection with a special meaning which also includes the principles of *lis pendens* and *res judicata*. By invoking abuse of process the Republic has, so it is argued, nevertheless not waived an objection of *lis pendens* and *res judicata*. Thus, the Republic claims that it is still entitled to invoke such grounds in the challenge proceedings. The concept of abuse of process has no direct equivalent in Swedish law and it has also been questioned whether it can be applied in conjunction with international arbitration proceedings. Taking into consideration what has come to light in the case, it appears to be unclear whether an objection of abuse of process includes or does not include an objection regarding *lis pendens* and *res judicata*. In light of the aforesaid, the Court of Appeal elects, for reasons of judicial economy, not to adopt a definite position regarding the issue of a bar but, rather, will determine whether the conditions are otherwise fulfilled in order for *lis pendens* and *res judicata* to be applicable. The Court of Appeal will, in this context, first determine whether identity may be deemed to exist between the claimant parties in the different arbitration proceedings, namely Lauder and CME'.

[408] Ibid., pages 97, 98.

[409] *CME*, above n. 391, Legal Opinion Prepared by Christoph Schreuer and August Reinisch, 22 May 2002, paras 223, 295-305.

[410] Ibid., paras 224-237.

211. The Court dismissed this argument and upheld a strict interpretation of the triple identity test. It also observed that even if the broad understanding of identity was admissible, the minority shareholder (even a controlling one) cannot be viewed as identical with the company, which is a uniform understanding not only under Swedish law but also in other legal systems.[411]

212. In the context of this research, *CME/Lauder* illustrate the prospects of the application of *res judicata* and *lis pendens* doctrines in relation to separately pending arbitrations as alternatives to consolidation in the absence of the parties' consent. *Res judicata* and *lis pendens* are the rules of international law precluding litigation of the same dispute twice (*ne bis in dem* principle). Accordingly, a judgment in an earlier decided case has a binding effect upon a concurrent proceeding (*res judicata*), and a proceeding must be provisionally stayed for the duration of an earlier instigated proceeding (*lis pendens*), provided that the triple identity test is met in all concurrent disputes (same parties, same subject matter or relief, same cause of action).[412] In addition, the same legal order is also mentioned as a precondition for *res judicata,*[413] which seems to be the least problematic aspect in the context of parallel investment arbitrations that take place on the same 'level'.[414]

213. A strict application of the triple-identity test is in conflict with the reality of parallel investment arbitrations, '[…] where one of the reasons for multiple proceedings is precisely that the proceedings are initiated by different actors'.[415]Although the negative attitude towards *res judicata* in international arbitration is shifting towards acceptance,[416]

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[411] Above n. 406, pages 97, 98.

[412] Yannaca-Small, 'Parallel Proceedings', above n. 1, 1013, 1014; Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 66, 67.

[413] Yannaca-Small, ibid., 1017.

[414] The International Law Association, Committee on International Commercial Arbitration, *Interim Report on Res Judicata in Arbitration*, presented at the ILA's Berlin Conference (2004) 19: 'Included in the same legal order are tribunals established under treaties and mixed arbitration tribunals (between private investors and host States)'.

[415] G. Kaufmann-Kohler, 'Multiple proceedings – New Challenges for the Settlement of Investment Disputes', above n. 1, 8.

[416] Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 66, 67; See Yannaca-Small, 'Parallel Proceedings', above n. 1, 1014-1021, referring to: Committee on International Commercial Arbitration of the International Law Association, *Final Report on Res Judicata and Arbitration*, presented at the Seventy-Second Biennial Conference in Toronto, 2006.

the rigid approach to the triple identity test[417] makes application of *res judicata* virtually impossible in practice of investment tribunals.[418] *Res judicata* and *lis pendens* are predominantly understood as concepts applicable to *identical* or *sufficiently similar* proceedings as opposed to related proceedings. This is a substantial distinction given that only *identity* of claims precludes claimants from pursuit of the same case before different tribunals.[419] Related claims underlying parallel proceedings in investment arbitration, however, fall within the concept of *connexity* which '[…] has not attracted broad support in international law and practice'.[420]

214. Although the alternative economic approach to *res judicata* is advocated by renowned authorities,[421] it does not have a broad recognition in the practice of international arbitration due to the principle of *separate identity of subsidiaries* in international corporate law.[422] However, this concern is more relevant in commercial arbitration whereas, in investment arbitration, considerations related to economic realities prevailed over principles of corporate law.[423]

215. The fact that the *CME/Lauder* tribunals viewed the respondent's objection to *de facto* consolidation (which the tribunals were ready to uphold) as a waiver of *res judicata/lis pendens* defences[424] indicates that consolidation would be a preferable solution for the coordination of parallel proceedings.

216. On the other hand, the respondent's hesitation towards consolidation illustrates the ambivalence of an allegedly positive effect that consolidation might have upon the respondent, such as, avoidance of the risk of double recovery. Contrary to this proposition, consolidation was objectively less desirable for the respondent compared to

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[417] Zarra, above n. 1, 140.

[418] Wehland, 'The Regulation of Parallel Proceedings in Investor-State Disputes', above n. 1, 586.

[419] Shany, above n. 4, 139.

[420] Ibid., 140.

[421] A. Reinisch, 'The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes', 3 *The Law and Practice of International Courts and Tribunals* (2004) 56 *et seq.*; B. Cremades, 'Arbitration Under the ECT and Other Investment Protection Treaties: Parallel Arbitration Tribunals and Awards' above n. 1.

[422] Yannaca-Small, 'Parallel Proceedings', above n. 1, 1021; See also ILA *Interim Report on Res Judicata*, above n. 414, 22, citing the *CME* Tribunal with regard to 'company group' theory (*CME*, above n. 396, para. 436): '[…] a 'company group' theory is not generally accepted in international arbitration (although promoted by prominent authorities) and there are no precedents of which this Tribunal is aware for its general acceptance'.

[423] Yannaca-Small, ibid.

[424] See Derains, above n. 1, 72.

lis pendens, since only the latter could extinguish the concurrent claims instead of simply 'replacing' a competent tribunal through consolidation. The tribunal, in a way, estopped the respondent from advocating one coordination technique and rejecting another for purely tactical reasons, thereby preserving the integrity of the process to a certain extent.

217. In similar circumstances, a more articulate policy-oriented position of the tribunal was demonstrated in *Orascom.*[425] Sawiris, a citizen of Egypt and an ultimate shareholder of three companies, initiated three arbitrations under Algeria's BITs with Egypt, Italy, and Luxembourg for the alleged taking of his investment in the telecom industry.[426] The ICSID tribunal upheld Algeria's jurisdictional objection on the ground that filing multiple claims constituted an abuse of rights by the claimant.[427] The tribunal explained rejection of the claims on this ground as follows:

'[…] the Claimant availed itself of the existence of various treaties at different levels of the vertical corporate chain using its rights to treaty arbitration and substantive protection in a manner that conflicts with the purposes of such rights and of investment treaties. For the Tribunal, this conduct must be viewed as an abuse of the system of investment protection, which constitutes a further ground for the inadmissibility of the Claimant's claims and precludes the Tribunal from exercising its jurisdiction over this dispute'.[428]

218. In the context of finding the 'tools available to tribunals to guard against double recovery in international law', *Orascom* was characterised as '[…] a welcome extension to the doctrine of abuse of rights, which prohibits the exercise of a right for purposes other than those for which the right was established and which, to date, has found limited application in investment jurisprudence'.[429] Abuse of rights/process, indeed, is one of the principles of international law, which is violated through instigation of parallel proceedings, and can be used as a defence against proliferation of disputes along with the joint resolution of

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[425] *Orascom TMT Investments S.à r.l. v People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, 31 May 2017; Carroll, above n. 1.

[426] *Orascom*, ibid., paras 544, 545: '[…] Mr. Sawiris himself recognized that he used the protection granted by Algeria in the different treaties at the various layers of the chain, for strategic reasons depending on the circumstances: […] the Claimant first caused one of its subsidiaries, OTH, to bring claims against Algeria. Then, it caused a different subsidiary in the chain, Weather Investments, to threaten to bring a different arbitration in relation to the same dispute. Finally – after selling the investment – it pursued yet another investment treaty proceeding in its own name for the same investment […] in relation to the same host state measures and the same harm'.

[427] Ibid., paras 173, 417.

[428] Ibid., 545.

[429] Carroll, above n. 1, 147, 148.

claims[430] but was never successfully invoked as such in practice before.[431] Furthermore, the 'abuse of process' argument may prove to be a better alternative for consolidation that requires parties' consent in one form or the other.

[430] Zarra, above n. 1, 128-135; Cremades, 'Parallel Proceedings in International Arbitration', above n. 1, 538; K. Hobér, 'Parallel Arbitration Proceedings – Duties of the Arbitrators: Some Reflections and Ideas', J. Lew, 'Concluding Remarks: Parallel Proceedings in International Arbitration – Challenges and Realities' in B. Cremades and J. Lew (eds), *Parallel State and Arbitral Procedures in International Arbitration, Dossiers of the ICC Institute of World Business Law* (2005) 253, 309; Cremades, 'Arbitration Under the ECT and Other Investment Protection Treaties: Parallel Arbitration Tribunals and Awards', above n. 1, 7; C. McLachlan, *Lis Pendens in International Litigation* (2009) 430; Waibel, above n. 1, 524; Wehland, 'The Regulation of Parallel Proceedings in Investor-State Disputes', above n. 1, 586, 587.

[431] *Orascom*, above n. 425, 540; Carroll, above n. 1, 149.

2.3 NAFTA Rules and Practice of Mandatory Consolidation

219. The above discussed *CME* and *Lauder* cases illustrate the minor chances of *res judicata* and *lis pendens* becoming accepted within the practice of investment tribunals, reaffirming the advantages of rules-based consolidation:[432] expediency of proceedings through saving time and costs, avoidance of contradictory rulings, and harmonization of arbitration practice.[433] Furthermore, claims that can be consolidated usually arise out of *the same state measure*, which is a 'much more precise criterion' compared to the ambiguous 'same dispute' underlying *res judicata* and *lis pendens* doctrines.[434]

220. Two consolidation orders issued under NAFTA are so far the only examples of consolidation *stricto sensu* in investment arbitration that should be distinguished '[…] from multiparty claims which involve two or more claimants jointly initiating a single proceeding against the same Respondent'.[435] This distinction is of principal importance in the context of decision-making on consolidation, although the notion as such can be used as a synonym for other types of the joint resolution of claims. As observed by Hanotiau clarifying the nuanced application of the term 'consolidation' in practice, '[i]t also overlaps to some extent the issue of group of contracts, *i.e.*, the question of whether it is possible to bring into one "consolidated" arbitration proceeding all the disputes arising from various connected agreements'.[436]

221. Furthermore, on the textual level, the prerequisites for consolidation under NAFTA are similar to those typically applied in other multiparty scenarios: factual and legal commonality between parallel proceedings together with fairness and efficiency accomplished through consolidation.[437]

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[432] Knahr, above n. 4, 3.

[433] On advantages of consolidation see: Yannaca-Small, 'Consolidation of Claims: A Promising Avenue for Investment Arbitration?', above n. 1, 234-235; Yannaca-Small, 'Parallel Proceedings', above n. 1, 1038-1041; Knahr, above n. 4, 1-4.

[434] Crivellaro, above n. 15, 408.

[435] Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 245.

[436] Hanotiau, above n. 274, 179. Although the comment was made in the context of arbitration in the United States, this terminological nuance can also be relevant in the context of investment arbitration as demonstrated by the *Noble Energy* which applied the rules on consolidation by analogy (see *Noble Energy*, above n. 37, paras 51, 51, 3.1, 54, 55).

[437] Zarra, above n. 1, 80, 81; Shany, above n. 4, 144-149; Romero, above n. 1, 601, 602; S. Puig, M. Kinnear, 'NAFTA Chapter Eleven at Fifteen: Contributions to a Systemic Approach in Investment Arbitration', 25 *ICSID Review – Foreign Investment Law Journal* (2010) 262; Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 257; Crivellaro, above n. 15, 401; Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple

222. The most significant features that affect the interpretation of consent and distinguish NAFTA consolidation from other types of multiparty proceedings are:

(i) The possibility and procedure of consolidation is stipulated in NAFTA and is viewed as a matter of procedure, as the ruling on consolidation is rendered in the form of procedural order.

(ii) Parties' consent to consolidation is not a prerequisite for consolidation, whereby a consolidation tribunal issues an order within its procedural discretion under NAFTA rules meaning that consolidation is ***mandatory***.

(iii) A consolidation request is filed by the respondent state and opposed by the claimants (in practice).[438]

223. In addition to general considerations of efficiency, consolidation in investment arbitration (and under NAFTA, in particular) serves a specific purpose of protecting the state from being sued repeatedly for the same conduct.[439] For investors, however, consolidation *stricto sensu* is less desirable (for tactical reasons or due to increased costs and duration of proceedings)[440] as their very choice to initiate separate proceedings indicates. Hence, contrary to multiparty claims *ab initio* where claimants are related, in the NAFTA context, respondents are objectively more inclined to seek consolidation which is opposed by the claimants. Therefore – contrary to the multiparty claims discussed above – in interpretating consent, the consolidation tribunal will focus on the claimants' arguments against consolidation. The tribunals had to particularly establish whether consent of the claimants is still relevant for the decision-making as an expression of party autonomy, despite a formal lack of consent as a prerequisite for consolidation under NAFTA.

Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 85-87; Alvarez, above n. 122, 413; C. Dugan, D. Wallace, N. Rubins, and B. Sabahi, *Investor-State Arbitration* (2008) 186, 190; Low, above n. 4, 135.

[438] Schreuer, above n. 2, 384.

[439] Alvarez, above n. 122, 414; M. Kinnear, A. Bjorklund, and J. Hannaford, *Investment Disputes under NAFTA: an Annotated Guide to NAFTA Chapter 11* (2006) 1126-3, 1126-4; Crivellaro, above n. 15, 402, 403; Knahr, above n. 4, 4.

[440] Knahr, ibid.

224. To briefly outline the procedure, consolidation under NAFTA[441] is governed by Article 1126.[442] A disputing party may submit a request for consolidation to the ICSID Secretary General who appoints the consolidation tribunal, so that one arbitrator has nationality of the respondent state and another one has nationality of the investors.[443] An additional party that has not been included into the request for consolidation may submit a respective request to the already established tribunal.[444] The consolidation tribunal may issue a

[441] On consolidation procedure under the NAFTA see, for example: Hanotiau, above n. 274, 189-191; Low, above n. 4.

[442] Article 1126 NAFTA provides as follows:

'1. A Tribunal established under this Article shall be established under the UNCITRAL Arbitration Rules and shall conduct its proceedings in accordance with those Rules, except as modified by this Section.

2. Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

(a) assume jurisdiction over, and hear and determine together, all or part of the claims; or

(b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.

3. A disputing party that seeks an order under paragraph 2 shall request the Secretary-General to establish a Tribunal and shall specify in the request:

(a) the name of the disputing Party or disputing investors against which the order is sought;

(b) the nature of the order sought; and

(c) the grounds on which the order is sought.

4. The disputing party shall deliver to the disputing Party or disputing investors against which the order is sought a copy of the request.

5. Within 60 days of receipt of the request, the Secretary-General shall establish a Tribunal comprising three arbitrators. The Secretary-General shall appoint the presiding arbitrator from the roster referred to in Article 1124(4). In the event that no such presiding arbitrator is available to serve, the Secretary-General shall appoint, from the ICSID Panel of Arbitrators, a presiding arbitrator who is not a national of any of the Parties. The Secretary-General shall appoint the two other members from the roster referred to in Article 1124(4), and to the extent not available from that roster, from the ICSID Panel of Arbitrators, and to the extent not available from that Panel, in the discretion of the Secretary-General. One member shall be a national of the disputing Party and one member shall be a national of a Party of the disputing investors.

6. Where a Tribunal has been established under this Article, a disputing investor that has submitted a claim to arbitration under Article 1116 or 1117 and that has not been named in a request made under paragraph 3 may make a written request to the Tribunal that it be included in an order made under paragraph 2, and shall specify in the request:

(a) the name and address of the disputing investor;

(b) the nature of the order sought; and(c)the grounds on which the order is sought.

7. A disputing investor referred to in paragraph 6 shall deliver a copy of its request to the disputing parties named in a request made under paragraph 3.

8. A Tribunal established under Article 1120 shall not have jurisdiction to decide a claim, or a part of a claim, over which a Tribunal established under this Article has assumed jurisdiction.

9. On application of a disputing party, a Tribunal established under this Article, pending its decision under paragraph 2, may order that the proceedings of a Tribunal established under Article 1120 be stayed, unless the latter Tribunal has already adjourned its proceedings […]'.

[443] Articles 1226(3), 1126(5) NAFTA.

[444] Article 1126(6) NAFTA.

consolidation order *in the interests of fair and efficient* resolution of the claims and *after hearing the disputing parties* if it is satisfied that claims submitted for consolidation have a *question of law or fact in common* and assume jurisdiction with regard to all or some/part of the claims.[445]

225. Although the NAFTA consolidation order is of procedural nature under the applicable rules, procedural discretion of the consolidation tribunal still can be questioned. On the one hand, the decision on consolidation is viewed as a procedural order which is final and cannot be subject to judicial scrutiny or appealed in any way.[446] At the same time, a view was expressed that the requirement of consent in a case of consolidation cannot be circumvented through reliance on procedural powers.[447] As an example of this ambiguity, in one of the NAFTA consolidation cases, the claimants filed (but soon withdrew[448]) a motion with the US District Court to vacate the consolidation order[449] on the grounds for setting aside of arbitral awards. The respondent argued that the challenge of the order is not possible as it is a procedural order and not an award.[450]

226. *Corn Products*[451] was the first NAFTA case where consolidation rules were applied. Two concurrent claims were filed with ICSID by three producers of high fructose syrup against the new excise tax for soft drinks containing high fructose corn syrup introduced by the Mexican government. Claimants were Corn Products International, Inc. (in the first dispute), Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. (in the concurrent arbitration).[452] Notably, the parties deviated from the standard

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[445] Article 1126(2) NAFTA.

[446] Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 99-103; Crivellaro, above n. 15, 133, 403.

[447] Shany, above n. 4, 142.

[448] *Tembec et al v United States of America*, United States District Court for the District of Columbia, Civil Action No. 07-1905 (RMC), Memorandum Opinion, 14 August 2008, page 2.

[449] *Tembec et al v United States of America*, United States District Court for the District of Columbia, Case No. 05-2345 (RMC), Motion to Vacate Arbitration Award, 17 February 2006.

[450] *Tembec et al v United States of America*, United States District Court for the District of Columbia, No. 05-CV-2345 (RMC), Respondent's Memorandum of Law in Opposition to Petitioners' Motion to Vacate, 28 March 2006, pages 15-21.

[451] *Corn Products International, Inc v United Mexican States*, ICSID Case No. ARB(AF)/04/1 and *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v United Mexican States;* ICSID Case No. ARB(AF)/04/5.

[452] Ibid., Order of the Consolidation Tribunal, 20 May 2005, para. 1: 'On 21 October 2003, Corn Products International, Inc. ("CPI"), a company incorporated in the State of Delaware, submitted a Request for Institution of Arbitration Proceedings to the International Centre for Settlement of Investment Disputes ("ICSID") against the United Mexican

procedure on the method of appointment of the consolidation tribunal: The parties agreed on the composition of the tribunal amongst themselves, whereas Article 1126 provides for appointment of all three arbitrators by the ICSID Secretary General.[453] The tribunal upheld the claimants' position and dismissed the request for consolidation.[454]

227. On the contrary, the *Canfor* consolidation tribunal was satisfied that the requirements for consolidation are met.[455] In *Canfor*, three arbitrations (*Canfor*, *Tembec et al*, *Terminal*) were initiated by *Canadian* producers of softwood lumber after a series of countervailing duty and antidumping measures had been introduced by the US.[456] Upon request of the respondent, the tribunal was established by the ICSID Secretary General. Following the respondent's application to stay two arbitrations (*Canfor* and *Tembec*) pending the decision on consolidation pursuant to Article 1126(9), the tribunal approved the request despite the claimants' objections in three cases[457] (the tribunal in *Terminal* was not constituted at the time when the consolidation tribunal was convened).[458]

228. The reasoning of the consolidation tribunals in *Corn Products* and *Canfor* on the prerequisites for consolidation (common issues of fact and law, fairness and efficiency of consolidation) shall be discussed in more detail in the following section. It will highlight how the tribunals approached the most problematic issues commonly discussed in the

States ("Mexico") under Chapter 11 of the North American Free Trade Agreement ("NAFTA"), for alleged breaches of Articles 1102, 1106 and 1110 of NAFTA arising from the imposition of an excise tax with effect from January 1, 2002 on soft drinks containing high fructose corn syrup. On 4 August 2004, Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. (hereinafter "ADM/Tate & Lyle" or "the ALMEX shareholders"), two Illinois based companies incorporated in the State of Delaware, submitted a similar Request for Institution of Arbitration Proceedings against Mexico, based on the same tax measure'.

[453] Ibid., para. 2: '[…] Mexico and the claimants submitted a "Confirmation of Agreement of the Disputing Parties Regarding Consolidation" which confirmed the membership and mandate of the Consolidation Tribunal pursuant to Article 1126, but stipulated that should consolidation be ordered, the disputing parties would by agreement amongst themselves determine the composition of the panel to hear the consolidated claims'. See also Low, above n. 4, 152; Kinnear, above n. 439, 1126-8.

[454] *Corn Products*, above n. 452, para. 20.

[455] *Canfor Corporation v United States of America, Tembec Inc., Tembec Investments Inc. and Tembec Industries Inc. v The United States of America, and Terminal Forest Products Ltd. v The United States of America, UNCITRAL,* Order of the Consolidation Tribunal, 7 September 2005, para. 221.

[456] Ibid., para. 3: 'The claims filed against the United States by Canfor Corporation ("Canfor"), Tembec Inc., Tembec Investments Inc. and Tembec Industries Inc. (collectively referred to as "Tembec"), and Terminal Forest Products Ltd. ("Terminal"),1 all Canadian producers of softwood lumber, concern a number of countervailing duty and antidumping measures adopted by the United States relating to Canadian softwood lumber products'.

[457] Ibid., paras 4, 5.

[458] Ibid., para. 24.

context of mandatory consolidation, such as, party autonomy, confidentiality, the risk of inconsistent outcomes, synchronization of proceedings, and appointment of arbitrators.

2.3.1 Common Questions of Fact and Law

229. Pursuant to Article 1126(2), 'a question of law or fact in common' is the first prerequisite for consolidation of NAFTA claims which was understood differently by the two consolidation tribunals (in relation to both qualitative and quantitative standard of commonality).

Corn Products

230. The *Corn Products* tribunal accepted '[…] that the claims submitted to arbitration do have certain questions of law or fact in common' without expanding on how it arrived at this conclusion.[459] Yet, in addressing the parties' positions as a matter of party autonomy,[460] the tribunal considered the claimants' argument on the differences between the claims (such as different strategic business plans for investments, markets, technology, costs, impacts of the tax, and expectations in making the investments) and decided that they are substantial enough to not meet the requirement of commonality.[461]

231. The tribunal also pointed to the fact that the respondent '[…] did not indicate, apart from jurisdiction, common defences it intends to raise to the claims'. Although the tribunal noted that it is not obligated to do so under Article 1126, '[…] it might have been helpful to Mexico's position in terms of evaluating the significance of any common questions of law or fact'.[462]

Canfor

232. The *Canfor* tribunal explained a standard it applied in assessing whether the issues are sufficiently common to justify consolidation (that was not done in *Corn Products*). A 'question of law or fact in common' should not be understood formalistically as a

[459] *Corn Products*, above n. 452, para. 6.

[460] Ibid., para. 12.

[461] Ibid., paras 14, 15.

[462] Ibid., para. 14.

'[…] mere invocation of the same provision of the NAFTA […]' that the respondent is allegedly in breach.[463] Rather, it should be a '[…] factual or legal issue that requires a finding to dispose of a claim'[464] and that the underlying arbitrations have in common.[465]

233. The tribunal set the limits to the standard of commonality: It is irrelevant, if the '[…] questions of law material to the determination of Tembec's claims were not material to the resolution […]' of the claims of other investors. A material factor is '[…] whether there exist common questions of law or fact among the claims asserted by the Claimants, not whether the legal and factual theories can be exported from one arbitration to another in order to determine liability in the latter dispute'.[466] The fact that the tribunal will have to evaluate different facts pertaining to each claimant '[…] does not negate the commonality among the underlying legal issues'.[467]

234. As to the quantitative qualifier, the *Canfor* tribunal set a low bar for common issues, considering that procedural economy is the ultimate purpose of consolidation:

'The object and purpose of the relevant part of the NAFTA are mainly related to procedural economy. Within that perspective, the presence of one common question of either law or fact in two or more […] arbitrations will serve that object and purpose under given circumstances'.[468]

235. The common questions of law should not only meet the quantitative standard of Article 1126 but also a qualitative one, namely, that addressing these questions should serve fair and efficient dispute resolution. The qualitative aspect, in principle, implies that common questions should be *material* and *important* for the ultimate outcome of the case. The tribunal, however, cautiously refrained from using these "qualifiers" not mentioned in the consolidation provision '[…] as they could be interpreted to unduly curtail the explicit discretionary power given to an Article 1126 Tribunal'.[469]

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[463] *Canfor*, above n. 455, para. 110.

[464] Ibid., para. 109.

[465] Ibid., para. 110.

[466] Ibid., para. 173.

[467] Ibid., para. 174.

[468] Ibid., para. 113.

[469] Ibid., paras 114, 115.

236. The tribunal also expanded on the extent to which the respondent should disclose its defences on the merits (if at all) in order to prove that the questions of law or fact share a required degree of commonality. The respondent was not ready to articulate its defences on the merits but a mere 'anticipation' that it would raise the same legal defences against all three claims is insufficient. However, if a certain issue has been raised in one of the parallel proceedings and '[…] a party shows that […] with a degree of certainty […]' it will be raised in the other, then a consolidation tribunal '[…] may legitimately take such anticipated issue into account'.[470] This approach serves the purpose of procedural economy and expediency. Otherwise, the resolution of the request for consolidation '[…] would suffer delay until the [concurrent] arbitrations were substantially pleaded'.[471]

237. The *Canfor* tribunal explained the disagreement and differences with the reasoning in *Corn Products* on the aspect of commonality: Firstly, the *Corn Products* tribunal did not elaborate on the requirements for the test of 'common issues of fact and law'. Secondly, in *Corn Products,* Mexico did not prove commonality regarding its defences on liability according to the consolidation tribunal, unlike the US that did in accordance with the standard adopted by the tribunal.[472] In particular, the tribunal undertook an extensive analysis of each of the underlying claims to establish common issues of fact and law with regard to every stage of the proceeding (jurisdiction, liability, and damages) and each claimant.[473]

2.3.2 Fairness and Efficiency

238. In addition to connectivity and commonality, another prerequisite for consolidation is that it must serve efficiency and fairness of dispute resolution that was understood differently by the *Corn Products* and *Canfor* tribunals. In essence, in *Corn Products*, the overarching criterion of fairness and efficiency was the risk of disclosing confidential business information amongst the claimants as direct competitors. In *Canfor*, the conflicting interests of the claimants as competitors were subordinated to procedural economy and

[470] Ibid., paras 116-118.

[471] Ibid., para. 119.

[472] Ibid., para. 222.

[473] Ibid., paras 175-206; See also Romero, above n. 1, 607.

recognised as the legitimate interest of the state to avoid multiple claims for the same conduct with potentially conflicting outcomes.

Corn Products

239. The *Corn Products* tribunal noted that maintaining confidentiality between the direct competitors would require complex adjustments of the procedure that '[…] would render consolidation in this case, in whole or in part, extremely difficult'. The parties would be hesitant to share information that would require adjudication on separate tracks, thus inevitably slowing down the process.[474] The status of competitors would affect the ability of the parties to fully present their cases, and it would be in violation of due process to impose on the parties an additional burden of calculating which information, if disclosed, can be detrimental for confidentiality and which cannot. Therefore, separate tribunals are in a better position to handle the cases efficiently.[475]

Canfor

240. The *Canfor* tribunal emphasised that the main concern of the NAFTA member states was that '[…] a State Party would be faced with a multitude of claims by investors arising out of the same event or related to the same measure by that State'. The fact that in the initial proposal of Canada only a state party could request consolidation supports this proposition.[476] Procedural economy, hence, should serve the '[…] goal of alleviating the resources of the State Parties in defending against multiple claims, as opposed to conserving the resources of the […] Tribunals empanelled to hear the individual disputes'.[477]

241. The requirement of fairness is also subordinate to the interests of procedural economy, even though this cannot be achieved for both parties on equal terms in that '[…] what is procedurally less efficient for one party is procedurally more efficient for another'. In striking the balance between the conflicting interests, a factor for consideration is that procedural economy should redound to the benefit of a disputing state.[478]

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[474] *Canfor*, ibid., para. 8.

[475] Ibid., paras 9, 10.

[476] Ibid., para. 73.

[477] Ibid., para. 76.

[478] Ibid., para. 125.

242. According to the respondent, the standard of fairness and efficiency '[…] is an absolute, and not a relative, standard', meaning that consolidation is not supposed to be '[…] the most fair and efficient means of resolving the claims, or […] be more fair and efficient than proceeding separately'.[479] The claimants opposed to an 'abstract' approach to fairness and efficiency and insisted that the standard should be interpreted '[…] relative to the positions of the individual disputing parties in their respective […] proceedings'. In particular, the following factors should be assessed: 'costs to all parties; length of hearings; procedural complexity; the parties' wishes; the parties' conduct or representation to each other; the impact on party autonomy; the importance and complexity of confidentiality; the timing of the consolidation application; and the progress that has been made in the parties' […] arbitrations'.[480]

243. The tribunal upheld the respondent's position and confirmed that comparison with separate proceedings cannot be read into the wording of Article 1126, and that '[…] efficiency in the sense of procedural economy is the operative goal of consolidation […]'. Therefore, the assessment of efficiency does not require '[…] drawing up a matrix of comparative advantages and disadvantages and applying relative weighing factors'.[481]

244. Although efficiency is an objective test according to the tribunal, it nevertheless entails comparison with continuing *status quo* of the proceedings in case consolidation is not ordered using the following factors: time, costs, and avoiding of conflicting decisions.[482] Thus, the tribunal was somewhat inconsistent with regard to the comparative test, but its reluctance to introduce it as a requirement in clear terms is another indication of the tribunal's pro-consolidation approach.[483]

245. The tribunal rejected the claimants' accusations that the request for consolidation was made in pursuit of 'abusive and disruptive litigation techniques' on the ground that it was

[479] Ibid., para. 121.

[480] Ibid., paras 122, 123.

[481] Ibid., para. 124.

[482] Ibid., para. 126.

[483] Shany, above n. 4, 148, 149.

not proved that the respondent '[…] is guilty of an abuse of right under international law […]'.[484]

2.3.3 Party Autonomy

246. Party autonomy was a relevant and overarching consideration in the *Corn Products* with regard to the claimants' objection to consolidation for confidentiality concerns despite the power of the tribunal to order consolidation in the absence of the parties' consent. *Canfor* promoted the prevalence of procedural economy at the expense of the parties' subjective interests and preferences.

Corn Products

247. The *Corn Products* tribunal's view was that '[…] party autonomy should be a relevant consideration to be taken into account in the interpretation and application of Article 1126 […]'. The tribunal explained that the parties '[…] "contracted around" the appointment and rules provisions of Article 1126 […]' and hence, party autonomy has been read into Article 1126 at least to a certain extent.[485] Against this background, unwillingness of the three out of four parties to consolidate their claims, is a relevant consideration in terms of fairness of procedure.[486]

Canfor

248. In *Canfor*, the tribunal rejected the claimants' argument that the consensual nature of arbitration precludes consolidation. The tribunal emphasised that the NAFTA state parties are entitled as sovereigns to set certain conditions for arbitration with investors under international law.[487]

249. The tribunal also rejected the claimants' argument that '[…] if consolidation is ordered, their claims will be adjudicated by a tribunal to which they have not consented […]':[488] By consenting to NAFTA arbitration, the claimants also automatically agreed to the

[484] *Canfor*, above n. 455, 137.

[485] *Corn Products*, above n. 452, paras 11, 12.

[486] Ibid., para. 12.

[487] *Canfor*, above n. 455, 78.

[488] Ibid., para. 79.

method of appointment of arbitrators under Article 1126, in that the parties are exempt from the nomination process (which does not deprive the parties from an opportunity to agree on another procedure as illustrated by *Corn Products*).[489]

2.3.3.1 Confidentiality

250. Both tribunals discussed confidentiality from the prism of party autonomy (of which consent is a key element) but only in *Corn Products* it was a deciding factor[490] for rejecting consolidation. For the *Canfor* tribunal, confidentiality issues do not preclude consolidation as long as it is equipped with procedural mechanisms for protecting claimants' business secrets.[491]

Corn Products

251. In *Corn Products*, the main concern for the claimants and for the tribunal was the risk of discovery of the claimants' confidential information amongst themselves, as they were direct competitors:[492]

'[…] each company emphasized that it cannot make known to the other, before an arbitration tribunal or anywhere, details as to the nature of its investments, business strategies, production costs, plant design, the effect of the tax on their investors and investments, and other data that must be put to a tribunal engaged in examining whether or not there has been discrimination, illegal performance requirements, or an expropriation […]'.[493]

Canfor

252. Contrary to the reasoning in *Corn Products*, the *Canfor* tribunal decided that confidentiality concerns are irrelevant for consolidation unless it '[…] would defeat efficiency of process or would infringe the principle of due process'.[494] The standard

[489] Ibid., paras 79, 85.

[490] *Corn Products*, above n. 452, paras 17, 19.

[491] *Canfor*, above n. 455, para. 143.

[492] *Corn Products*, above n. 452, Opposition of Corn Products, para. 70; Observations of Archer Daniels, para. 12.

[493] *Corn Products*, above n. 452, para. 7.

[494] *Canfor*, above n. 455, para. 138.

protective measures available in arbitration (such as 'protective orders; imposition of confidentiality undertakings; partially separate hearings in camera; classifying submissions, documents and testimony; appointment of a confidentiality advisor; redaction of award for public access') may adequately cater for the claimants' interests related to confidential information.[495]

253. In line with the general trend toward transparency in investor-state arbitration, the NAFTA [496] parties accorded minor importance to confidentiality in the Notes of Interpretation of Certain Chapter 11 Provisions[497] in the following terms:

'[…] Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal'.

254. Although withholding confidential business information is foreseen under the NAFTA, the documents submitted to or issued by a NAFTA tribunal should be made available to the public as a rule.[498] The fact that the parties are direct competitors cannot be viewed as a bar for consolidation as it is a standard situation not only in multiparty scenarios but also in bi-partite arbitrations:

'It has never been seriously suggested that arbitration cannot proceed in those cases for the mere reason that the parties are competitors and that disclosure of confidential information is purportedly bound to occur'.[499]

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[495] *Canfor*, ibid., para. 143.

[496] On the NAFTA approach to transparency see L. Fortier, 'Canadian Approach to Investment Protection – How Far We Have Come!', in Binder, above n. 1, 534-540.

[497] *Canfor*, above n. 455, para. 140, referring to the Notes of Interpretation of Certain Chapter 11 Provisions, issued by the NAFTA Free Trade Commission on 31 July 2001. Footnote omitted.

[498] Ibid., citing the Notes of Interpretation: '[…] each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:

(i) confidential business information;

(ii) information which is privileged or otherwise protected from disclosure under the Party's domestic law; and

(iii) information which the Party must withhold pursuant to the relevant arbitral rules, as applied'.

[499] Ibid., para. 141.

2.3.3.2 Risk of inconsistent awards

255. The risk of inconsistent outcomes and duplication of resources on the respondent's side was the main concern in *Canfor*, whereas, in *Corn* Products, maintaining party autonomy in relation to confidentiality trumped the potential harm to the state caused by inconsistent awards.

Corn Products

256. The *Corn Products* tribunal was not particularly concerned with the risk of conflicting awards: The claims were sufficiently distinct in terms of liability and quantum, therefore, the awards could be different but not necessarily inconsistent, which mitigated Mexico's concern of being confronted with conflicting awards.[500] Furthermore, '[…] the risk of unfairness to Mexico from inconsistent awards resulting from separate proceedings cannot outweigh the unfairness to the claimants of the procedural inefficiencies that would arise in consolidated proceedings'.[501]

Canfor

257. In *Canfor*, the tribunal was of the view that avoidance of inconsistent awards is a matter of effective administration of justice '[…] which is demanded by efficient proceedings as referred to in Article 1126(2)'. The previously discussed *CME/Lauder* conflicting awards were mentioned as an example, demonstrating how the risk of inconsistent decisions can materialize under circumstances which warranted consolidation. Even if (unlike in *CME/Lauder*) the parties are unrelated, the cases can still present the same legal issues arising out of the same state measure and the risk persists that '[…] the findings with respect to those issues differ in two or more cases'.[502]

2.3.3.3 Desynchronised parallel proceedings

258. The tribunals also addressed the problem of desynchronisation, given that consolidation of 'too' advanced proceedings can make it counter-productive from the perspective of efficiency. At the same time, at the very early stages, there can be a shortage of elements

[500] *Corn Products*, above n. 452, para. 16.

[501] Ibid., para. 17.

[502] *Canfor*, above n. 455, paras 131-133.

from separate proceedings that can be compared for evaluation of commonality as a precondition for consolidation. The *Corn Products* set a relatively high standard for the degree of synchronization that warrants consolidation.

Corn Products

259. In one out of the two concurrent arbitrations in *Corn Products*, the tribunal has been established and the claimant has submitted its Memorial on Issues of State Responsibility (*Corn Products)*, whereas in the other case, the tribunal was yet to be appointed (*Archer Daniels*). Given that the separate cases were not procedurally aligned, the potential delays caused by the need to cater for the confidentiality concerns in the consolidated proceeding would result in considerable delays in the decision-making process, especially for Corn Products. In these circumstances, the requirement of fairness and efficiency would not be met.[503]

Canfor

260. Time was seen by the *Canfor* tribunal as one of the elements of efficiency.[504] In this regard, the general principle serving procedural economy is that the '[…] more advanced the separate proceedings are, the less likely it is that consolidation will be ordered'. A consolidation tribunal must balance interests of all parties and not deny consolidation for the sole reason that consolidated proceedings would be more time consuming for investors.[505] In none of the underlying cases, have the tribunals issued awards on jurisdiction (let alone, liability, or damages). The parallel proceedings, hence, have not progressed so far '[…] that consolidation would no longer serve procedural economy'.[506]

261. The discrepancies between the proceedings and additional efforts required from the claimants, should consolidation be ordered, could not cause an unfair delay in the claimants' proceedings.[507] The tribunal pointed out that, to this extent, the case differs

[503] *Corn Products*, above n. 452, para. 19.

[504] *Canfor*, above n. 455, para. 121.

[505] Ibid., paras 128, 129.

[506] Ibid., paras 209, 210.

[507] Ibid., paras 211-214.

from *Corn Products*, where one of the grounds for non-consolidation was that the cases were not close to a procedural alignment.[508]

262. 'Re-submission' of a case to the consolidation tribunal, if it assumes jurisdiction over consolidated claims, raises the issue of efficiency and fairness in terms of costs incurred earlier in separate proceedings. The tribunal admitted that consolidation would decrease the costs for the respondent and increase the costs for the claimants. However, such an increase will not be excessive and, furthermore, the money spent in the separate proceedings cannot be considered as "thrown away" since the work product submitted to the previous tribunals can be used in the consolidated proceeding as well.[509]

2.3.4 Consolidation Provisions in Other FTAs and BITs

263. Since NAFTA, about 100 BITs containing provisions similar to consolidation under Article 1126 have been negotiated.[510] The two NAFTA consolidation orders discussed above are practically valuable as a reference point for applying the consolidation provisions in other rules governing investment arbitration, discussed briefly in the following section.

264. Canadian Model BIT is almost identical to NAFTA on the essential aspects of consolidation concerning the prerequisites, process, and consequences of consolidation.[511]

265. Another method and different prerequisites for consolidation are foreseen under the US Model BIT.[512] It is similar to the NAFTA consolidation in that a consolidation tribunal

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[508] Ibid., para. 222.

[509] Ibid., paras 215, 216.

[510] 2018 Proposals for Amendment of the ICSID Rules, above n. 27, 845.

[511] Article 32 Canadian Model BIT (2004): '[…] Where a Tribunal established under this Article is satisfied that claims submitted to arbitration under Article 27 (Submission of a Claim to Arbitration) have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:(a)assume jurisdiction over, and hear and determine together, all or part of the claims; or(b)assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others. […]'

[512] Article 33 US Model BIT (2012) provides as follows:

'1. Where two or more claims have been submitted separately to arbitration under Article 24(1) and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order […].

can be established by the ICSID Secretary General upon the request of a disputing party. However, a higher threshold – both in terms of conditions and procedure – is set forth for approval of the request. Firstly, the ICSID Secretary General can deny the request if it is *manifestly unfounded*.[513] Secondly, in addition to common issues of fact and law, another precondition for consolidation is that related claims should arise out of the same events or circumstances.[514] Thirdly, the request for consolidation should be submitted in accordance with the *agreement of all disputing parties* sought to be covered by the consolidation order.[515] Lastly, two arbitrators in the consolidation tribunal should be appointed by the parties and the presiding arbitrator – by the ICSID Secretary General.[516]

266. The US Model BIT differs from NAFTA and Canada's Model BIT also in relation to the outcome of the consolidation request. Under the latter treaties, in case of a positive decision on consolidation, the consolidation tribunal will in any event be involved in resolution of the dispute – by hearing (either entirely or partially) all or some of the

[…] 3. Unless the Secretary-General finds […] that the request is manifestly unfounded, a tribunal shall be established under this Article.

4. Unless all the disputing parties sought to be covered by the order otherwise agree, a tribunal established under this Article shall comprise three arbitrators:

(a) one arbitrator appointed by agreement of the claimants;

(b) one arbitrator appointed by the respondent; and

(c) the presiding arbitrator appointed by the Secretary-General, provided, however, that the presiding arbitrator shall not be a national of either Party. […]

6. Where a tribunal established under this Article is satisfied that two or more claims […] have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

(a) assume jurisdiction over, and hear and determine together, all or part of the claims;

(b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others; or

(c) instruct a tribunal previously established […] to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that

(i) that tribunal, at the request of any claimant not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 4(a) and 5; and

(ii) that tribunal shall decide whether any prior hearing shall be repeated. […].'

[513] Article 33(3) US Model BIT.

[514] Article 33(6) US Model BIT.

[515] Article 33(1) US Model BIT.

[516] Article 33(4) US Model BIT.

claims.[517] In contrast, under the US Model BIT, the consolidation tribunal can also refer *all* claims to one of the previously constituted individual tribunals.[518] In this case, the claimants have the right to reappoint the arbitrator, so that 'new' claimants have an opportunity to participate in the appointment procedure.[519]

267. However, the element of inequality is that the 'new' parties may potentially suffer from the prejudice of arbitrators caused by the way the 'older' claimants argued their cases before consolidation. Furthermore, depending on how advanced each of the individual cases was, the 'new' parties may need more time to synchronize their positions with the more 'advanced' parties. The tribunal has the duty to 'decide whether any prior hearing shall be repeated',[520] which can partially resolve this problem but simultaneously creates unnecessary delays for the 'old' parties.

268. In general, the US Model BIT is more cautiously formulated from the perspective of maintaining party autonomy within the consolidation process. Thus, consolidation can be sought upon the agreement of all parties concerned; a two-step approval of the request is foreseen; the parties have an opportunity to (re)appoint the tribunal.

269. The requirement of the 'same events or circumstances' as one of the prerequisites for consolidation strengthens '[…] the need for factual similarity between the claims, at the expense of legal similarity' and infers more clearly that a single state measure falls within this requirement.[521]

270. Several FTAs envisage the possibility of consolidation according to elaborate procedures similar to the above discussed rules. The Central America Dominican Republic-US Free Trade Agreement[522] and the US-Chile Free Trade Agreement[523] provide for the procedure

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[517] Article 1126(2): 'Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

(a) assume jurisdiction over, and hear and determine together, all or part of the claims; or

(b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others'.

[518] Article 33(6)(c) US Model BIT.

[519] Article 33(6)(c)(i) US Model BIT.

[520] Article 33(6)(c)(ii) US Model BIT.

[521] Shany, above n. 4, 145.

[522] Article 10.25 Central America-Dominican Republic-United States Free Trade Agreement (2004).

[523] Article 10.24 of the United States-Chile Free Trade Agreement (2003).

on consolidation, which resembles the Model US BIT.[524] Similarly, consolidation procedure implemented in the Canada-Chile Free Trade Agreement echoes the structure of Canada's Model BIT.[525]

271. New Zealand-Malaysia FTA offers the right of the disputing parties to agree on consolidation of claims in general terms without elaborating on the procedure:

'Where two or more investors notify an intention to submit claims, or have submitted claims, separately to arbitration […] and the claims have a question of law or fact in common and arise out of the same or similar events or circumstances, all concerned disputing parties may agree to consolidate those claims in any manner they deem appropriate, including with respect to the forum chosen'.[526]

272. Consensual consolidation is also foreseen under the Japan-Peru FTA:

'The arbitral tribunal may consolidate two or more proceedings regarding the same measure or the same matter with the consent of the Parties'.[527]

273. In addition to separate claims arising from common factual and legal issues, some BITs (for example, several Mexico's BITs), provide for consolidation of separate claims submitted by shareholders in the same enterprise as a consequence of the same breaches.[528]

274. Interestingly, the Mexico-Switzerland BIT does not elaborate on the appointment of the 'tribunal of consolidation', the only instruction being that it '[…] shall be installed under the UNCITRAL Arbitration Rules',[529] which do not provide for consolidation procedure at all. The most relevant provision governs composition of the tribunal in a *single*

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[524] Article 10.24(6)(c) United States-Chile Free Trade Agreement; Article 10:25(6)(c) Central America-Dominican Republic-United States Free Trade Agreement.

[525] Article G-27 Canada-Chile Free Trade Agreement (2019).

[526] Article 10.27 New Zealand-Malaysia FTA (2010).

[527] Article 215 Agreement between Japan and the Republic of Peru for an Economic Partnership (2011).

[528] See for example, Article 6(2)(a) Mexico-Switzerland BIT: '[…] Proceedings will be consolidated in the following cases:

(a) when a disputing investor submits a claim to arbitration on behalf of an enterprise that he effectively controls and, simultaneously, other investor or investors participating in the same enterprise, but not controlling it, submit claims to arbitration on their own behalf as a consequence of the same breaches; […]'; See also Article 14 Mexico-Austria BIT (2001) with identical wording.

[529] Article 6(1) Mexico-Switzerland BIT (1995).

arbitration with multiple parties, according to which joint nominations should be made by the claimant(s) and/or respondent(s).[530] However, consolidation relates to *separately* filed claims and, hence, in this case, the procedure of consolidation is seemingly a matter of the parties' discretion and unanimous agreement.

275. Based on numerous multiparty cases and problematic issues that previously were not adequately addressed in the ICSID legal instruments, the recent Proposals for Amendment of the ICSID Rules envisage a provision on voluntary consolidation and coordination of parallel proceedings:

'Rule 46 Consolidation or Coordination of Arbitrations

(1) Parties to two or more pending arbitrations administered by the Centre may agree to consolidate or coordinate these arbitrations.

(2) Consolidation joins all aspects of the arbitrations sought to be consolidated and results in one Award. To be consolidated pursuant to this Rule, the arbitrations shall have been registered in accordance with the Convention and shall involve the same Contracting State (or constituent subdivision or agency of the Contracting State).

(3) Coordination aligns specific procedural aspects of two or more pending arbitrations, but the arbitrations remain separate proceedings and result in separate Awards.

(4) The parties referred to in paragraph (1) shall jointly provide the Secretary-General with proposed terms for the conduct of the consolidated or coordinated arbitrations and consult with the Secretary-General to ensure that the proposed terms are capable of being implemented.

(5) After the consultation referred to in paragraph (4), the Secretary-General shall communicate the proposed terms agreed by the parties to the Tribunals

[530] Article 10(1) UNCITRAL Arbitration Rules: 'For the purposes of article 9, paragraph 1, where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator'.

constituted in the arbitrations. Such Tribunals shall make any order or decision required to implement these terms'.[531]

276. The proposed procedure enables the parties to agree on the terms of conduct of the consolidated proceeding, which secures a higher degree of party autonomy compared to the mandatory NAFTA consolidation. Given the complexity of multiparty arbitration, the 'terms of consolidation' enable the parties and the tribunal to adopt case-tailored rules for consolidation and maintaining multiparty proceedings. Coordination of arbitrations as an alternative to consolidation allows for even more flexibility for the alignment of the proceedings and accounts for the controversies amongst the parties that may emerge at any stage of arbitration.

[531] 2021 Proposals for Amendment of the ICSID Rules, above n. 31, 49, 50.

2.4 *Abaclat*: First 'Mass' Arbitration under the ICSID Convention

277. The most recent development related to multiparty investment arbitration is mass arbitration – a 'new form of large-scale arbitration'[532] illustrated so far by *Abaclat* with initially over 180,000 claimants (which reduced to over 60,000 in the course of the proceeding). The dispute arose out of the restructuring of Argentina's sovereign debt in relation to the sovereign bonds held by Italian investors.[533] *Abaclat* was one of numerous ICSID cases initiated by foreign investors in the aftermath of the financial crisis in Argentina in 2001-2002 and the respective economic emergency measures.[534] Two other 'Italian bondholder' cases (*Ambiente* and *Alemanni*) were also discussed in the context of mass claims, however, a smaller number of claimants did not allow to categorise them as 'mass' instead of 'regular' multiparty arbitrations.[535]

278. The unprecedentedly high number of claimants required a unique form of participation in the proceeding through a representative Task Force Argentina ('TFA') – a consortium of eight Italian banks in which bonds were purchased by the investors. TFA was established for the purpose of representing Italian bondholders in the negotiations of the settlement with Argentina in the course of the debt restructuring.[536] After the negotiations had failed, the bondholders authorised TFA to initiate ICSID arbitration through the TFA Mandate Package ('Mandate Package') by signing the Power of Attorney.[537] The main implication of TFA's involvement was the de-individualized examination of claims,[538] which proved to be the most controversial issue in the case as far as consent to mass proceedings is concerned.

279. In contrast with previously discussed multiparty and consolidation cases where consent was an issue in relation to either respondent or claimants, *Abaclat* raised the issue of

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[532] Strong, above n. 5, 16.

[533] *Abaclat*, above n. 38, paras 1, 3, 9, 216.

[534] V. Heiskanen, 'Arbitrating Mass Investor Claims: Lessons of International Claims Commissions', in PCA, above n. 20, 297, 298; Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 63; Dugan, above n. 437, 188; Cremades, 'Parallel Proceedings in International Arbitration', above n. 1, 516, 517.

[535] *Ambiente*, above n. 221, para. 120; *Alemanni*, above n. 227, para. 267.

[536] *Abaclat*, above n. 38, paras 4, 65-68.

[537] The Mandate Package comprised (i) TFA Instruction Letter, (ii) Power of Attorney, (iii) TFA Mandate, and (iv) additional questionnaires and instructions. Ibid., paras 85-89, 450-452.

[538] Van Houtte, above n. **Fehler! Textmarke nicht definiert.**, 231, 232.

consent on both sides. The determination of consent by the Majority was based on the interpretation of 'mass' element as a matter of *admissibility*, which was differentiated from jurisdiction as follows:

'If there was only one Claimant, what would be the requirements for ICSID's jurisdiction over its claim? If the issue raised relates to such requirements, it is a matter of jurisdiction. If the issue raised relates to another aspect of the proceedings, which would not apply if there was just one Claimant, then it must be considered a matter of admissibility and not of jurisdiction'.[539]

280. Under this approach, the Majority had no difficulties in establishing that the requirements for jurisdiction under the ICSID Convention and the Argentina-Italy BIT are fulfilled, including the respondent's consent to arbitrate with multiple investors.[540] Hence, the 'mass aspect' '[…] relates to the modalities and implementation of the ICSID proceedings and not to the question whether Respondent consented to ICSID arbitration'.[541]

281. In the Dissent, Professor Abi-Saab observed that limitations to the tribunal's power, whether inherent or consensual, are the matters of jurisdiction and, hence, Argentina's consent cannot be interpreted '[…] to cover the power of the Tribunal to hear collective mass claims actions requiring resort to atypical or abnormal procedures'.[542]

282. In the following, the Majority's reasoning on the respondent's and claimants' consent will be summarised in more detail, whereby the aspects of consent related to jurisdiction and admissibility will be discussed separately in accordance with the structure of the Majority's reasoning.

[539] *Abaclat*, above n. 38, para. 249.

[540] Ibid., paras 489-492; Lamm, above n. 2, 118, 119.

[541] *Abaclat*, above n. 38, para. 492.

[542] Ibid., Dissenting Opinion to Decision on Jurisdiction and Admissibility of Georges Abi-Saab, 4 August 2011, para. 127.

2.4.1 Respondent's Consent to Mass Proceedings

283. Argentina argued that the respondent's consent to mass claims procedure must be explicit,[543] as collective proceedings are not foreseen under the ICSID Convention; nor were they allowed in Italy and Argentina at the time of conclusion of the ICSID Convention and the Argentina-Italy BIT. Furthermore, collective adjudication would be outside the ICSID framework that provides for separate determination of the harm inflicted to each individual claimant, in that '[…] can no longer be realistically examined and the peculiarities of each investment are ignored in favour of the lowest common denominator'.[544] Procedural adaptations required for the conduct of mass proceedings are of such importance that they should be specifically authorised in the respondent's consent.[545] Silence with regard to collective proceedings is a "qualified silence" that points to inadmissibility of mass claims and, thus, the tribunal cannot set up a mechanism to deal with mass claims relying on its procedural discretion.[546]

2.4.1.1 Respondent's consent as a matter of jurisdiction

284. In *Abaclat*, the question of specific consent to multiparty arbitration had to be answered a new in light of the 'mass' element. The Majority observed that, before deciding on the question of specific consent, the nature of the proceeding should be established.[547] The *Abaclat* case is of hybrid nature, combining the elements of representative and aggregate proceedings. According to the Majority, representative proceedings allow to seek representative relief whereby '[…] high number of claims arise as one single action', for example, in consumer disputes or in the US class actions. [548]

285. Although it was emphasised that *Abaclat* should be distinguished from class actions initiated by a representative on behalf of *unnamed* and *unidentified* members of the class; whereas, in *Abaclat*, each claimant who is named and identified (supposedly[549]), is aware

[543] *Abaclat*, above n. 38, paras 470, 471, 481.

[544] Ibid, para. 471.

[545] Ibid., para. 481.

[546] Ibid., para. 516.

[547] Ibid., para. 482.

[548] Ibid., paras 483, 485-488.

[549] See paras 548, 631-633 *infra*.

of and consented to ICSID arbitration.[550] Aggregate proceedings address collective injuries through aggregation of claims, for example, in multiparty and multi-contract arbitrations.[551] Hence, *Abaclat* is of hybrid nature in that it started as aggregate proceedings but then continued with features similar to representative claims due to the high number of claimants.[552]

286. The Majority observed that there is not any numeric threshold that would require a specific authorisation of multiparty arbitration in addition to general consent to ICSID arbitration:[553]

'Assuming that the Tribunal has jurisdiction over the claims of several individual Claimants, it is difficult to conceive why and how the Tribunal could loose [sic] such jurisdiction where the number of Claimants outgrows a certain threshold. First of all, what is the relevant threshold? And second, can the Tribunal really 'loose' [sic] a jurisdiction it has when looking at Claimants individually?'

287. The Majority also recalled a fundamental characteristic of any form of collective proceedings that should be considered in establishing consent in regard to a mass element:

'Collective proceedings emerged where they constituted the only way to ensure an effective remedy in protection of a substantive right provided by contract or law; in other words, collective proceedings were seen as necessary, where the absence of such mechanism would *de facto* have resulted in depriving the claimants of their substantive rights due to the lack of appropriate mechanism'.[554]

288. Against this background, the Majority decided that the mass element does not justify the requirement of specific consent to mass proceedings if the parties' consent to ICSID arbitration is established, thus, mirroring the approach of previous tribunals in multiparty cases.[555]

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[550] Ibid., para. 486.

[551] Ibid., 483.

[552] Ibid., paras 483, 487, 488.

[553] Ibid., para. 490.

[554] Ibid., para. 484. Footnote omitted.

[555] Ibid., para. 490.

2.4.1.2 Respondent's consent as a matter of admissibility

289. Based on the distinction between jurisdiction and admissibility drawn by the Majority,[556] the mass aspect of the respondent's consent was approached as a matter of admissibility and not jurisdiction:[557] The respondent's consent encompasses mass claims if '[…] an ICSID arbitration [can] be conducted in the form of 'mass proceedings' considering that this would require an adaptation and/or modification by the Tribunal of certain procedural rules provided for under the current ICSID framework […]'. A negative answer would imply the lack of the respondent's consent to mass claims but '[…] not because Argentina did not consent thereto but because mass claims as the ones at stake are not possible under the current ICSID framework'. Within this logic, mass aspect relates '[…] to the modalities and implementation of the ICSID proceedings […] and hence is a question of admissibility and not of jurisdiction.'[558]

290. The test for admissibility is a two-fold question: (i) whether mass actions are '[…] compatible with the current ICSID framework and spirit […]' and (ii) what procedural adaptations should be adopted '[…] in order to make such a "mass action" workable in an ICSID arbitration'.[559] The guiding principle for the Majority in this regard was that it '[…] would be contrary to the purpose of the BIT, and to the spirit of ICSID […]' to require an additional express consent to mass claims proceedings if the '[…] investments require a collective relief in order to provide effective protection to such investment […]'.[560]

291. For the same reason, silence should be interpreted not as a prohibition of mass proceedings but rather as a gap that the tribunal can fill as a matter of its procedural discretion under Article 44 of the ICSID Convention and Article 19 of the ICSID Arbitration Rules.[561] Adaptation of the rules should be distinguished from a modification that would require the parties' consent[562] whereby '[…] filling of the gap does not consist

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[556] Ibid., para. 279.

[557] Lamm, above n. 2, 119.

[558] *Abaclat*, above n. 38, paras 491, 492.

[559] Ibid., para. 507.

[560] Ibid., para. 518.

[561] Ibid., paras 518-521.

[562] Ibid., paras 522-524.

of an amendment of the written rule itself, but rather of an adaptation of its application in a specific case'.[563]

292. Such adaptations would yield individual consideration of the claims impossible: Argentina would be deprived of an opportunity to defend itself against each claimant and the claimants would have to waive their right to pursue their claims individually in favour of the interests of the entire group.[564] In order to decide whether such implications are admissible, they should be compared with the alternative of pursuing the claims separately, which would be cost prohibitive for many claimants and impossible for ICSID to administer. Thus, the rejection of admissibility may constitute a denial of justice that would be 'shocking' given that, under the applicable BIT, the underlying investments are eligible for protection by means of ICSID arbitration.[565]

293. Hence, the test for admissibility is to find the right balance when evaluating whether imposing certain restrictions on procedural rights of the parties would be justified in order to accord effective protection to the investments.[566] In striking the balance, it should be considered: (i) under which conditions the group treatment is justified and whether they are met; (ii) to what extent the respondent's rights are affected compared to 60,000 separate claims; (iii) whether the deprivation of certain procedural rights of the claimants is admissible.[567]

294. The pre-condition for group treatment is that the claims are identical or at least sufficiently *homogeneous*, which the claims at hand met: (i) the claims were based on the same provisions of the same BIT, (ii) the rights of the investors derive from the same security entitlements, (iii) all these entitlements were affected by the same state measures and Argentina's conduct had the same effect upon all the claimants.[568]

295. With respect to Argentina's truncated defence rights, the Majority observed that dealing with 60,000 separate claims would be '[…] a much bigger challenge to Argentina's effective defence rights than a mere limitation of its right to individual treatment of

[563] Ibid., para. 525.

[564] Ibid., para. 536.

[565] Ibid., para. 537.

[566] Ibid., para. 538.

[567] Ibid., para. 539.

[568] Ibid., para. 543.

homogeneous claims […]'. Moreover, the Majority was not certain whether to '[…] enter into full length and detail into the individual circumstances of each Claimant […]' is at all necessary considering the homogenous nature of the claims.[569]

296. With regard to the limitations of the claimants' procedural rights, the Majority noted that the claimants made a conscious and informed choice in deciding to be represented by TFA in order to benefit from collective treatment of their claims,[570] as discussed further below in the section on the claimants' consent.

2.4.2 Claimants' Consent to Mass Proceedings

297. The Majority decided not to establish whether *each* claimant gave its consent to arbitration and limited the jurisdictional phase in this regard with the question of '[…] whether Claimants' consent, as expressed in the relevant documents of the TFA Mandate Package, is fit to constitute a valid consent to the present ICSID arbitration taking into account the representation mechanism implemented by the TFA Mandate Package'.[571]

298. Argentina argued that acting in the ICSID proceeding through TFA as a representative cannot be accepted as a valid consent on the ground that it does not meet the requirements under Article 25 of the ICSID Convention.[572] In particular, the Mandate Package is flawed by the conflict of interests as an instrument for the TFA members to evade liability towards the claimants. Furthermore, the claimants' consent was obtained fraudulently through misrepresentation and non-disclosure of the relevant information, evidenced by counterfeited signatures in the documents authorising TFA in its representative capacity. The Mandate Package deprived the claimants of their procedural rights by providing TFA with full control over arbitration. The respondent argued that '[…] had Claimants known

[569] Ibid., para. 545.

[570] Ibid., para. 546.

[571] Ibid., para. 424; On the validity of consent in *Abaclat* see: Steingruber, '*Abaclat and Others v Argentine Republic*: Consent in Large-scale Arbitration Proceedings', above n. 6, 241, 242.

[572] *Abaclat*, above n. 38, para. 423.

such real purpose, they would not have given their consent to the TFA Mandate Package and thereby to ICSID arbitration'.[573]

299. In addition to substantive invalidity, Argentina argued that the Mandate Package did not comply also with the form requirements, since under the Italian law, the Power of Attorney issued to TFA must be executed in front of a notary and there are 'strong doubts' regarding authenticity of the signatures.[574]

300. Although avoidance of the contract for the flaw in consent can be invoked by the party whose consent is flawed, the Majority decided to address Argentina's argument given that the alleged fraud was committed by a third party and the respondent never had a link or control over TFA.[575] However, the fact that the claimants themselves did not challenge their consent loosens the standard of proof which otherwise would be higher.[576]

301. The Majority dismissed the objection regarding notarization because validity of consent should be determined under international public law and not under national law.[577] Motivations behind consent and whether it was a 'good' decision do not affect the validity of consent.[578] The argument concerning possible falsification of some signatures is irrelevant at the jurisdictional stage and – if necessary – should be examined when dealing with the issues relating to individual claimants.[579]

302. The Majority, hence, distinguished between the existence of *formal consent* and *validity of consent*. In the absence of any relevant provision in the Argentina-Italy BIT, the only *formal* requirement under the ICSID Convention is that consent should be in writing.[580] The request for arbitration and, in case it is filed by a lawyer, the power of attorney, constitute consent of the investor.[581] It is regulated by the Rule 18 of the ICSID Arbitration Rules on representation, which does not give the right to act as representative

[573] Ibid., para. 455.

[574] Ibid., para. 428.

[575] Ibid., para. 444.

[576] Ibid., para. 445.

[577] Ibid., paras 430, 432.

[578] Ibid., para. 438.

[579] Ibid., para. 454.

[580] Ibid., paras 431, 432.

[581] Ibid., paras 446, 452, 453.

exclusively to legal professionals and, hence, does not bar representation through TFA. Validity of the Power of Attorney as procedural instrument is irrelevant for assessment of the validity of the consent given therein, which is a jurisdictional matter regulated by international law.[582]

303. With regard to *substantive validity* of consent, the applicable instruments do not stipulate any specific requirements and, therefore, it would be sufficient for jurisdictional purposes to examine '[…] the existence of a written document, incorporating the parties' consent to submit the dispute to ICSID arbitration […]'.[583] Yet, the Majority concluded that given a crucial role of consent, it should also examine whether such consent reflected the claimants' sincere intention and if it was given in a *free and informed manner*.[584] Under general principles of law, consent should be '[…] genuine and intended, *i.e.*, free from coercion, fraud and/or from any essential mistake'.[585] The test for validity of consent was formulated by the Majority as follows:

'In view of the content and specificities of the TFA Mandate Package, the alleged circumstances surrounding its signature and the representation mechanism implemented by such Package, can Claimants' consent to ICSID arbitration still be considered a free and informed consent?'[586]

304. In particular, the Majority looked into whether limitations of the claimants' procedural rights affect their consent as a matter of jurisdiction and admissibility as discussed further.

2.4.2.1 Waiver of the Right to Sue the TFA Member Banks as a Matter of Jurisdiction and Admissibility

305. The Majority decided that inability to sue the TFA member banks pending ICSID arbitration does not truncate the claimants' consent, since – 'in exchange' for certain

[582] Ibid., paras 447, 454.

[583] Ibid., para. 434.

[584] Ibid., paras 435, 440.

[585] Ibid., paras 436, 437.

[586] Ibid., para. 449.

restrictions – the investors got access to ICSID arbitration which is financed at the expense of TFA:[587]

'[…] from TFA's perspective, the TFA Mandate Package is a sort of a risk insurance, for which they pay a premium (the cost of ICSID arbitration), in return for which they are protected to a certain extent against a risk (lawsuits from Claimants)'.[588]

306. The Majority also denied the respondent's contention that the initiation of the proceedings through TFA constitutes an abuse of process, aimed at the pursuit of TFA's hidden interests at the expense of the claimants.[589] The alleged conflict of interest between TFA and the claimants is a matter of admissibility.[590] The Majority explained that even if there is a conflict of interest, the claimants should not be precluded from exercising their rights under the ICSID Convention '[…] because of the alleged behaviour of a third party on which Claimants have no influence'.[591]

2.4.2.2 Non-participation of the Claimants in the Proceedings

307. Regarding the non-participation of the claimants in the proceedings as a pre-condition for representation, the Majority also found that it does not affect the validity of the claimants' consent given that it was clearly set forth in the Mandate Package and, hence, the claimants 'knew what they were doing'. Whether such limitations 'have gone too far' is not a matter of consent but of admissibility.[592]

308. A question related to consent as such is not TFA's motivations but '[…] whether through the TFA Mandate Package Claimants were fraudulently induced in doing something they did not want to do, or whether they unconsciously waived a right or lost an option, which – if conscious thereof – they would not have been willing to concede at the price of being able to conduct ICSID arbitration'.[593] The Majority found that the Mandate Package

[587] Ibid., para. 458.

[588] Ibid., para. 458.

[589] Ibid., paras 642, 644, 651, 655.

[590] Ibid., para. 459.

[591] Ibid., paras 657-660.

[592] Ibid., para. 457.

[593] Ibid., para. 459.

contained enough information for the claimants to give an informed consent, including provisional waiver of claims.[594]

309. With regard to the extent of information that should be disclosed, the Majority observed that TFA is '[…] entitled to assume a certain level of sophistication and knowledge of the investors in assessing of the sufficient extent of information disclosure' in contrast to disputes arising out of pure consumer transactions.[595] The Majority added that even if the Mandate Package did to some extent misrepresent, the events following the launch of the ICSID arbitration allowed the claimants to get a 'full picture'.[596] Thus, although the Majority refused to take the position on whether TFA '[…] was a "seduction operation," there is no indication that such operation was systematically fraudulent, coercive or otherwise caused Claimants to agree to ICSID arbitration based on an essential mistake'.[597]

310. In assessing the admissibility of the waiver of procedural rights by the claimants, the Majority noted that individual pursuit of 60,000 separate claims would be cost prohibitive for the claimants and technically impossible for ICSID to manage which would result in denial of justice.[598]

[594] Ibid., para. 462: '[…] based on the information contained in the TFA Mandate Package the Tribunal finds that it allowed Claimants to make an informed choice between (i) ICSID arbitration at the cost of TFA and at the temporary detriment of Claimants' potential claims against TFA's member banks, or (ii) civil litigation against the banks, at Claimants' own expense and without the option of simultaneous ICSID arbitration against Argentina'.

[595] Ibid., para. 461.

[596] Ibid., para. 463.

[597] Ibid., para. 464.

[598] Ibid., para. 537.

Chapter 3: Analysis of the Issues Related to Consent in Different Types of Multiparty Investment Arbitration

311. Based on the case law overview discussed previously, firstly, the issues related to consent in case of a departure from the prevailing jurisdictional approach to the nature of the decision on the joinder of claims should be discussed.[599]

312. Secondly, the approaches and methods applied for establishing consent in each type of multiparty investment arbitration and related issues shall be summarised and evaluated separately.[600]

3.1 Nature of the Decision on the Joint Adjudication of Claims

313. The overview of the three multiparty scenarios demonstrates that, in addition to the prevailing jurisdictional approach to the nature of the decision on the joint resolution of claims, it can also be viewed (either under applicable rules or by the tribunal) as a matter of procedure[601] or admissibility.[602] The interpretation of consent and related issues were largely predetermined by the respective approach, as explained in the following section in further detail.

3.1.1 Procedural Approach

314. The procedural approach was applied in *Noble Energy* by analogy with consolidation[603] which, indeed, operates as a procedural order under arbitration rules with an explicit consolidation provision (such as NAFTA).[604] However, when consolidation is invoked (albeit by analogy) in order to justify the reliance on the procedural discretion to allow the aggregate resolution of claims, a number of issues linked to consent and jurisdiction arise. Contrary to multiparty cases *ab initio* (of which *Noble Energy* is an example),

[599] See paras 314 *et seq. infra.*

[600] See paras 336 *et seq. infra*

[601] See paras 51 *et seq.*, 219 et seq. *supra*, 314 *et seq. infra*.

[602] See paras 57 *et seq.*, *277 supra*, 539 *et seq. infra*.

[603] See paras 51 *supra*, 314 *et seq. infra.*

[604] See paras 91, 92, 222 *supra*, 395 *et seq. infra*

consolidation is a method of merging separately initiated and pending proceedings (consolidation *stricto sensu*)[605] and it was discussed as such in the source quoted as an authority for choosing the procedural approach in *Noble Energy*.[606]

315. By contrast, this distinction had more weight in *Guaracachi* where the respondent argued that initiation of a single arbitration by two investors can be equated with consolidation, which was not foreseen under the applicable BITs and, hence, falls outside the scope of consent.[607] This argument was rejected by the tribunal because the claims were filed jointly *ab initio* and, hence, the merger of the two separate proceedings was not at issue.[608]

316. Such a clear demarcation line between consent as a matter of jurisdiction and consolidation as a merger of concurrent arbitrations is a more adequate approach, considering not only a formal aspect (collective claim *ab initio* and separately initiated proceedings) but also material distinctions between jurisdictional and procedural rulings.

317. As the case overview demonstrates, in the domain of investment arbitration, consolidation of separate proceedings without parties' consent is only possible where applicable rules (such as NAFTA or some BITs) provide for this option[609] (mandatory consolidation).[610] Hence, to the extent that consent as an element of jurisdiction does not play an important role in the rules-based consolidation process,[611] the procedural approach can be justified indeed.

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[605] Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 80; Kaufmann-Kohler, 'Multiple proceedings – New Challenges for the Settlement of Investment Disputes', above n. 1, 7; Romero, above n. 1, 601; Yannaca-Small, 'Parallel Proceedings', above n. 1, 1032, 1033; Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*, above n. 1, 110.

[606] Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 110.

[607] See para. 171 *supra*.

[608] *Guaracachi*, above n. 235, paras 164, 338.

[609] Kaufmann-Kohler, 'Multiple proceedings – New Challenges for the Settlement of Investment Disputes', above n. 1, 7; Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 245; Yannaca-Small, 'Parallel Proceedings', above n. 1, 1034, 1035.

[610] Kinnear, ibid.; Yannaca-Small, ibid.

[611] Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 87, 88; Yannaca-Small, 'Consolidation of Claims: A Promising Avenue for Investment Arbitration?', above n. 1, 235, 236; Yannaca-Small, 'Parallel Proceedings', above n. 1, 1042, 1043.

318. However, where the issue of consent is not addressed through the mechanism of mandatory consolidation, the procedural approach remains highly questionable given the importance of party autonomy. One of the possible extreme and undesirable consequences can be that parties will contract out of the tribunal's procedural discretion in their arbitration agreement, as explained by Shany:

'[…] one possible way to circumvent the need to secure the consent of all of the disputing parties to consolidation could be the utilization of "general powers" provisions found in the constitutive instruments or arbitration rules of most arbitration institutions. For example, Article 44 of the ICSID Convention authorizes ICSID tribunals to settle any unregulated question or procedure. Similarly, Article 15 of the UNCITRAL Arbitration Rules authorizes UNCITRAL tribunals to conduct the proceedings in a manner they deem appropriate. However, the pursuit of this interpretative avenue is rather unlikely. […] even courts operating in national systems supported by relatively strong institutional backing are often reluctant to order consolidation; and such reluctance would be even greater in the international sphere where tribunals are institutionally weaker and the premium placed on party autonomy is generally higher. Circumventing the consent requirement through application of default "general powers" provisions might also prove ineffective in the long run, since parties to arbitration could always contract-out from this procedure or from "general powers" clauses, altogether'.[612]

319. Even assuming that procedural discretion under Article 44 and analogy with consolidation have merit, allowing a joinder without the parties' consent (explicit or implied) would be the case of *mandatory* consolidation which is only valid if it is foreseen under the applicable procedural rules as explained by Kinnear:

'Neither Article 26 of the Convention nor Rule 44 have been used as the basis for mandatory consolidation at ICSID, and the majority view is that absent an express consolidation provision, an ICSID Tribunal cannot consolidate against the wishes of the parties'.[613]

320. Henceforth, apart from consolidation as a procedural ruling that is regulated as such under the applicable rules, the choice between the procedural and the jurisdictional approach to

[612] Shany, above n. 4, 142.

[613] Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 249.

the decision on the joint adjudication of claims must be made in favour of the latter. Consequently, except for the rules-based consolidation following the NAFTA model, procedural discretion remains outside of the tribunal's competence until its jurisdiction over multiple claims has been established. For the same reason, the specific features, principles, and considerations that are factored into the decision-making process on consolidation *stricto sensu* differ from those developed for the joint resolution of 'regular' multiparty claims.

3.1.2 Admissibility Approach

321. Another challenge to the prevailing jurisdictional approach was the decision in *Abaclat* to authorise mass claims as a matter of *admissibility* on the ground that they are procedurally manageable as the Majority established within the procedural discretion.[614] This 'unorthodox' perspective allowed the Majority to examine the fulfilment of the ICSID jurisdictional preconditions on the group basis and thereby extend the treaty protection for thousands of small claims.[615]

322. However, this approach conflicts with the requirement to establish the jurisdiction *ratione personae* over each claimant in order to make sure that each investor is covered not only by the respondent's general but also specific consent.[616]

323. On the surface, approaching the scope of the respondent's general consent from the perspective of admissibility can be justified, given that the state's offer of consent to unidentified and unlimited multitude of investors implies the possibility of a collective claim.[617] Di Brozolo explains this point by contrasting the interpretation of consent to an acceptable number of claimants in commercial and investment treaty arbitration:

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[614] *Abaclat*, above n. 38, paras 491, 492.

[615] Ibid, para. 484.

[616] See paras 82-85 *supra*.

[617] Steingruber, '*Abaclat and Others v Argentine Republic*: Consent in Large-scale Arbitration Proceedings', above n. 6, para. 241: 'Due to its characteristics, the public offer also has to be seen as an open, or a standing, offer by the State to arbitrate disputes with foreign investors. The offer is standing because a foreign investor can capitalize on the opportunity to bring a claim at any time. Moreover, the expression also shows that investment arbitration is open to a wide class of potential claimants and disputes. For this reason, the consideration of the Majority that 'the relevant question is not ''has Argentina consented to the mass proceedings?'', but rather ''can an ICSID arbitration be conducted in the form of 'mass proceedings' ...?'' ' is intelligible. In fact, offers to arbitrate contained in investment treaties are 'inherently' directed to

'[…] there is one difference between the two that could militate in favor of a less strict interpretation of the number of addressees of the offer to arbitrate that can be permitted to bring claims jointly. This is the fact that, while in commercial arbitration, the parties to the arbitration agreement are, at least in principle, identified or identifiable from the beginning, in investment arbitration the offer to arbitrate is very broad and directed to an undetermined number of potential parties'.[618]

324. Along the same lines, Heiskanen observes that it was within the Majority's discretion to establish jurisdiction over the claimants in general, following which the decision to allow mass claims is a '[…] matter of judgment rather than a decision dictated by hard and fast jurisdictional rules'.[619]

325. However, this aspect of the respondent's general consent refers to the possibility for investors to pursue their claims collectively but does not exempt them from meeting a jurisdictional requirement that *each* claimant should satisfy the test of *ratione personae*. For the same reason, only if jurisdiction is established on an individual basis, it would be accurate to say that an offer to arbitrate '[…] resolves one potential problem (the question of "with whom" respondents are required to arbitrate) […]'.[620]

326. Further, justifying the deindividualized determination of jurisdiction *ratione personae* by opting for the admissibility approach is also problematic from the perspective of the dichotomy of jurisdiction and admissibility both of which are the elements of a tribunal's competence. Abi-Saab in his Dissent expressed the same critic regarding the

a multitude of potential qualified investors (ie all investors with protected investments)'. Footnotes omitted; Strong, above n. 5, 268; Heiskanen, above n. 1, 618.

[618] Di Brozolo, above n. 4, 130.

[619] Heiskanen, above n. 1, 616.

[620] Strong, above n. 5, 268. Footnote omitted.

differentiation between 'general' and 'special' jurisdiction,[621] which corresponds to the notions of general and specific consent in the context of this study.[622]

327. In line with the above statements, Van Houtte insists on the strict compliance with the ICSID jurisdictional framework in relation to mass claims:

'[…] there are simply many Claimants within one case and however difficult the task, they must each be dealt with as any claimant in an ordinary ICSID proceeding would be. […] The time spent dealing with the 'mass' element as a stand-alone issue may have been better spent on the no doubt difficult but necessary task of looking at whether each and every one of the 60,000 Claimants meets the jurisdictional requirements of nationality, domicile and consent. Instead, the Majority settles abstract criteria, to be applied at a later, unspecified date and in an unspecified manner'.[623]

328. The problem of distinction between jurisdiction and admissibility[624] is not merely 'artificial or, at best, academic one that satisfies the observer's predilection for categorizing phenomena'.[625] A tribunal's choice predetermines whether an award can be subjected to scrutiny by an international tribunal or by national courts as explained by Paulsson:

'Decisions of tribunals which do not respect jurisdictional limits may be invalidated by a controlling authority. But if parties have consented to the jurisdiction of a given tribunal, its determinations as to the admissibility of claims should be *final*. Mistakenly classifying issues of admissibility as jurisdictional may therefore result in an unjustified extension of

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[621] *Abaclat*, above n. 542, para. 12: 'In international law, because of its consensual basis, jurisdiction as an ambit is analysed and scrutinized at two different levels, where adjudication is not intended for one case only, but takes place within an institutional setting, either of a standing organ (such as the International Court of Justice (ICJ) or a framework within which ad hoc tribunals are established (such as the Permanent Court of Arbitration and the ICSID):

(a) 'general jurisdiction' which defines the objective range and outer limits of the ambit for all cases, according to the constitutive instrument of the organ (e.g. the ICJ Statute), or the framework convention (e.g. the ICSID Convention);

(b) 'special jurisdiction' which defines the subjective range and limits of the ambit of jurisdiction of the organ in a particular case, according to the specific jurisdictional title bearing the consent of the parties, on the basis of which the case is brought before the organ'; Steingruber, above n. 72, 678. Footnote omitted.

[622] See paras 81 *et seq. supra*.

[623] Van Houtte, above n. 64, 233, 234.

[624] See paras 46 *et seq.*, 313 *et seq. supra.*

[625] Reinisch, above n. 64, 25.

the scope for challenging awards, and frustrate the parties' expectation that their dispute be decided by the chosen neutral tribunal'.[626]

329. The choice between jurisdiction and admissibility may have consequences not only for the post-award stage but also affect the reasoning of a tribunal in relation to both jurisdiction and merits.

330. Firstly, it can affect the ruling on a preliminary objection concerning the authority of a tribunal to decide the case on merits. Douglas observes in this regard:

'The rules of admissibility, if properly invoked, may require the dismissal of the claim […] before the determination of its merits. The grounds of inadmissibility at base represent certain legal defects in a claim that are independent of, and yet, often closely connected to, the substantive grounds upon which a claim […] is to be adjudicated on the merits. Admissibility deals with the *suitability* of the claim for adjudication on the merits'.[627]

331. Secondly, obstacles for admissibility can be temporary and the tribunal may order a stay of proceedings for the respective adaptation of the claim, which can then be accepted for adjudication, whereas non-fulfilment of jurisdictional requirements excludes such an option.[628] Similarly, the decision on admissibility does not have *res judicata* effect in that, after the claim was declined for inadmissibility, the claimant can initiate arbitration a new after having satisfied a respective pre-condition for admissibility (*e.g.*, complying with the waiting period).[629]

332. Thirdly, in contrast with jurisdiction, the requirements pertaining to admissibility can be waived (*e.g.*, exhaustion of local remedies). This distinction is linked to the competence of a tribunal to address jurisdiction upon its own initiative (*proprio motu*), which it is unlikely to do in relation to admissibility.[630]

333. Finally, given that admissibility is established after jurisdiction, a tribunal has more latitude in terms of the phase of the proceeding at which admissibility shall be dealt with.

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[626] Paulsson, above n. 66, 601, also referred to in Reinisch, above n. 64, 25.

[627] Douglas, above n. 34, 148.

[628] Waibel, above n. 65, 1275.

[629] Ibid., 1277.

[630] Ibid., 1275.

It can be crucial in bifurcated proceedings if a tribunal decides to rule on admissibility at the merits phase, which may reduce the chances of the host state to succeed on its objection[631] within '[t]he fight on the battleground of preliminary objections'.[632]

334. Thus, the preference of the jurisdictional approach is a more diligent solution from the perspective of compliance with the limitations of a tribunal's competence and enforceability of an award. Furthermore, the jurisdictional approach is more appropriate also on the functional level, given that the maturity of claims for collective adjudication may intertwine with the basic jurisdictional requirements (such as nationality of investors).[633] Therefore, the fulfilment of the *ratione personae* jurisdictional test must be examined on an individual basis before the mass claims can proceed to merits, which is irreconcilable with the group treatment of claimants.

335. Furthermore, even if the determination of the *ratione personae* status could be undertaken on an individual basis, the inevitable group treatment of claims at the merits phase as an 'adaptation of procedure'[634] cannot be read into the scope of the respondent's consent, given the substantial limitation of the parties' due process rights. As the comparative analysis of other types of 'mass' arbitration will demonstrate, the magnitude of such limitations requires that they are foreseen under the source of consent and the respective procedural rules.[635]

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[631] Ibid., 1276.

[632] F. Fontanelli, A. Tanzi, 'Jurisdiction and Admissibility in Investment Arbitration. A View from the Bridge at the Practice', 16 *The Law & Practice of International Courts and Tribunals* (2017) 5.

[633] See paras 158 *et seq.*, 166, 167 *supra.*

[634] *Abaclat*, above n. 38, paras 491, 517, 519, 520.

[635] See paras 601 *et seq. infra*.

3.2 Multiparty Claims *Ab Initio*

336. The earliest type of multiparty investment arbitration introduced the methods and concepts applied for the interpretation of consent as well as the pertaining procedural and jurisdictional issues that arose later in other multiparty scenarios. In this line of cases, consent to multiparty arbitration was the central consideration in deciding on the joint resolution of claims since the tribunals approached it as a matter of jurisdiction. However, the interpretation of the scope of consent was only required if the respondent raised an objection to multiplicity of claimants, for which reason the following analysis is focused mostly on this sub-category of cases.

3.2.1 *De Facto* Consolidation: Requirement of the Respondent's Explicit Consent as the Main Disadvantage

337. *De facto* consolidation applied in the ICSID practice is positively assessed in literature as a '[…] very reasonable method of addressing the problem of inconsistent awards […] based completely on the autonomy of the parties without any sort of compulsion, which may prove to have a significant psychological effect on participants in such proceedings'.[636] Indeed, this is in line with the basic principle of arbitration causing difficulties in establishing the scope of consent in multiparty cases that – contrary to litigation – the joinder of claims cannot be ordered without the parties' consent.[637] Along these lines, it was argued in literature that if *Lauder* and *CME* cases would have been brought before ICSID, the '[…] ICSID Secretariat would have most likely found a way to persuade the parties to constitute a single tribunal for both cases […]'.[638] Hanotiau noted that *de facto* consolidation applied by ICSID allows '[…] to reach in practice a result that is as close to consolidation as possible'.

[636] Dimsey, above n. 1, 134, 135; Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 246, 247.

[637] N. Voser, 'Multi-party Disputes and Joinder of Third Parties', in Van den Berg, above n. 1, 350, 351; N. Andrews, 'Arbitration and the expanding circle of consenting parties: joinder of additional parties and consolidation of related claims', in R. Nazzini, *Transnational Construction Arbitration: Key Themes in the Resolution of Construction Disputes* (2017) 48.

[638] Crivellaro, above n. 15, 412.

338. However, at the same time, respect to party autonomy is also a drawback of *de facto* consolidation from the perspective of efficiency, given that it 'is still based on the consent of the parties that – for whatever reasons – may decide not to give'.[639]

339. Kaufmann-Kohler mentioned in the context of *de facto* consolidation that an issue of due process may arise '[…] if a tribunal relies on knowledge acquired in one case to resolve another' which may lead to the decline of nomination by an arbitrator in the absence of the parties' consent.[640] Yet, this critic is more relevant for mandatory consolidation *stricto sensu* where consolidation can be ordered even in the absence of the parties' consent and at a more advanced stage of the proceedings. In contrast, in the context of *de facto* consolidation, parties are usually invited to appoint identical tribunals soon after the related claims have been filed and arbitrators have not been appointed yet so that the arbitrator's prejudice is less imminent.[641] Consensus of the parties will allow to avoid or mitigate other drawbacks of mandatory consolidation in relation to confidentiality and costs apportionment.[642]

340. At the same time, it is true that an issue common for all types of aggregate adjudication is also relevant for *de facto* consolidation, in that it '[…] does not necessarily permit rationalizing the use of resources, as submissions, hearings and decisions are often separate for each proceeding'.[643] Even if the claimants agreed to have their related claims resolved by the same arbitrators, this is not a safeguard against differences in opinions with regard to certain procedural steps, even amongst the co-claimants. For example, in *Von Pezold,*[644] a potential conflict between the claimants at the enforcement stage resulted in the disagreement with the respondent on the question whether an award should be issued for each claim separately or if a single award would suffice. Although the

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[639] Zarra, above n. 1, 85.

[640] Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 75; Zarra, above n. 1, 85.

[641] See paras 96 *et seq. supra*.

[642] Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*, above n. 1, 110; Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 83, 84; Yannaca-Small, 'Consolidation of Claims: A Promising Avenue for Investment Arbitration?', above n. 1, 235, 236; Yannaca-Small, 'Parallel Proceedings', above n. 1, 1043-1045.

[643] Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 75; Zarra, above n. 1, 85.

[644] See para. 194 *supra*.

tribunal issued separate awards, the respondent's objections thereto are illustrative of how such procedural complications can manifest themselves in practice.[645]

341. Hence, although a consensual nature of *de facto* consolidation has an obvious positive effect from the perspective of party autonomy, it is advisable for parties to agree on the procedure for tackling specific issues which may arise from the multiparty aspect.

3.2.2 Lack of the Respondent's Objection to Multiplicity of Claimants: to Which Extent is it Relevant for Establishing Consent?

342. Starting from the earliest multiparty cases, it was accepted in practice of ICSID and non-ICSID tribunals that multiple claimants, as a matter of principle, may institute a single arbitration even if the underlying jurisdictional instrument(s) do not explicitly provide for multi-party arbitration[646] or refer to investors in the singular form.[647] Given such a uniform consensus, respondents do not necessarily use these ambiguities related to the multiparty element in their jurisdictional objections.[648] Hence, consent can be inferred '[…] by the respondent […] continuing with the arbitration without raising objection to the fact that there is a multiplicity of claimants'.[649] In this case, interpretation of the scope of the specific (dispute-related) consent is not required.[650]

343. However, respondents' non-objection in other investment arbitrations cannot be used as an argument that if the respondent does raise such objection, the question of whether the respondent's consent in a particular case covers multiple claims should be answered in the negative. As Obadia observed, cases in which respondents did not object to the jurisdiction over multiple claimants '[…] do not bring light on the scope of respondent's consent contained in the relevant bilateral or multilateral treaty'.[651] Along the same lines, the tribunal in *Ambiente* advised '[…] caution regarding attempts to draw definite conclusions […] in the one or the other direction' from cases where the multiplicity of

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[645] *Von Pezold*, above n. 174, para. 6; See para. 340 *supra*.

[646] See paras 35 *et seq*., 123 *et seq. supra.*

[647] Ibid.

[648] See para. 118 *supra*.

[649] *Alemanni*, above n. 227, para. 285.

[650] See paras 131, 132 *supra*.

[651] Obadia, above n. 7, 108.

claimants was not among the grounds for accepting the respondent's objections to jurisdiction:[652]

'[…] The silence of both the respondent Governments and the deciding tribunals in all these cases as to the presence of a multitude of investors on the claimant's side may be interpreted [not only] as an indirect acknowledgment that this was not an obstacle for the cases to proceed [but also] as manifestation of the principle that, where a tribunal admits one of the objections put forward and determines that it has no jurisdiction, there is no need for the tribunal to elaborate on the rest of the (possible) objections'.

344. One can argue that such effect of the lack of objections on the interpretation of consent is an expression of the principle of judicial economy, which can be contrasted with an alternative view that the prerequisites for the joinder of claims must be assessed even in the absence of the respondent's objection. Di Brozolo observed to this effect:

'It is of course permissible for the State to give its consent to the aggregation once the claims are brought, if such consent is clearly lacking or is in doubt (as may have been the case in some of the earlier cases). However, since […] a specific consent by the State to the aggregation of proceedings is not required, the satisfaction of the conditions for the aggregation has to be assessed regardless of the State's position on consent at the time when the claims are brought'.[653]

345. Yet, the respective case overview demonstrates that tribunals did not engage in the evaluation of the 'conditions for the aggregation' in the absence of the respondent's objections. This approach is in line with the long-established practice that the ICSID Convention and investment treaties – as long as they do not exclude multiparty claims from the scope of protection – permit claims by multiple investors.[654]

346. Furthermore, rejection of (some) claims for non-fulfilment of the conditions for aggregation upon a tribunal's initiative would be problematic also from the perspective of a tribunal's competence.[655] Thus, if the *Abaclat* Majority's approach to the procedural

[652] *Ambiente*, above n. 221, para. 138.

[653] Di Brozolo, above n. 4, 135.

[654] See paras 35 *et seq*., 123 *et seq. supra.*

[655] Di Brozolo, above n. 4, 130.

manageability of mass claims as a precondition for admissibility[656] (*i.e.*, a 'condition for aggregation') is upheld, dismissal of the claims upon a tribunal's initiative could be plausible, if it decides that the claims are not manageable.

347. However, as discussed earlier, the issues of admissibility are, as a rule, decided upon the respective objection of a party and not upon a tribunal's own initiative.[657] In *Abaclat*, admissibility was closely linked to jurisdiction,[658] and the respondent did raise a jurisdictional objection to the 'mass element'. In this case, the tribunal's competence is questioned and, hence, the examination of the conditions for aggregation becomes relevant for establishing the tribunal's jurisdiction. However, rejecting the claims on the ground that they are not manageable upon a tribunal's own initiative would fall outside the tribunal's competence if the objective requirements for jurisdiction are met. Hence, the tendency amongst investment tribunals to equate the lack of objection with consent is not only a matter of judicial economy but also corresponds to the limitation of a tribunal's power to determine jurisdiction.

3.2.3 Limits of the Application of the 'Same Investment' as the Main Connectivity Element in Relation to Specific Consent

348. Given the lack of the rules-based instructions on the determination of consent to multiparty investment arbitration, tribunals inevitably have to borrow the respective methods from other types of multiparty disputes, in particular, from commercial arbitration and domestic litigation.

349. Therefore, in the absence of an explicit indication as to the parties' intent, ICSID tribunals focused on a 'somewhat artificial' task of making presumptions regarding the expectations of the parties, which is a common approach in such circumstances also in commercial arbitration.[659] The expectations were established by analogy with commercial arbitration by determining '[…] whether the relevant agreements all involve the parties to the arbitration, relate to a single transaction or project and do not contain

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[656] See paras 289, 290 *supra*.

[657] See para. 332 *supra*.

[658] D. Donovan, 'Abaclat and others v Argentine Republic: *As a Collective Claims Proceeding', 27 ICSID Review – Foreign Investment Law Journal* (2012), 261; Van Houtte, above n. 64, 234.

[659] Born, above n. 114, 1416.

irreconcilable dispute resolution provisions (contained in each of the underlying contracts)'.[660]

350. Indeed, although without articulating it in each case, tribunals have applied various theories for extension of an arbitration agreement to non-signatories, that were developed and commonly applied in commercial arbitration, such as group of companies, estoppel, accession, incorporation-by-reference.[661] For example, the *Noble Energy* and *Holiday Inns* tribunals relied on the theory of 'incorporation-by-reference' in deciding 'whether the parties in the referring document will be bound by the arbitration clause' in the contract to which they refer.[662]

351. 'Group of companies' – another doctrine related to non-signatories – was also 'borrowed' by the *Noble Energy* tribunal when the fulfilment of various contractual obligations by a non-signatory justified an extension of the ICSID arbitration clause.[663] This doctrine is applied if a party is a member of 'a tight group structure' with 'strong organisational and financial links' and played an active role in the negotiation and performance of the contract.[664]

352. At the same time, despite being the predominant tools for the interpretation of intent in multiparty commercial arbitration, the aforementioned theories can only be used as supplementary methods in investment arbitration as the domain of international public law.[665] The same point can be made about the relevance of national laws regulating multiparty litigation as observed by Di Brozolo:

'In principle, guidance could be sought in domestic civil procedure, which in all legal systems contains a wealth of rules on multiparty proceedings. However, as with many aspects of investor-State proceedings, there is not much that one can borrow from national civil procedure because of the differences between court litigation and arbitration, in

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[660] Ibid., 2611.

[661] On arbitration agreement in the context of non-signatories and multiple contracts see: Born, above n. 114, 1517 *et seq*.; S. Brekoulakis, *Third Parties in International Commercial Arbitration* (2010) 186 *et seq*.; Hanotiau, 'Multiple Parties and Multiple Contracts in International Arbitration', in PCA, above n. 20, 35 *et seq*.; Hanotiau, above n. 274, 49 *et seq*.

[662] Brekoulakis, ibid., 66.

[663] See paras 142 *et seq. supra*.

[664] Brekoulakis, above n. 660, 149 *et seq*.; See also Hanotiau, above n. 661, 35 *et seq*.; Hanotiau, above n. 274, 49 *et seq*.; Pryles, above n. 1, 445-447.

[665] Di Brozolo, above n. 4, 128, 129.

particular investor-State arbitration, and because even the rules of domestic laws on this type of issue may differ considerably across legal systems'.[666]

353. The *Ambiente* tribunal formulated this principle with reference to borrowing the rules of domestic laws as the interpretative methods in treaty arbitration:

'The Tribunal would, however, caution against importing domestic law standards in this respect and would recall, once again, that the decision on jurisdiction within the ICSID framework is a question to be answered on the basis of international law'.[667]

354. Investment treaties and the ICSID Convention stipulate the overarching rules which prevail over such standards. Thus, the fundamental rule of interpretation is that '[…] agreement to arbitrate between the claimant, investor and the respondent host state is governed by international law and incorporates the provisions of the investment treaty relevant to the jurisdiction of the arbitral tribunal'.[668]

355. In particular, if the rules of the ICSID Convention exclude jurisdiction over certain claimants, despite their factual and legal involvement in the same investment, they will not be allowed to proceed with their claims. In *Holiday Inns*, for example, an attempt to extend an ICSID arbitration clause to the companies of the same group was barred by the tribunal because the condition for extension of the treaty protection to nationals of the host state (a written agreement with the state to treat a local company as a foreign investor) was not met.[669]

356. *Impregilo* illustrated another limitation for the possibility of extending ICSID jurisdiction by appointing a representative acting on behalf of the members of a joint venture as they did not meet the ICSID jurisdictional requirements. Firstly, they did not have nationality

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[666] Ibid., 128.

[667] *Ambiente*, above n. 221, para. 153.

[668] Douglas, above n. 34, 76; See also Dupuy, above n. 34, 218, 219: '[…] the law to be applied to State consent as expressed in international treaties is framed and defined by public international law. It is in application of this law, not of the rules of private international law as used in the context of international trade arbitration between two private persons of different nationalities, that State consent to arbitration must be assessed by ICSID tribunals as this consent is expressed in international agreements. What is at stake here is the consent of sovereign States and the interpretation of international treaties, not of private contracts'.

[669] See paras 158-161 *supra*.

protected under the applicable BIT and secondly, the joint venture itself did not have separate legal personality.[670]

357. Representative claims on behalf of the group are, in principle, excluded from the mechanism of multiparty claims under the ICSID Convention, in that '[…] multiparty or mass claim is not a representative or class claim, in which designated claimants pursue the litigation on behalf of a larger group who fall within the definition of the class […]'.[671]

358. Hence, even if the parties agreed on ICSID arbitration in their investment contract(s), a multi-contract investment project must be diligently structured so that all parties fall within the scope of the ICSID Convention for investors to pursue their related claims within a single arbitration. To illustrate this point, it was observed that had the joint venture in *Impregilo* been incorporated in Pakistan, '[…] Impregilo, as the foreign controller of the local company, could have brought the case in its own name under the Italian BIT and [the joint venture] could have been included as a claimant in its own name [and the] two claimants could likely have sought all damages of [the joint venture]'.[672]

359. In general, in multiparty proceedings, public and contractual issues must be treated separately as observed by Lew in the context of parallel investment proceedings:

'An important distinction ought to be made in every case between private and commercial rights, and public or international rights. These are not always so clear. In the first case the issues are drawn from the parties' contract, what they agreed and the implications of the applicable law. This is equally so whether the contract parties are pure commercial entities, or if one party is also a state or state entity. In the latter case, public international law in general, and the treaty obligations of states as reflected in multilateral and bilateral treaties, establish an additional tier of rights and obligations. These may support, add to or be distinct from the private commercial terms agreed under the contract'.[673]

360. The risk of resorting to the methods applied in commercial arbitration for resolution of investment treaty disputes is that, as observed by Moss, '[…] these two branches of arbitration are looked upon as interchangeable' in which case they become 'false

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[670] See paras 163-167 *supra*.

[671] 2018 Proposals for Amendment of the ICSID Rules, above n. 27, 835.

[672] Bishop, above n. 20, 249.

[673] Lew, above n. 430, 305.

friends'. [674] *Lex mercatoria* represents transnational law governing contractual relationships between private parties and is fundamentally distinct from the rules that '[…] bind States and limit the exercise of their sovereign powers'.[675] Disregarding this substantial difference can compound to the erosion of the efforts on harmonization of investment law which is perceived as an endeavour of public importance.[676]

361. An example of importing the principles of commercial arbitration as 'false friends' was the claimants' reference to ICC arbitrations in *Impregilo,* where one of the partners in the joint venture was allowed to act as its representative. In contrast, the ICSID tribunal refused to accept the appointment of the representative by other members of the joint venture without legal personality in the state of incorporation.[677]

362. As far as the conflict between international and national legal norms is concerned, the latter can be applied for determination of the questions of fact[678] (which, however, is debatable in the context of investment arbitration[679]). Indeed, in the discussed cases, tribunals did invoke the doctrines and norms of municipal law in deciding legal issues of jurisdiction. Thus, a legal status of the joint venture as one of the conditions for ICSID jurisdiction was established in *Impregilo* under domestic corporate law.[680]

363. It can be summarised that allowing the joint resolution of claims based on the *same investment* requires a complex analysis of contractual and treaty provisions whereby the

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[674] G. Moss, 'Commercial Arbitration and Investment Arbitration: Fertile Soil for False Friends?' in Binder, above n. 1, 783.

[675] Ibid., 785.

[676] Ibid., 792, 793.

[677] See paras 164-166 *supra*.

[678] 'According to the classical dichotomy, international rules are law, internal rules are fact. As a consequence, if a rule is of a domestic nature, international law shall be indifferent to it as a matter of law'. I. Hayek and A. Gilles, 'The Multifaceted Settlement of International Investments Disputes: Thoughts about the Variety of Instruments Claiming Their Applicability to the Investment Dispute', 29 *ICSID Review – Foreign Investment Law Journal* (2014) 574. Footnote omitted.

[679] Douglas, above n. 34, 69, referring to W. Jenks, *Prospects of International Adjudication* (1964) 552: 'The principle that municipal laws are to be treated as facts before an international court or tribunal is, according to Jenks, 'at most, a debatable proposition the validity and wisdom of which are subject to, and call for, further discussion and review'. Footnotes omitted.

[680] See paras 163, 165 *supra*; But if domestic laws are not corroborated with relevant provisions of international investment law, they may not be invoked in order to challenge jurisdiction of an ICSID tribunal. Thus, the tribunal in *Noble Energy* rejected an attempt of the respondent to refute the claimants' argument in favour of the extension of the arbitration agreement to the non-signatory that became a successor of the signatory on the ground that succession was not implemented in accordance with the procedure foreseen under national corporate law. See paras 142, 143 *supra*.

threshold for the joinder of claims is set relatively high. Schreuer even observed that claims under different instruments can be adjudicated jointly only as an *exception*:

'Exceptionally, claims arising from the same overall transaction between the same parties but subject to several jurisdictional instruments may call for consolidation'.[681]

3.2.4 Multiple BITs as Separate Sources of Consent: Compatibility of BITs and the Requirement of Separate Treatment of Claims

364. Another type of connection between the claims (which can be combined with the unity of investment in a particular case) is where investors of different nationalities jointly pursue their claims arising out of the same state measure that affected either their common investment project or economic industry under different BITs. In this scenario, a starting point in deciding whether an aggregate adjudication of claims is possible is that different BITs represent *separate consents*.[682] Hence, the decision on the possibility of the joinder evolves not around the question of whether (by analogy with multiparty arbitration under single BIT) the scope of consent under one BIT can be extended to investors acting under another BIT. Rather, the focus must be on the question of whether the host state's consent in each BIT allows arbitration with investors acting under another BIT of the same state. The criteria considered by the tribunals in the decision-making process were *compatibility* of the BITs[683] and *connectivity (link)* between the claimants and their investments.[684]

3.2.4.1 Compatibility of the BITs and Link between the Claimants as the Pre-conditions for the Joint Adjudication of Claims under Multiple BITs

365. *Compatibility* was considered as a test for permitting claims under different BITs within a single arbitration in the context of the respondent's jurisdictional objection that procedural rules and beneficiaries are separate in each treaty, which is incompatible with

[681] Schreuer, above n. 2, 383, 384.

[682] Obadia, above n. 7, 110.

[683] See paras 168, 176-180, 188 *supra*.

[684] See paras 170, 171, 179 *supra*.

individual consents (*Sempra/Camuzzi*,[685] *Noble Energy*,[686] *Guaracachi*[687]). ICSID tribunals demonstrated a pro-investor approach to the compatibility test by disregarding the discrepancies in the BITs that, according to the respondents, precluded the joint treatment of claims.

366. For example, in *Sempra/Camuzzi*, the fact that only one of the applicable BITs allowed to treat nationals of the host state with foreign control as foreign investors was not accepted by the tribunal as a valid justification of incompatibility. Furthermore, such a discrepancy did not preclude the investor acting under one BIT to combine its shares with the shares of the investor acting under another BIT in order to jointly satisfy the requirement of foreign control.[688] In *Guaracachi*, under one of the invoked BITs only investors had the right to file an ICSID claim, whereas, under another BIT, the host state also had this option which did not become an obstacle for jurisdiction despite the respondent's objection to this end.[689] In *Suez*, different arbitration rules in the applicable BITs did not preclude the same tribunal from hearing multiple claims (but an important difference was that the parties agreed thereto).[690]

367. However, despite a broad understanding of compatibility, a common state measure alone is not a sufficient link for the aggregate treatment of claims under multiple BITs and must be compounded with connectivity between the claimants and their investments.[691] In *Sempra/Camuzzi*, the tribunal emphasised that the claimants' shares *in the same companies* must be treated jointly for the interpretation of consent under different BITs and, in particular, of the agreement on 'foreign control' if it is foreseen only under one of them. Thus, if investors made their investments independently and in different companies but act together as claimants, they cannot 'import' the agreement on foreign control from another BIT which scope covers only investors of certain nationality.[692]

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[685] See paras 172 *et seq. supra*.

[686] See paras 146-149 *supra*.

[687] See paras 169 *et seq. supra*.

[688] See paras 172 *et seq. supra*.

[689] See para. 188 *supra*.

[690] See para. 196 *supra*.

[691] Di Brozolo, above n. 4, 134; Obadia, above n. 7, 107, 110, 111.

[692] See para. 178 *supra*.

368. Tribunals did not necessarily mention that connectivity (other than common state measure) is required but it still was present. In *Guaracachi*, for example, the claimants owned shares in the same company, and, apparently, this was sufficient to meet the test of commonality although the tribunal only mentioned 'the same alleged facts and […] the same alleged breaches'.[693]

369. On the contrary, unrelated investors and investments, albeit affected by the same state conduct, are likely to be precluded from the pursuit of their claims collectively both in ICSID and non-ICSID proceedings.[694] For example, in *Accession Mezzanine*, the ICSID Secretariat refused to register a collective claim of the two groups of unrelated investors acting under three BITs because their investments (licenses in two broadcasting companies) were 'manifestly unrelated' and consent of all disputing parties was missing.[695]

370. In *Erhas*, where the only common element between twenty-two investors was their Turkish nationality and the allegedly anti-Turkish policy introduced by the state, the *ad hoc* UNCITRAL tribunal found that the link between the claims was clearly insufficient to meet the connectivity test.[696]

371. In another UNCITRAL arbitration initiated against the Czech Republic by investors in photovoltaic industry under the Energy Charter Treaty and five BITs, the PCA accepted the respondent's objection to the collective pursuit of the claims through appointment of different arbitrators for individual claims because the investments and investors were unrelated.[697] Di Brozolo observed that '[…] the position that would have been taken under most arbitration rules' would be in line with the claimants' view that the respondent 'should have appointed only one arbitrator and then subsequently contested the jurisdiction of the arbitral tribunal to hear all the claims together'.[698] The refusal of the PCA to appoint a single arbitrator for the respondent as requested by the claimants was criticized for not addressing the issue:

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[693] See paras 169, 171 *supra*.

[694] Obadia, above n. 7, 110.

[695] See paras 182, 183 *supra*.

[696] Di Brozolo, above n. 4, 131.

[697] See paras 184, 185 *supra*.

[698] Di Brozolo, above n. 4, 135.

'[…] the PCA very questionably washed its hands of the matter […] and the issue of whether the claims could have been brought together was completely sidestepped and could not be subject to a proper adjudication'.[699]

372. Douglas advocated an opposite view that multiple BITs represent 'different written consents' and consequently, the respondent is entitled to appoint different arbitrators, thereby 'procedurally refusing the joinder'.[700] Obadia denounced the opposition between these two approaches noting that under both '[…] the result might have been the same (*i.e.*, rejection of the joinder)'.[701]

373. To summarise, if unrelated investors of different nationalities made separate investments and the only common element between them is the same state measure, a respondent will most likely succeed in challenging jurisdiction based on the lack of consent to the joinder of claims under several BITs. Although, as reported by ICSID, '[i]n most of [voluntary consolidation] cases, claimants were not related to each other',[702] this seems to be relevant in the absence of a respondent's objection – otherwise, a closer link would be required for the affirmative finding on consent. Therefore, if the statement is made in literature that '[…] various tribunals have affirmed jurisdiction over claims of multiple and unaffiliated parties'[703] it should be read through the prism of this important reservation.[704]

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[699] Ibid., 135.

[700] Obadia, above n. 7, 110, referring to the opinion of Z. Douglas.

[701] Ibid.

[702] See 2018 Proposals for Amendment of the ICSID Rules, above n. 27, 840.

[703] Lamm, above n. 2, 117.

[704] Even in the cases quoted by Lamm to illustrate this point, the investors were either shareholders in the same companies or the respondents did not object to multiplicity of claimants as an objection to jurisdiction: '[…] in *Goetz v Burundi*, the ICSID tribunal accepted jurisdiction over a claim brought by six individual Belgian shareholders in a Burundian company; in *Suez et al. v Argentina*, the ICSID tribunal found jurisdiction over a claim brought under two BITs by a French and two Spanish shareholders in an Argentine water company; in *Urbaser et al. v Argentina*, the ICSID tribunal heard a claim of two Spanish shareholders in an Argentine water company; in *OKO Pankki Oyj et al. v Estonia*, the ICSID tribunal exercised its jurisdiction over a claim brought under two BITs by a German and two Finnish banks; and in *Funnekotter et al. v Zimbabwe*, the ICSID tribunal decided a claim brought by fourteen unaffiliated Dutch investors in different farms in Zimbabwe. In *Amco Asia v Indonesia*, there were three claimants from three different jurisdictions. Similarly, arbitral jurisdiction was not precluded by the number of claimants in the investment treaty cases of *Anderson et al. v Costa Rica*, where there were 137 claimants; in *Bayview Irrigation District et al. v Mexico*, with 46 claimants; or in Canadian Cattlemen for *Free Trade v United States*, with 109 claimants, although each of these three cases was dismissed on grounds other than the claimants' numerosity'. Lamm, ibid., 117, 118. Footnotes omitted.

3.2.4.2 Separate Treatment of Claims under Different BITs as an Impairment for Efficiency

374. Another implication of the principle that (as formulated in *Camuzzi/Sempra*) '[…] consent is expressed in each treaty individually, with a different personal and normative import' is that each claim must be treated individually as well.[705] The tribunal in *Noble Energy* made a relevant observation on this point that '[…] resolving different disputes in a single proceeding does not mean merging disputes, or applicable laws, or remedies' and '[…] the parties and the Tribunal will have to distinguish each dispute under its own applicable rules, even though facts, evidence and arguments may be common to all or some of them'.[706] Along the same lines, the *Guaracachi* tribunal was of the view that compatibility of the BITs remains intact despite the discrepancies between them, as long as the tribunal '[…] is prepared to analyse each Claimant's claims […] in accordance with the applicable BIT invoked by each Claimant'.[707]

375. This consideration may conflict with efficiency of the dispute resolution, achieved through economy of time and financial resources perceived as an advantage[708] and one of the requirements for aggregation of related disputes.[709] In *Noble Energy*, the tribunal observed in this respect:

> '[…] there is no question that it is more efficient to deal with all the claims in one proceeding rather than to resolve them separately. It also appears fair to resolve all the disputes in one arbitration. It will avoid contradictions or inconsistencies on identical or related issues and, there is no reason to believe that the parties' procedural rights would be adversely affected by a single procedure'.[710]

376. It can be questioned, though, that discrepancies between the applicable rules have no potential to affect procedural rights of the parties and must not be factored in the

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[705] *Sempra*, above n. 147, para. 52; *Camuzzi*, above n. 148, para. 39.

[706] *Noble Energy*, above n. 37, para. 206.

[707] *Guaracachi*, above n. 235, para 345.

[708] Lamm, above n. 1, 54, 68-70; Crivellaro, above n. 15, 373; Yannaca-Small, 'Consolidation of Claims: A Promising Avenue for Investment Arbitration?', above n. 1, 226, 233, 234; Schreuer, above n. 2, 383; G. Cuniberti, 'Parallel Litigation and Foreign Investment Dispute Settlement', 21 *ICSID Review – Foreign Investment Law Journal* (2006) 414.

[709] Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 86, 87.

[710] *Noble Energy*, above n. 37, para. 193.

interpretation of consent.[711] Cremades observed that this is one of the factors for determining whether '[…] consolidation is possible within the framework of the different applicable dispute resolution mechanisms'.[712] Kaufmann-Kohler noted to this effect, that if '[…] arbitration clauses are different or refer to different institutional rules […], it cannot be assumed that there is an advance agreement to consolidate [which] can be cured by later consent [and if] it is not, consolidation generally will be impossible'.[713] Born makes a similar point:

'[…] where the parties have entered into contracts containing differing dispute resolution provisions (including different arbitration provisions), then there will generally be little basis for concluding that they impliedly consented to consolidation or joinder/intervention'.[714]

377. On the other hand, divergencies in procedural rules will not necessarily jeopardise efficiency, either because parties agreed to the application of different procedural rules in one proceeding (*Suez*)[715] or because the aspects of proceedings that are regulated differently are not relevant in the respective case (*Guaracachi*).[716] The risk persists that such an agreement shall not be reached in every multiparty case, for instance, if one party would insist on the application of a more favourable provision in the 'competing' rules. Furthermore, multiparty scenarios bear the risk of procedural situations which are only regulated for bi-partite cases. For instance, in *Suez,* the parties disagreed about the terms of withdrawal of one of the claimants and its effect on the co-claimants' right to pursue their claims further.[717]

378. Another potential implication is that the parties can agree on *different arbitral seats* under the applicable sources of consent, which may also serve as an indication that the parties'

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[711] Kaufmann-Kohler, 'Multiple proceedings – New Challenges for the Settlement of Investment Disputes' above n. 1, 7, 8; Pryles, above n. 1, 447.

[712] Cremades, 'Parallel Proceedings in International Arbitration', above n. 1, 534.

[713] Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 89.

[714] Born, above n. 114, 2780.

[715] See para. 196 *supra*.

[716] See para. 188 *supra*.

[717] See para. 190 *supra*.

intent did not include joinder of claims under the respective agreements, as explained by Born:

'[…] it is very difficult to see how arbitrations in different arbitral seats could properly be consolidated, consistent with the parties' agreement. […] Unless the parties could be said to have agreed to consolidation, and for this agreement to override conflicting agreements as to the arbitral seat, there would be no legitimate basis for ordering consolidation'.[718]

379. Divergent procedural rules compound to the problem of procedural desynchronisation of separate proceedings, which is perceived as another challenge associated with the joint treatment of claims.[719]

380. As such, a complex case management is the most serious argument against aggregation of claims that '[…] are bound to last longer than a separate arbitration' and '[e]ven with effective case management, such proceedings are likely to be more time-consuming and cumbersome than each individual proceeding'.[720]

381. For this reason, a more diligent approach would be for the parties to agree on the rules regulating the typical multiparty issues from the outset of an arbitration. This principle is upheld in the proposal on voluntary consolidation and coordination in ICSID arbitration, stipulating that the parties '[…] shall jointly provide the Secretary-General with proposed terms for the conduct of the consolidated or coordinated proceeding(s) and consult with the Secretary-General to ensure that the proposed terms are capable of being implemented'.[721]

[718] Born, above n. 114, 2782.

[719] Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 85; S. Strong, 'Incentives for Large-Scale Arbitration: How Policymakers Can Influence Party Behaviour', in Hanotiau, above n. 2, 151.

[720] Kaufmann-Kohler, ibid., 83.

[721] 2021 Proposals for Amendment of the ICSID Rules, Rule 46 of the ICSID Arbitration Rules, above n. 31, 50.

SUMMARY

382. The first type of multiparty investment arbitration (multiparty arbitration *ab initio*) covers arbitrations where related disputes are adjudicated jointly by a single tribunal from the outset. This historically earliest type of multiparty proceedings introduced the basic approaches to establishing consent to the joint resolution of claims and can be summarised as follows.

383. The case law demonstrates that the decision on the joint resolution of claims was made by establishing whether the scope of consent covers multiparty arbitration and, hence, was viewed as a matter of jurisdiction.

384. In two scenarios a tribunal is exempt from the task of determining whether parties agreed to the joint resolution of claims:

1) If an ***explicit consent*** through parties' agreement to appoint identical tribunals for related arbitrations exists (*de facto* consolidation), which is an exception in practice.

2) If an ***implied consent*** of the respondent through non-objection to multiplicity of claimants exists.

385. When a respondent raises an objection to the resolution of multiple claims in one arbitration, a tribunal must deconstruct an arbitration agreement regarding the parties' intent on handling multiparty arbitration (implied consent) for two points in time, corresponding to the two types of consent:

1) ***General consent*** provided by a respondent in the investment treaty before an outbreak of a dispute.

2) ***Specific consent*** regarding specific investments and investors involved in a particular dispute.

386. This typology results from the temporal asymmetry of effectuating consent in investment arbitration.[722]

[722] See paras 82 *et seq. supra*.

387. Establishing general consent proved to be a relatively easy task, as it is a uniform understanding that ICSID Convention and BITs cover multiparty claims in the absence of multiparty provisions, unless they clearly exclude this option (*Klöckner*, *Götz*, *Noble Energy*, *Sempra/Camuzzi*, *Guaracachi*).[723]

388. Determining the scope of specific consent, on the other hand, is a more complex exercise that involves weighting additional factors surrounding an investment, whereby ***connectivity*** between the claims[724] and ***efficiency***[725] are the main deciding factors.

389. Connectivity can be inferred from participation of the claimants in the same investment project (***same investment***)[726] and/or through the ***same state measure*** that affected investors of different nationalities acting under different BITs.[727]

390. Determination of specific consent typically involves the question of whether investors that did not sign respective instruments of consent (*e.g.*, the investment agreement) can still invoke the arbitration clause contained therein.[728] In this case, the fact that all related claims concern the ***same investment*** will be the main criterion of connectivity. In particular, the degree of involvement in the negotiation and implementation process as well as affiliation with the same group of companies play a deciding role (*Noble Energy*, *Holiday Inns*, *Sempra/Camuzzi*).[729]

391. Although various techniques for the interpretation of an arbitration agreement regarding multiple claims can be imported from commercial arbitration and domestic law, this method is limited by the norms of treaty law. Thus, if the jurisdictional requirements under the BIT exclude some of the claimants involved in the same investment with other claimants from the treaty protection, the respective provisions of the BIT prevail.[730]

392. Where ***multiple BITs*** are invoked by investors of different nationalities affected by the same state measure, it should be acknowledged that each respective BIT provides for

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[723] See paras 35 *et seq.*, 123 *et seq.*, 342 *supra.*

[724] See paras 133, 137 *et seq.*, 229 et seq., 294, 295 *supra.*

[725] See paras 134, 186 *et seq*. *supra.*

[726] See paras 137 *et seq*. *supra*.

[727] See paras 133, 168 *et seq*. *supra*.

[728] See paras 90, 138 *et seq.*, 348 *et seq*. *supra.*

[729] See paras 142 *et seq*., 349 *et seq*. *supra*.

[730] See paras 158 *et seq*., 352 *et seq*. *supra.*

separate consent. In this case, ***compatibility of BITs*** (and consents) was the central consideration in deciding on the joinder of claims. Different arbitration rules and other procedural discrepancies in the instruments of consent do not necessarily prove incompatibility of BITs as long as the tribunal is prepared to treat each claim under the rules designated by the respective BIT (*Noble Energy*, *Guaracachi*, *Sempra/Camuzzi*).[731]

393. However, at the same time, the need to approach claims individually in accordance with the scope of consent under each BIT undermines efficiency as the ultimate objective and rationale for the joinder of claims. Efficiency in this case is contingent upon the parties' willingness to cooperate, which may prove to be problematic to maintain throughout the entire proceeding, even if they agreed to the joinder of claims from the outset (*Suez*, *Von Pezold*).[732]

394. Despite the pro-investor tendency to permit joint adjudication of related claims under multiple BITs, it should be emphasised that the same state measure is not a sufficient link to satisfy the requirement of connectivity provided that investors of different nationalities are completely unrelated. In this case, both ICSID and non-ICSID tribunals upheld the respondent's objection that the scope of consent under each of the invoked BITs precludes the resolution of claims under other BITs in a single arbitration (*Erhas*, *Accession Mezzanine*, unpublished PCA arbitration against the Czech Republic).[733]

[731] See paras 188 *et seq*., 365, 366, 374 *supra*.

[732] See paras 189 *et seq*., 375 *et seq. supra*.

[733] See paras 181 *et seq*., 368 *et seq. supra*.

3.3 Rules-based Mandatory Consolidation *Stricto Sensu* under NAFTA

395. The most remarkable advantage of mandatory consolidation from the perspective of efficiency is that it is a *procedural* matter under applicable rules, so that a consolidation tribunal has procedural discretion to order consolidation without agreement of the parties. It is simultaneously the most problematic issue from the perspective of consent and party autonomy. Therefore, it is necessary to look to this issue in more detail in order to establish whether and to what extent such limitation of the party autonomy is justified within the NAFTA system and can be applied as a point of reference in a non-NAFTA investment arbitration.

396. NAFTA consolidation is indeed 'an unusual and innovative provision'[734] in the context of other arbitration rules, since mandatory consolidation is only exceptionally foreseen under few national procedural laws and institutional arbitration rules.[735] However, predominantly, consolidation is conditioned upon the parties' agreement.[736]

397. For this reason, the principles developed in the context of the rules-based consolidation should not be extended to non-NAFTA arbitrations. Romero made a relevant point in this regard:

> '[…] majority of parallel proceedings do not benefit from a consolidation provision such as the one included in NAFTA. As such, to the extent that they are derived from this textual basis, many of the considerations of the two consolidation tribunals discussed above are not directly applicable in BIT arbitration'.[737]

398. Contrary to the NAFTA framework where the '[…] word "may" in the first sentence of Article 1126(2) makes it clear that whether to consolidate is a discretionary decision of

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[734] Alvarez, above n. 122, 413.

[735] Born, above n. 114, 2784, 2785; Cremades, 'Parallel Proceedings in International Arbitration', above n. 1, 533, 536; Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 91, 93, 94; Yannaca-Small, 'Parallel Proceedings', above n. 1, 1033; J. Mair, 'Consolidation of Proceedings in International Commercial Arbitration', in Knahr, *Investment and Commercial Arbitration – Similarities and Divergences*, above n. 4, 32, 33; Hanotiau, above n. 274, 180-188; Hobér, above n. 430, 254.

[736] Born, above n. 114, 2770-2776; Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 87, 88; Yannaca-Small, 'Parallel Proceedings', above n. 1, 1033; Mair, ibid., 32-35; Steingruber, *Consent in International Arbitration*, above n. 6, 174-183.

[737] Romero, above n. 1, 608.

the consolidation tribunal',[738] in the absence of such provision '[…] it is untenable to argue that the institution or the arbitral tribunal has the power to consolidate separate arbitrations'.[739] Only *de facto* consolidation upon agreement of the parties is feasible in this case.[740]

399. Along the same lines, Waibel observes that consent as the essential condition for consolidation, which parties may not be willing to give,[741] is the major impediment for consolidation to become a working method for coordination of parallel proceedings, if contrasted with the 'NAFTA's hard law solution':

'Thus far, the general requirement for party consent in order to consolidate arbitral proceedings is the Achilles heel of this potentially powerful tool to coordinate proceedings and pre-empt potentially inconsistent decisions. Consolidation is the most efficient way of reducing the risk of decisional fragmentation for closely related cases. Yet […] it may not be in the interest of parties or their law firms for proceedings to be consolidated. Consolidation, as a result, has lain dormant. […] NAFTA's hard law solution in respect of […] consolidation points the way forward if one wanted to move away from the informal and discretionary coordination mechanisms that investment tribunals occasionally apply. Coordination techniques frequently used in domestic litigation are not currently part of the daily toolbox of investment arbitrators. Only by hard-wiring coordination mechanisms into investment treaties can coordination become a regular, built-in feature of IIL'.[742]

400. Moreover, the NAFTA practice on consolidation remains unique due to the specific policy goal of the respective NAFTA provision[743] and, therefore, must not be compared

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[738] Puig, above n. 437, 262.

[739] Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 91; Mair, above n. 735, 41.

[740] Romero made the same point with regard to the crucial role that an express consolidation provision plays in the interpretation of consent: '[*Corn Products*] was also the first ICSID-administered case where a tribunal had to decide for itself whether or not to consolidate such proceedings. This was due to the existence of an express provision in the treaty under which the arbitrations against Mexico were brought. It necessarily follows that a different approach to consolidation may be warranted in the absence of such a provision. As will be further discussed below, this has, indeed, been the case, insofar as tribunals and parties have often favored the route of a *de facto* consolidation'. Romero, above n. 1, 605, 608.

[741] Zarra, above n. 1, 82.

[742] Waibel, above n. 1, 529, 530. Footnotes omitted.

[743] See paras 240, 426 *et seq*. *infra*.

with hypothetical consolidation of related claims under other treaties for interpretative purposes, even if they provide for NAFTA-like rules on consolidation:[744]

'[…] parallel proceedings are not necessarily brought under the same treaty regime. In particular, it is entirely possible that a factual matrix may trigger both direct and indirect claims for compensation and that these might, in turn, be submitted on the basis of different investment treaties. Consequently, even consolidation provisions such as those included in NAFTA and in recent US and Canadian BITs will be of little assistance in such cases'.[745]

401. However, different BITs would not preclude the joinder of related claims if the BITs were compatible and the scope of consent under each of them did not exclude the claims of the investors with different nationalities provided that the claimants were connected.[746] It was, yet, the most controversial scenario which must be seen as an exception, given that different BITs represent different consents.[747] Moreover, in the respective line of cases, the related claims were adjudicated under multiple BITs collectively *ab initio* and arose out of the same investment and state measure. In contrast, the NAFTA practice on consolidation (and, most likely, other potential consolidation under investment treaties) dealt with the same state measure as the only common element. Such degree of connectivity between parallel proceedings is insufficient to establish that consent under one BIT does not exclude claims under another BIT and *vice versa*.

402. Thus, lacking NAFTA-like consolidation provision in a treaty (or treaties) providing for the ICSID arbitration, the interpretation of the prerequisites for consolidation by the NAFTA consolidation tribunals cannot be 'imported' by a non-NAFTA tribunal in the reasoning on consolidation *stricto sensu*:

'[…] NAFTA debate on consolidation has only had a limited impact on similar debates occurring in BIT arbitrations, regardless of the fact that many of its key issues would be

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[744] On BITs with consolidation provisions see: Knahr, above n. 4, 5, 9; Lamm, above n. 1, 56; Schreuer, above n. 2, 384; Romero, above n. 1, 601, 602; Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 80; Crivellaro, above n. 15, 403-405; Shany, above n. 4, 145, 146; Dugan, above n. 437, 185; Cremades, 'Parallel Proceedings in International Arbitration', above n. 1, 533, 534; 2018 Proposals for Amendment of the ICSID Rules, above n. 27, 845-847.

[745] Romero, above n. 1, 608.

[746] See paras 364 *et seq. supra*.

[747] Schreuer, above n. 2, 383, 384; Obadia, above n. 7, 110.

entirely apposite in a non-NAFTA arbitration context. This, for example, includes the way to best define the meaning of the "common questions of law and fact" concept or the weight to be given to concerns relating to confidentiality of information. The limited impact of the NAFTA consolidation discussion will remain so, of necessity, at least pending the creation of an ICSID mechanism allowing for consolidation of parallel arbitrations filed with the Centre'.[748]

403. However, as *Corn Products* clearly demonstrated, even if the tribunal has a discretionary power to decide on consolidation under the applicable rules, the legitimacy of mandatory consolidation still can be questioned from the perspective of party autonomy.[749] Kinnear made a relevant observation while contrasting consolidation *stricto sensu* with *de facto* consolidation:

'[…] where consolidation can be ordered despite the objections of one or more parties, questions of fairness and consent may be raised. Some argue that consolidation contradicts the fundamental principle of party autonomy, and thus it should not be imposed on a reluctant party'.[750]

404. At the same time, policy considerations such as avoidance of inconsistent awards and protection of respondents from duplication of resources in parallel proceedings,[751] may justify the curtailment of individual rights of the parties, as advocated by the *Canfor* tribunal.[752] The prevalence of such considerations in a concrete dispute signals a tribunal's inclination towards policy considerations at the expense of party autonomy, which is acceptable only if the respective rules vest such power in the tribunal:

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[748] Romero, above n. 1, 608.

[749] Knahr, above n. 4, 9; Yannaca-Small, 'Parallel Proceedings', above n. 1, 1042; Shany, above n. 4, 135; Steingruber, *Consent in International Arbitration*, above n. 6, 171.

[750] Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 247; Kinnear, above n. 439, 1126-5. Shany questioned the downplaying of party autonomy in Canfor in the context of consolidation of the claims filed separately by direct competitors: '[…] the tribunal's entire line of reasoning appears hostile to the need to respect the autonomy of the parties in regard to their decision on whether or not to bring a claim that involves their direct competitors, and to insist or not to insist upon confidentiality protecting measures'. Shany, above n. 4, 147, 148.

[751] Knahr, above n. 4, 1-4; Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 82, 83; Romero, above n. 1, 601; Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 246; Yannaca-Small, 'Parallel Proceedings', above n. 1, 1039; Hobér, above n. 430, 254; Cremades, 'Parallel Proceedings in International Arbitration', above n. 1, 534.

[752] See paras 240 *et seq. supra*.

'According to this vision of international investment arbitration, it might be reasonable for international lawyers to create new legal norms, or to construe existing law in ways which may override the objections to consolidation by one or more of the parties to the proceedings'.[753]

405. Given a specific nature of NAFTA consolidation and the problematic issues that arise in practice, the comment was made that such an 'extremely uncertain' picture does not allow '[…] to see consolidation as a general and reliable remedy to the problem of parallel proceedings in investment arbitration'.[754]

406. In line with the explained concern that mandatory consolidation infringes upon the party autonomy, the proposed consolidation provision in the ICSID Rules allows consolidation only subject to the parties' consent.[755] As long as this important distinction persists, 'the NAFTA debate on consolidation' will, indeed, remain to have a 'limited impact' in 'BIT arbitrations'.[756]

3.3.1 Two Approaches to the Role of Party Autonomy and Consent in the NAFTA Consolidation Orders

407. In general, parties' consent and whether it should be factored in deciding on consolidation as a matter of party autonomy is seen as the most controversial condition for consolidation in investment arbitration.[757] Contrary to the radical view that '[…] the principle of party autonomy, as understood in commercial arbitration, has very little place in investment treaty arbitration as a public law system',[758] party autonomy is of paramount importance

[753] Shany, above n. 4, 136.

[754] Zarra, above n. 1, 84.

[755] 2021 Proposals for Amendment of the ICSID Arbitration Rules, Rule 46(1) of the ICSID Arbitration Rules: 'Parties to two or more pending arbitrations administered by the Centre may agree to consolidate or coordinate these arbitrations'. Above n. 31, 49.

[756] Romero, above n. 1, 608.

[757] Yannaca-Small'Parallel Proceedings', above n. 1, 1042; Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 87; Knahr, above n. 4, 8, 9; Alvarez, above n. 122, 414.

[758] G. van Harten, *Investment Treaty Arbitration and Public Law* (2007) 126 referred to in S. Wittich, 'The Limits of Party Autonomy in Investment Arbitration', in Knahr, *Investment and Commercial Arbitration – Similarities and Divergences*, above n. 4, 126.

in any type of arbitration in comparison to adjudication under national law.[759] A mixed nature of investment arbitration (in that the disputing parties are private parties and sovereign states) does not diminish the role of party autonomy.[760]

408. The issue of consent is not the only problematic aspect deriving from the limitation of party autonomy:

'In addition to overriding the principles of consent and privity by joining arbitrations between different parties, consolidation may also override the choice of the parties with respect to the applicable procedural rules and the composition of the tribunal'.[761]

409. With this in mind, even despite an explicit possibility of non-consensual consolidation, both NAFTA consolidation tribunals had to address the issue of consent, which is another indication that consent 'is by far the most controversial condition' for consolidation.[762] In the reasoning on consent, the NAFTA consolidation orders illustrated concrete aspects of the fundamental problem underlying every multiparty scenario discussed in this research – the need to balance party autonomy and efficiency of dispute resolution. In other words, the NAFTA consolidation tribunals had to reconcile the opposition of 'systemic interests with individual case interests' which inheres in the consolidation mechanism.[763] The very wording of Article 1126 reflects this dichotomy, in that a consolidation tribunal may issue a consolidation order upon its own discretion but 'after hearing the disputing parties'.[764] Given the focus of this research, two different approaches to the role of party autonomy adopted by the NAFTA consolidation tribunals warrant a more detailed analysis.

410. The *Canfor* tribunal was satisfied that the pre-dispute consent to the rules permitting mandatory consolidation was sufficient for the consolidation procedure to comply with consensual nature of arbitration. With regard to the claimants' objection to consolidation related to confidentiality, it '[…] found that proper measures to safeguard confidentiality

[759] Wittich, ibid., 50, 52.

[760] Ibid., 53.

[761] Alvarez, above n. 122, 414.

[762] Shany, above n. 4, 138.

[763] Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 246.

[764] Article 1126(2) NAFTA Rules; D. Price, 'An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement', 27 *The International Lawyer* (1993) 733.

could be put into place without rendering the process inefficient, thus giving prevalence to the State's interest to consolidation'.[765] In particular, the decision indicated that '[…] the main purpose of NAFTA Article 1126 was to prevent procedural harassment, *i.e.*, a public policy goal which limits the ability of claimants to independently shape the proceedings'.[766]

411. On the contrary, *Corn Products* opted for a more rigid understanding of party autonomy, in that confidentiality measures were seen as 'insuperable difficulties' for the claimants to 'defend themselves jointly in one single case' so that 'the claimants' right to due process prevails over the State's right to one sole decision on the merits'.[767]

412. The opposition of *Corn Products* and *Canfor* can be routinely explained by differences in factual circumstances of the cases and the conclusion can be made that interpretation of the prerequisites for consolidation is case-specific:

'In proceedings governed by NAFTA, where provision is made for the potential consolidation of arbitrations involving common issues of law and fact, the debate is case-centric, in that it requires an analysis of the circumstances of each case in order to determine whether or not such a procedural device is opportune'.[768]

413. Alternatively, the split of the NAFTA tribunals can be viewed as an expression of preferences towards either of the conflicting values underlying consolidation and not just as the logical implications of the factual differences, as observed by Shany:

'The dilemma […] is thus predominantly ideological: Which of the conflicting value – respect for private autonomy or the need to promote public order – should prevail. […] I propose therefore to appreciate the recent conflicting NAFTA consolidation decisions […] not merely as technical disputes over the correct interpretation and

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[765] Crivellaro, above n. 15, 419, 420; Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 259; Yannaca-Small, 'Parallel Proceedings', above n. 1, 1036, 1037; Knahr, above n. 4, 8, 9, 14, 15; Dugan, above n. 437, 194; Low, above n. 4, 156; Lamm, above n. 1, 57, 58, 73, 74; Puig, above n. 437, 263.

[766] Shany, above n. 4, 137, 138. Footnote omitted.

[767] Crivellaro, above n. 15, 419; Romero describes the opposition of the tribunals on the issue of the weight of party autonomy as follows: '[…] the Canfor consolidation tribunal went on to discard party autonomy as playing any part in reaching a decision on consolidation. As seen above, this, however, was an issue on which the Corn Products International Consolidation Tribunal placed significant emphasis'; Romero, above n. 1, 606; Yannaca-Small, 'Parallel Proceedings', above n. 1, 1036; Knahr, above n. 4, 14; Dugan, above n. 437, 192, 193; Low, above n. 4, 153; Lamm, above n. 1, 72, 73; Y. Andreeva, 'First NAFTA (non-)Consolidation Order: Corn Products et al. v. Mexico', 2 *Transnational Dispute Management* (2005) 3, 4.

[768] Romero, above n. 1, 609.

application of a particular NAFTA provision […] but rather as indicative of the ideological divide or choice between values underlying consolidation procedures in international investment disputes'.[769]

414. This values-based approach affects the decision on consolidation even if the plain wording of the rules seemingly sets forth the hierarchy of values by giving less weight to party autonomy. For example, party autonomy as the prevailing factor in *Corn Products*, on the surface, conflicts with the wording of Article 1126 but can be explained through the prism of the values-dichotomy:

'*Corn Products* decision indicates that the hierarchical ordering of competing values influences not only the original configuration of the rule, *i.e.*, whether to introduce an Article-1126-type consolidation rule, but also the manner in which the rule, and the conditions it introduces, would be interpreted and applied by consolidation tribunals'.[770]

415. The ideological standing of a tribunal on the issue of party autonomy in the context of mandatory rules-based consolidation affects not only the determination of consent but also the reasoning on commonality, fairness, and efficiency as the formal conditions for consolidation. As discussed in the previous chapter,[771] the latter three factors are also relevant in cases where only general pre-dispute (*ex ante*) consent to consolidation exists[772] and the joinder of claims requires additional justification in light of the absence of the parties' explicit *ex post* consent.[773]

416. Moreover, the prevalence of party autonomy or efficiency correlated with the pro-state (*Canfor*) or pro-investor (*Corn Products*) inclination and explains the opposite approaches to the allocation of the burden of proof: The point was made that the *Canfor*

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[769] Shany, above n. 4, 136, 137.

[770] Ibid., 138.

[771] See paras 87-90, 133 *et seq*. *supra*.

[772] Obadia, above n. 7, 109, 110; Di Brozolo, above n. 4, 129, 130.

[773] Shany, above n. 4, 143: 'Disagreements on whether parallel claims are sufficiently proximate in nature and whether their consolidation would be effective and fair are expected to arise primarily in cases where consolidation is based on ex ante consent (on the basis of NAFTA Article 1126, for example). Such disagreements are much less likely to occur, however, when consolidation was accepted by the parties in an *ex post* manner, *i.e.*, after the parallel sets of arbitration proceedings had already been initiated. In such circumstances, the explicit consent of the parties may in effect facilitate the consolidation of proceedings which objectively fail to meet the last two conditions, *i.e.*, *ex post* consent may expand upon (or limit) the circumstances in which consolidation may take place. Furthermore, even in legal regimes where ex ante consent had already been established, the additional existence of ex post consent by most, if not all, parties might be factored in the deliberating tribunal's discretion on whether or not to it is efficient and fair to order consolidation'.

tribunal '[i]nexplicably […] relieved the moving party from the burden of establishing that the balance of fairness and efficiency considerations favored consolidation' that was seemingly unorthodox compared to '[…] standard practice in placing the burden on the moving party' in *Corn Products*.[774] This approach, however, seems to be in line with the prevalence of public interest in *Canfor*.

417. A closer look at the NAFTA consolidation orders demonstrates that it is indeed not so much circumstances of each case, as the choice between the two values that predetermined the interpretation and application of the conditions for consolidation as elaborated further.

3.3.1.1 *Canfor* Approach: Agreement to the Rules Providing for Mandatory Consolidation as an Expression of Consent

418. *Canfor* advocated the view according to which party autonomy within the NAFTA framework is subordinate to the interests of efficiency and, hence, the claimants' confidentiality-related concerns carry less weight than the respondents' interests of '[…] alleviating the resources […] in defending against multiple claims'.[775] The tribunal emphasised that party autonomy as it is understood in private arbitration can be compromised in the NAFTA arbitration as a part of international public law: In the latter, states '[…] are entitled as sovereigns to set certain conditions' to 'ensure procedural economy in the case of multiple claims arising out of the same event or related to the same measure'.[776]

419. The tribunal also relied on the theory of implied consent[777] according to which as long as parties agreed to the '[…] provision for consolidation embedded in the NAFTA Rules, there is no need for further specific party consent to consolidation'.[778] Indeed, where procedural rules to which parties agreed 'by reference' allow *consolidation*, '[…] consent might be implied by the underlying willingness of all parties […] to have all disputes

[774] Low, above n. 4, 161, 162.

[775] *Canfor*, above n. 455, para 76; Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 258, 259; Romero, above n. 1, 606, 607; Knahr, above n. 4, 14, 15; Yannaca-Small, 'Parallel Proceedings', above n. 1, 1044; Shany, above n. 4, 137, 138.

[776] *Canfor*, above n. 455, 78.

[777] See paras 90-92 *supra*.

[778] Lamm, above n. 1, 57.

arising be dealt with by one arbitration procedure'.[779] Lamm refers to this type of consent as 'pre-dispute consent for the coordination of multi-party arbitration'.[780]

420. The tribunal observed that opting for the NAFTA arbitration implies consent to '[…] the potential consequence that its claims will be adjudicated by a tribunal that is composed of persons different from those who formed part of the original […] Tribunal'.[781] Crivellaro made the same point by observing that '[…] NAFTA consolidation ultimately takes its source from the parties' consent'.[782] Thus, the *Canfor* tribunal '[…] held that consent to consolidation was given by consenting to arbitration under Chapter 11 of NAFTA, and so no issue of party autonomy was raised'.[783]

421. In commenting on the reasoning of the *Canfor* tribunal along these lines, Knahr described the consent-related implications of choosing NAFTA arbitration:

'Investors have to be aware of the fact that when consenting to arbitration under NAFTA Chapter 11 they get a 'package deal', which, if the requirements of this provision are met, also includes the possibility that consolidation is ordered and a tribunal for which they cannot appoint an arbitrator will decide the dispute'.[784]

422. The same commentator observed with regard to the effect of a consolidation provision the treaty on the deconstruction of the respective scope of an arbitration agreement:

'[C]onsent to arbitration under a BIT that expressly provides for the option of consolidation does also cover the treaty provisions in their entirety – thus, also potentially consolidation of two or more disputes into one arbitral proceeding conducted by a tribunal to which the parties have not consented separately and did not have the possibility to appoint the arbitrators'.[785]

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[779] Mair, above n. 735, 36; See also Knahr, above n. 4, 8, 9.

[780] Lamm, above n. 1, 56, 59, 60; Romero comments on implied consent in *Canfor* as follows: '[…] the investor's consent to arbitration under NAFTA Article 1121 also necessarily entailed consent to the application of NAFTA Article 1126 and, implicitly, consent to the consolidation of parallel proceedings potentially arising on that basis. This finding obviated the need for the tribunal to take into account any contemporaneous "preferences against consolidation.", Romero, above n. 1, 607.

[781] Lamm, above n. 1, 79.

[782] Crivellaro, above n. 15, 403.

[783] Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 247.

[784] Knahr, above n. 4, 8, 9.

[785] Ibid., 9.

423. On the surface, this approach significantly simplifies the otherwise complicated task of establishing consent in compliance with the principle of party autonomy, as the previously discussed line of multiparty cases demonstrates. In the context of the consolidation provision under the Rules of Arbitration of the International Chamber of Commerce ('ICC Rules'), Pryles and Waincymer observed as follows to this effect:

'In our view, if the parties have expressly selected the ICC Rules and if one concentrates on consent at the outset, one cannot necessarily view a decision by the ICC Court to consolidate as going against party autonomy'.[786]

424. Similarly, in the context of arbitration where national arbitration law is applicable, views were expressed that '[…] the parties' agreement to arbitrate in a state whose law permits mandatory consolidation, even absent the parties' consent, constitutes acceptance of such consolidation'.[787] This is relevant in the context of non-ICSID investment arbitration because '[i]n contract-based arbitrations, if the arbitration clause is ambiguous or silent as to multiparty proceedings, tribunals will look to the governing national law or national rules'.[788]

425. However, given the crucial role of consent in arbitration, in evaluating the possibility of establishing consent to consolidation through the choice of the arbitration rules permitting consolidation, the emphasis should be made on whether *mandatory* consolidation is an option. Otherwise, even if consolidation is foreseen under these rules, the lack of the parties' agreement excludes consolidation, unless the rules allow non-consensual consolidation.

a. Interests of the state prevail over interests of the investors for policy considerations

426. Along with the provision permitting mandatory consolidation, another unique factor that affects the determination of consent under NAFTA is that, originally, the consolidation provision was implemented by the NAFTA member states '[…] to alleviate the State

[786] Pryles, above n. 1, 463.

[787] Born, above n. 114, 2768; See also Hanotiau, above n. 274, 180; Zarra, above n. 1, 80; Steingruber, *Consent in International Arbitration*, above n. 6, 171; Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*, above n. 1, 112-114.

[788] Lamm, above n. 1, 55. Footnote omitted.

Parties from the burden of having to defend themselves in multiple arbitral proceedings arising out of the same action or regulatory measure'.[789] The first draft of the NAFTA consolidation provision did '[…] not appear to have accorded to investors a similar right to request consolidation'.[790]

427. Indeed, one of the frequently mentioned arguments for consolidation is that it is an efficient mechanism which '[…] relieves a State from the burden of having to defend against multiple claims (arising from a same measure) in scattered arbitrations'.[791] Thus, in *Corn Products*, for example, '[…] as the sole respondent in two related proceedings, Mexico would otherwise be put in the unfair position of having to defend itself twice'.[792]

428. *Canfor* adopted a pro-state approach emphasising the public nature of the NAFTA arbitration:

'Chapter 11 of the NAFTA is the result of an international treaty negotiated by three States. They provided for dispute settlement between them and investors by means of arbitration governed by international law. In doing so, the State Parties to the treaty are entitled as sovereigns to set certain conditions'.[793]

429. Furthermore, in treaty arbitration 'without privity' (contrary to commercial arbitration), a state has less control over the risk of being confronted by multiple claimants, which should be factored into evaluating the weight of the risk of conflicting awards as observed by Crivellaro:

'A private international trader runs several risks if he structures his contracts in a manner that opens the door to multiple disputes. This, at least in part, depends on him. A State, however, is not in the same position. When a situation arises where it is alleged that its actions or omissions have affected more than one investor simultaneously, a State has the right to have international rules applied to it in a consistent way'.[794]

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[789] Knahr, above n. 4, 6.

[790] Kinnear, above n. 439, 1126-3; Knahr, ibid., 6.

[791] Crivellaro, above n. 15, 402; Knahr, ibid., 4; Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 83; Schreuer, above n. 2, 383.

[792] Romero, above n. 1, 604.

[793] *Canfor*, above n. 455, para. 78.

[794] Crivellaro, above n. 15, 418.

430. Another rationale for 'adjusting' the consolidation provision in favour of a respondent state, is that it can be compelled to share the increased costs of multiple claims in relation to the same state measure, even if the initiation of parallel arbitrations constitutes an abuse of process by the investors:

'While a degree of "abuse of process", however unwelcome, can be seen as inevitable in international commercial arbitration, where the costs and the effects of the abuse are borne by the parties responsible for such complex proceedings, the same "abuse" cannot be accepted when a State is involved, as the State, respondent in all proceedings, is not responsible for the multiplication of these proceedings'.[795]

431. Although consolidation of parallel arbitrations emerged in the realm of commercial arbitration as a strictly consensual tool,[796] a different approach to party autonomy in the context of consolidation in treaty arbitration can be justified. The *Canfor* consolidation tribunal cited a respective observation made by Alvarez:

'Although mandatory consolidation is not widely accepted in private commercial arbitration, it makes good sense in the case of Chapter 11 of NAFTA, which is not the usual private, consensual context of international commercial arbitration. Rather, Chapter 11 creates a broad range of claims which may be brought by an equally broad range of claimants who have mandatory access to a binding arbitration process without the requirement of an arbitration agreement in the conventional sense nor even the need for a contract between the disputing parties. In view of this, some compromise of the principles of private arbitration may be justified'.[797]

432. Indeed, investor-state arbitration is unique due to a public interest that is always at stake in the dispute. In particular, investment tribunals establish the legal framework for the states' exercise of their regulatory powers in terms of compliance with the standards of protection under investment treaties.[798] Consequently, treaty arbitration 'limits […] the host state's powers to act in the public interest' within its sovereign national jurisdiction'.[799] Thus, to the extent that the public law facet of investment arbitration has

[795] Ibid.

[796] Zarra, above n. 1, 79.

[797] Alvarez, above n. 122, 414; Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 257.

[798] Wittich, above n. 758, 65, 66.

[799] Schill, above n. 6, 403.

'an effect not only on the parties to the proceedings',[800] it is distinguishable from other types of international arbitration (be that inter-state or commercial arbitration) where individual interests of the parties are in the core of a dispute.[801]

b. Party autonomy must still be factored in deciding on consolidation even if efficiency is viewed as an overarching principle

433. It should be stressed that even the *Canfor* tribunal did consider consent in its decision-making, thereby, addressing party autonomy as the main concern associated with consolidation. Despite a theoretical presumption that parties are aware about the possibility of consolidation, in practice, parties rarely consciously contemplate that it can materialize in the future:[802]

'While investors are required to agree to the possibility of consolidation as part of their consent to arbitration under Chapter 11B, some of these consequences of consolidation may come as a surprise'.[803]

434. The pre-dispute (implied) consent was sufficient for the *Canfor* tribunal and was characterised not as a lower standard for consent but as a different approach towards the relevant date for establishing consent:

'[T]his may appear to be in contradiction with the earlier finding of the *Corn Products* […] Tribunal on the point of party consent to consolidation. However, it is not. Rather than saying that consent is entirely irrelevant to consolidation, the *Canfor* consolidation tribunal merely looks to a different date of consent: instead of the present (*i.e.*, the date of the request for consolidation), it looks to the past, *i.e.* to the date when the investor accepted the State's offer by filing the notice of arbitration under NAFTA'.[804]

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[800] Ibid., 405.

[801] Wittich, above n. 758, 64.

[802] Mair, above n. 735, 36.

[803] Alvarez, above n. 122, 414, 415.

[804] Romero, above n. 1, 607. Footnotes omitted.

435. However, as discussed earlier, given the temporal asymmetry of consent in treaty-based investment arbitration, both dates are relevant:[805] If an objection against the joint resolution of claims is raised after outbreak of a dispute and the parties did not agree on consolidation in the respective contracts directly or at least by opting for institutional rules permitting consolidation, then a tribunal must address consent on both dates. Therefore, it is not advisable to interpret the *Canfor* order as an indication that the type of consent sufficient for positive decision on consolidation is a matter of choice of the relevant point in time. Rather, it is an example of a 'loose' standard of party autonomy based on the choice of procedural economy as an overarching value of the NAFTA consolidation provision.

436. Furthermore, a certain standard of consent can be read into the text of Article 1126, since a consolidation tribunal must *hear the disputing parties* before issuance of a ruling on consolidation. In addition, the lack of *ex officio* power of a tribunal to order consolidation even in the absence of a party's request can be seen as an expression of privity inherent in arbitration:

'This system is reminiscent of the old arbitration privity since consolidation cannot be ordered without one of the parties explicitly requesting it. In the absence of such a request, the two or more arbitration cases proceed separately and in parallel'.[806]

437. Observing that arbitral institutions and tribunals are reluctant to opt for consolidation, even where rules allow to do so under certain circumstances, Shany made the same point:

'[E]ven under NAFTA Article 1126(3), the initiation of consolidation motions is party driven; it depends upon a request made by one of the parties and cannot be ordered by the consolidation tribunal or another NAFTA institution *proprio motu*'.[807]

438. At the same time, in defining the limits of party autonomy in the NAFTA consolidation, it should be kept in mind that, by choosing certain institutional rules, parties themselves

[805] See on *ex ante* and *post ante* consent: Shany, above n. 4, 142, 143; Steingruber, 'Abaclat and Others v Argentine Republic: Consent in Large-scale Arbitration Proceedings', above n. 6, 238, 239; Steingruber, *Consent in International Arbitration*, above n. 6, 212, 213; Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*, above n. 1, 111, 115-119; Mair, above n. 735, 36.

[806] Crivellaro, above n. 15, 403.

[807] Shany, above n. 4, 141.

set the limits to party autonomy (or freedom of contract), including non-consensual consolidation.[808]

439. Therefore, the limitations to party autonomy as they were introduced in *Canfor* should not be understood as the manifestation of an absolute prevalence of public interest and disregard of consensual nature of arbitration. Rather – both from practical and academic perspective – it should be seen as an effort to strike a balance between the two fundamental values underlying investment arbitration which is the most appropriate, albeit nuanced and complex, guiding principle for consolidation in investment arbitration.

3.3.1.2 *Corn Products* Approach: The Claimants' Objection to Consolidation Must Be Factored in the Ruling on Consolidation if It Serves Efficiency

440. Party autonomy was considered by the *Corn Products* tribunal because, although 'Article 1126 does not address preferences against consolidation', '[…] party autonomy has appeared to play a role of some importance in the agreed establishment of the Consolidation Tribunal and its agreed rules of procedure' and '[…] should be a relevant consideration to be taken into account in the interpretation and application of Article 1126'.[809] Based on this observation, the tribunal concurred with the claimants' argument that the measures required for preserving confidentiality would '[…] result in complex and slow proceedings […]'[810] which is not '[…] in the interests of fair and efficient resolution of the claims' as the prerequisite for consolidation.[811]

441. Such a one-sided interpretation of party autonomy can be criticized for disregarding the core element of this concept, namely, that it confers the right to agree on the conduct of the proceedings to *all* parties. Under this traditional understanding, to rule in favour of the preferences of only one side would amount to denial of justice and procedural

[808] '[…] while party autonomy can be freely exercised in choosing an arbitral institution and its rules, that choice may have a price in the form of limitations on that autonomy when it comes to the conduct of the proceedings under the chosen rules'. K. Berger, 'Institutional Arbitration: Harmony, Disharmony and the 'Party Autonomy Paradox', 34 *Arbitration International* (2018) 477.

[809] *Corn Products*, above n. 452, para. 11.

[810] Ibid., para. 8.

[811] Ibid., para. 9; See also Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 247.

inequality,[812] which is at odds with fairness and efficiency as the prerequisites for consolidation.[813]

442. Meanwhile, it is a commonly accepted practice in arbitration for parties to have differences in opinion regarding certain aspects of procedure, as long as they are given an equal opportunity to present their positions on the matter.[814] Yet, referring to the concept of party autonomy as the ground to favour one party's position is still open for criticism as a 'doubtful route'.[815]

443. Furthermore, reading additional weight to the role of party autonomy, in general, can be questioned as well. Arguably, Article 1126 explicitly set the limits to the weight that should be given to a party's position by instructing a tribunal that it should decide on consolidation 'after hearing the disputing parties' – the standard that both NAFTA tribunals have positively met. The requirement of the parties' consent is beyond such limits that excludes a tribunal's discretion to order consolidation stipulated in NAFTA. To this effect, Romero also criticized the *Corn Products* decision to uphold the claimants' objection for disregarding the lack of the requirement of consent in Article 1126:

'Albeit apparently subordinated to the overarching requirement of fairness, this point underscored by the Tribunal is perhaps all the more surprising for two main reasons: on the one hand, because NAFTA Article 1126 does not make any mention of party autonomy in this respect, nor does it afford a particular role to party consent to consolidation. Conversely, party consent to consolidation becomes truly indispensable in the absence of an express consolidation provision'.[816]

444. On the other hand, the approach to party autonomy in *Corn Products* is an indication that the lack of consent to consolidation must still be factored in deciding on the joinder of

[812] Andreeva, above n. 767, 3, 4.

[813] Ibid.

[814] Ibid., 4.

[815] Ibid.

[816] Romero, above n. 1, 604, 605.

claims, albeit not as a prevailing condition, even if non-consensual consolidation is permitted under the rules.[817]

445. Along these lines, in commenting on the deciding role of confidentiality within the reasoning on party autonomy in *Corn Products* through comparison with the opposite approach in *Canfor*, Shany 'remain[ed] unconvinced that the wishes of the parties or, particularly, due process interests are irrelevant factors'.[818]

446. Thus, *Corn Products* demonstrates that consenting to the rules permitting consolidation in the absence of the parties' consent does not exclude consideration of the aspects related to party autonomy from the decision-making process. Even in the presence of a consolidation provision in the rules, it is still true that '[…] compelling parties to a dispute to participate in consolidated proceedings would clash with notions of party autonomy and weaken such parties' control over the procedure'.[819]

447. It should be discussed further how the tribunals applied the requirements for consolidation under NAFTA depending on their standing in relation to the hierarchical interrelation between party autonomy and procedural efficiency.

3.3.2 Common Issues of Fact and Law as the Prerequisites for Mandatory Consolidation: Criteria and Different Degrees of Commonality Depending on the Preference of Party Autonomy or Efficiency

448. In both NAFTA cases, tribunals dealt with the condition of commonality of facts and law in more detail compared to other types of multiparty cases.[820] Yet, in *Corn Products*, the tribunal practically skipped the task of establishing the criteria of commonality.[821]

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[817] Cuniberti made a relevant point in commenting NAFTA consolidation (and *Corn Products*, in particular) as one of the instruments of coordination of parallel proceedings: 'When parallel proceedings are brought before arbitral tribunals, it is at least theoretically possible to envisage to consolidate them. In practice, however, the conditions for such consolidation, in particular the agreement of all the parties involved, are rarely met. […] Even in the NAFTA context, where article 1126 enables arbitral tribunals to consolidate proceedings seemingly without the need of seeking the agreement of the parties, it was held that party autonomy should be taken into consideration and that the opposition to the consolidation by most concerned parties was relevant'. Above n. 708, 404, 406, footnote 77.

[818] Shany, above n. 4, 147.

[819] Ibid., 135.

[820] Ibid., 144-146; Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 257, 258; Kinnear, above n. 439, 1126-12; Knahr, above n. 4, 9, 10; Low, above n. 4, 156, 158; Romero, above n. 1, 607.

[821] Romero, above n. 1, 605; Kinnear, above n. 439, 1126-12.

Instead, it simply stated vaguely that there are 'certain questions of law or fact in common' but significant differences between the investors did not allow to establish the necessary threshold of commonality.[822]

449. Given that commonality is a fundamental preliminary step of the test for consolidation,[823] such scarcity can be criticized:

'[…] the Tribunal did formally accomplish this preliminary verification, insofar as it noted that such common points were indeed apparent. The absence of a more detailed analysis remains, however, notable, and it is submitted that it should be seen as an inescapable component in any discussion pertaining to consolidation. This is particularly important since such common questions of fact and law are at the very origin of the phenomenon of parallel proceedings and, consequently, are the main reason consolidation is ever raised in the first place'.[824]

450. In focusing on the differences between the claims, the *Corn Products* tribunal did not explain which factors should be taken into account in deciding on the commonality test and why exactly it was not met.[825] Respectively, the critic was expressed that the tribunal '[…] overlook[ed] a fundamental preliminary step: the assessment of whether the separate claims before it have questions of law and fact in common, which might justify their joint resolution'. The tribunal undertook a preliminary verification, but consolidation warrants a more detailed analysis.[826]

451. At the same time, the burden of proof placed upon the respondent with regard to legal commonality was arguably set too high compared to the test foreseen under Article 1126 which does not set a "high bar" or "high threshold" for consolidation orders. Thus, a party

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[822] *Corn Products*, above n. 452, paras 6, 13-15.

[823] Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 85, 86; Romero, above n. 1, 605.

[824] Romero, ibid., 605.

[825] See *Canfor*, above n. 455, para. 222, the C*anfor* tribunal pointing to this omission in the *Corn Product* Tribunal's reasoning: '[…] the Order on Consolidation in Corn Products is silent about what Article 1126(2) requires for satisfying the term "a question of law or fact in common." The Tribunal there wrote, without any further inquiry expressed in the Order, in ¶ 6: "The Consolidation Tribunal accepts that the claims submitted to arbitration do have certain questions of law or fact in common for purposes of Article 1126(2)," and at ¶ 15: "The Tribunal is persuaded that notwithstanding certain common questions of law and fact, the numerous distinct issues of state responsibility and quantum further confirm the need of separate proceedings." Footnote omitted.

[826] Romero, above n. 1, 605.

seeking consolidation does not '[…] carry a particular evidentiary burden other than to show that the elements listed in Article 1126(2) have been met'.[827]

452. On the contrary, the *Canfor* tribunal opposed the formalistic approach to commonality in *Corn Products* stating that the same treaty provisions that were allegedly in breach and common facts *undisputed* by the parties are irrelevant for the test of commonality.[828] Rather, related proceedings must share the *disputed* issues of facts and law that require 'a finding to dispose of a claim'.[829] Hence, the test refers to the *controversial* issues that the consolidation tribunal will have to decide upon in relation to *each* of the consolidated claims.[830] Commonality must exist amongst the claimants whereas – contrary to the approach adopted in *Corn Products* – it is not necessary that the respondent will raise the same legal defences in *all* the disputes sought to be consolidated.[831]

453. The different approaches to addressing the commonality test shall be addressed further in more detail.

3.3.2.1 The Same State Measure as a Sufficient Criterion of Commonality

454. Contrary to the previously discussed type of multiparty disputes where claimants had to be related to qualify for the joint treatment of their claims (at least, if an objection was raised), in both NAFTA cases, tribunals omitted this factor in evaluating the commonality test. In putting the NAFTA cases in the context of the role of connectivity between the claimants in deciding on consolidation, Shany observed:

'Although it is found as a formal requirement only in a few consolidation providing instruments, there seems to exist a hidden assumption that consolidated proceedings ought to be directed against the same defendants or sufficiently related defendants. In the same vein, one expects to find a greater inclination on the part of tribunals reviewing consolidation motions in identifying commonality of claims submitted by the same or sufficiently related claimants. This is because their litigation interests and litigation

[827] Kinnear, above n. 439, 1126-10.

[828] Knahr, above n. 4, 9.

[829] *Canfor*, above n. 455, para. 109.

[830] Knahr, above n. 4, 9.

[831] *Canfor*, above n. 455, para. 173.

strategies are likely to coalesce around common factual and legal issues. […] [I]ndeed, that identity or similarity of parties is an important factor in assessing the commonality of the issues at hand and the propriety of consolidation'.[832]

455. At the same time, a link between the claimants 'should not be viewed as a *sine qua non* for consolidation'.[833] Rather, in NAFTA cases, the only common element between the claims was the same state measure, which is in line with the initial intention of the NAFTA member states 'to avoid procedural harassment'[834] by addressing 'the possibility of multiple claims arising from a single measure taken by a State Party'.[835] Crivellaro noticed that the 'same state measure' is a more appropriate standard for the commonality test compared to the 'same dispute':

'This is a positive development in respect of traditional arbitration law as the concept of State "measure" is a much more precise notion to determine and identify claims than the concept of "dispute" used in traditional legal terms. Indeed, there might be, within a same "dispute", several claims involving different parties, possibly also based on different legal grounds.[836] […] This concept constitutes a much more precise criterion for consolidation than the "same dispute" concept under the traditional *lis pendens / res judicata* theories (same parties, same cause of action, same relief sought)'.[837]

456. Crivellaro also suggested that the '[…] "same State measure" criterion is '[…] the fundamental element to be taken into consideration in order to determine whether or not parallel arbitrations should be consolidated' in contrast to commercial arbitration where there is no such alternative to the test of 'same dispute'.[838]

457. Similarly, Shany advocates this departure from the strict 'triple identity test' in the NAFTA consolidation practice also for the policy considerations of efficiency:

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[832] Shany, above n. 4, 146.

[833] Ibid.

[834] Kinnear, above n. 439, 1126-4, citing a Canadian negotiator of NAFTA Chapter 11 in J. Fried, 'Two Paradigms for the Rule of International Trade Law', 20 *Canada-United States Law Journal* (1994) 39,49.

[835] Alvarez, above n. 122, 413; Kinnear, above n. 439, 1126-4, 1126-5; Knahr, above n. 4, 6.

[836] Crivellaro, above n. 15, 404.

[837] Ibid., 408.

[838] Ibid., 414

'Cases which manifest a high degree of similarity that subjects them to a more rigid international regulatory framework should be excluded from the purview of consolidation rules. […] many of the policy considerations favoring consolidation (for example, the need to prevent conflicting judgments and to protect some of the parties from the inconveniences of multiple litigation), […] support the development of an expansive approach vis-à-vis the method of application of the same parties/issues tests'.[839]

458. Thus, the most significant distinction from the early line of multiparty investment disputes with regard to the commonality test is that NAFTA permits consolidation '[…] where the parties are not (formally) the same'[840] and there is not any type of link between them and their investments. However, it should be reminded that even if the rigid identity test for consolidation adopted in *CME/Lauder* cedes to a 'looser' commonality test, a relatively high degree of connection between the claimants and their claims is still required in non-NAFTA cases. Such a 'loose' standard should not be extended to multiparty arbitrations where respondents object to the joint treatment of claims and mandatory consolidation is not permitted under the rules. In this case, the link between the claimants would most likely be a necessary pre-condition to authorise the collective pursuit of multiple claims.[841]

459. 'Raising the bar' in the test of connectivity outside the NAFTA consolidation is similar to the principle advocated in literature with regard to related claims 'based on different legal grounds' representing different consents and, for this reason, requiring a higher degree of connectivity (such as, involvement in the same investment project and/or group of companies):[842]

'The higher the degree of proximity between the parallel claims is, the weightier are the policy considerations favoring consolidation. Moreover, the effectiveness and fairness of

[839] Shany, above n. 4, 140.

[840] Waibel, above n. 1, 528.

[841] See paras 181-185 *supra*; See also Obadia, above n. 7, 108, 110.

[842] On different legal basis of claims as an impediment to consolidation see: Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 88, 89, 92; Mair, above n. 735, 36.

conducting a consolidated procedure may facilitate a determination that the parallel proceedings are related to one another'.[843]

460. Different treaties invoked in parallel proceedings can be problematic not only from the perspective of different consents but also because they may provide for a divergent procedural matrix, which is not the case if all claims are pursued under NAFTA. Shany points to this aspect of the commonality test in the context of mandatory consolidation:

'[I]f the claims arise under different substantive instruments (for example under different BITs), one has to consider the effects of this normative divergence on the ability to identify commonalities between the parallel legal claims. In addition, the question which of the competing mechanisms should address the consolidation motion introduces an additional level of procedural difficulty, which, realistically speaking, can only be probably accommodated through agreement by all of the parties to the parallel proceedings'.[844]

461. Not only the principles of NAFTA consolidation with regard to commonality are inapt for non-NAFTA cases but also, conversely, a test of commonality in the latter is not applicable for establishing connectivity under NAFTA. In particular, the point that consolidation requires simultaneously the same investment *and* the same state measure[845] is not relevant in the NAFTA context. For example, Crivellaro's comment to this effect must be read through the prism of this nuanced interpretation of the connectivity requirement that caters for the differences between the types of multiparty investment arbitration (all of which can be referred to in literature as 'consolidation' as long as this term is applied in the broad sense[846]):

'[…] the basic rationale underlying consolidation in investment disputes is that, in the presence of a dispute which regards a same investment (which is to be considered as a

[843] Shany, above n. 4, 143, 144.

[844] Ibid., 139.

[845] See, for example, Yannaca-Small, 'Parallel Proceedings', above n. 1, 1042; Yannaca-Small, 'Consolidation of Claims: A Promising Avenue for Investment Arbitration?', above n. 1, 236; Crivellaro, above n. 15, 413, 414.

[846] Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 64, 65.

single economic operation) and which arises from a same single State measure, only one arbitration should be conducted to settle all related elements of the dispute'.[847]

462. In general, focus on the 'same state measure' in the NAFTA cases should not mislead to the conclusion that this is the only element that the analysis on commonality can be confined to in all types of multiparty arbitration. The same state measure is rather one of many potential elements of connectivity, given that consolidation is possible in '[…] cases arising from the same measure and, quite possibly, similar facts'.[848] After all, the same state measure is present in *all* multiparty scenarios and, logically, should only be a starting point in the reasoning on commonality.[849]

3.3.2.2 Factual Commonality *vs* Legal Commonality and Qualitative *vs* Quantitative Approach to Commonality

463. In NAFTA consolidation cases, the distinction between factual and legal commonality as well as differences regarding qualitative and quantitative characteristics of the commonality factors played an important role in the decision-making process. In essence, in *Corn Products*, the tribunal did not elaborate in detail on its approach to commonality but put an emphasis on legal commonality understood as a certain threshold of common legal defences on merits that the state intends to present in relation to each of the related claims.[850] In *Canfor*, on the contrary, the tribunal addressed the criteria and principles of commonality while rejecting a high burden of proof for the party requesting consolidation.[851]

464. *Corn Products* was criticized for establishing an excessively high standard of commonality to be proved by the respondent that went beyond the threshold required for

[847] Crivellaro, above n. 15, 413.

[848] Alvarez, above n. 122, 414.

[849] Knahr made a similar observation that only one common element between the claims would be insufficient, albeit in relation to the alleged breach of the same treaty provision: 'Setting a higher threshold in this context and requiring more connection between the cases than simply the invocation of the same treaty provisions will certainly be necessary in order to ensure that consolidation is kept within limits and a consolidation tribunal will be able to reasonably perform its task. After all, it is the very purpose of consolidation to merge closely related arbitrations. It would certainly go beyond the idea of consolidation if only marginally related proceedings were joined simply because the same treaty provision was invoked by different investors'. Knahr, above n. 4, 9, 10.

[850] *Corn Products*, above n. 452, para. 14; Andreeva, above n. 767, 4; Low, above n. 4, 154; Kinnear, above n. 439, 1126-12.

[851] Shany, above n. 4, 144, 145; Romero, above n. 1, 607; Kinnear, above n. 439, 1126-12.

procedural determination on consolidation. In particular, 'common defences it intends to raise to the claims'[852] (apart from those related to jurisdiction) as well as impact of the state measure on the investors with 'different strategic business plans' fall within the issues related to the merits of the dispute.[853]

465. Furthermore, disclosing legal defences by the respondent requires more effort given that legal defences on merits are presented at a more advanced stage of the proceedings. In order to refute the respondent's arguments on commonality, it was sufficient for the *Corn Products* claimants to list the differences between them that were not even case-specific.[854] In contrast, if the joint adjudication of related claims is sought by the claimants in non-NAFTA arbitrations, commonality is based on the *dispute- and investment-specific* common facts and alleged treaty violations. In this case, the commonality standard more adequately reflects the wording of Article 1126 according to which the '[…] commonality of law and facts turns on whether the underlying facts and substantive claims of the parties are substantially similar'.[855]

466. As for commonality on the claimants' side, the test proposed in *Corn Products* also entailed the requirement that the *impact* of the state measure on investors must be the same, but could not be met in light of different business strategies of the claimants.[856] Such a stretch of the scope of commonality standard to the amount of damages is at odds with the plain wording of Article 1126 which '[…] does not authorize a consolidation tribunal to take account of the impact of a contested measure on the claimants'.[857] Given that under the rules the tribunal may '[…] assume jurisdiction over, and hear and determine together, all or part of the claims […]'[858] a consolidation order may confine the reasoning on commonality to jurisdictional objections.[859] Therefore, even if

[852] *Corn Products*, above n. 452, para 14.

[853] Ibid.; Andreeva, above n. 767, 4.

[854] *Corn Products*, above n. 452, para, 14.

[855] Andreeva, above n. 767, 4.

[856] *Corn Products*, above n. 452, paras 14-16.

[857] Andreeva, above n. 767, 4.

[858] Article 1126(2)(a) NAFTA.

[859] Shany observes with regard to the mechanism of partial consolidation as the mechanism to set the limits for commonality standard by separating factual and legal commonality: '[…] an important conceptual question […] is whether to interfere with the parallel conduct of claims based on similar facts, yet different legal bases. […] the possibility of partial consolidation, which may entail consolidation of factual but not legal aspects of the parallel proceedings—may assist in the pragmatic resolution of this problem'. Shany, above n. 4, 144.

commonality cannot be established for merits and damages, a consolidation tribunal still has'[…] the burden on assessing whether commonality had been established for jurisdiction'.[860]

467. *Canfor* rejected a quantitative threshold adopted in *Corn Products* and ruled that only one common fact and one anticipated legal defence can satisfy the test for consolidation.[861] The quantitative characteristic of common issues (that is, the degree of commonality) must serve procedural economy. With regard to the common legal defences, it would suffice if the respondent presented 'with a degree of certainty' the legal defences on merits that had already been raised in one of the individual proceedings and that will be put forward in another related dispute.[862]

468. The rationale for the minimum requirements to the quantitative aspect of the commonality test in *Canfor* is that *procedural* economy and expediency are the main goals of consolidation.[863] Within this logic, waiting until parallel proceedings are 'substantially pleaded' separately, so that legal defences are presented and their commonality can be evaluated would be at odds with the ultimate purpose for consolidation as it may delay the issuance of consolidation order.[864]

469. In *Corn Products*, the fact that one of the parallel proceedings was too advanced compared to the other was viewed as an obstacle for consolidation.[865] This approach is hard to reconcile with the requirement to disclose legal defences given that it is more likely to be fulfilled when the proceedings are at the relatively advanced stage. However, at this point, consolidation can be unfeasible because the case is at the 'too' advanced stage so that consolidation would be counter-productive in terms of efficiency (which the *Corn Products* tribunal itself saw as an obstacle for consolidation).

470. The desynchronisation of parallel proceedings is indeed an issue that may affect efficiency, especially, since consolidation will be inevitably less efficient for a party in

[860] Andreeva, above n. 767, 4.

[861] See para. 234 *supra*.

[862] See para. 236 *supra*.

[863] See para. 240 *supra*.

[864] See paras 260-262 *supra*.

[865] *Corn Products*, above n. 452, 18, 19.

the proceeding that has progressed the most.[866] Hence, the question of the 'cut-off' point in the proceeding after which consolidation would not serve efficiency is one of the key issues related to consolidation. For example, Hanotiau suggested that '[…] the key deadline, a better solution, if compatible with the rules, would be to allow consolidation as long as the case has not gone beyond the pleading stage'.[867]

471. If a proceeding has progressed substantially, '[…] a party exposed to parallel proceedings, which are essentially the same, is entitled, in principle, to insist that the repetitive claims be dismissed instead of consolidated, a solution which might entail greater costs and delays than outright dismissal'.[868] On the contrary, from the perspective of efficiency, consolidation at the earlier stages would be more appropriate, as illustrated by the outcome in *CME/Lauder* where the tribunals were ready to accept the claimants' proposal (rejected by the respondent) to coordinate parallel proceedings through consolidation.[869]

472. One of the possible solutions for coordination of parallel disputes at the advanced stages is to consolidate only common aspects through the mechanism of partial consolidation and separate awards (which, however, may have an effect of further multiplication of arbitrations).[870] This solution is foreseen under NAFTA whereby a tribunal may '[…] assume partial jurisdiction over a claim, leaving the initial claim to be arbitrated

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[866] Knahr points to the importance and complexity of choosing the most appropriate 'cut-off' point in time for consolidation: 'With regard to time the first question that comes to mind is whether there is any deadline for requesting consolidation and whether there is any specific stage of the proceedings after which consolidation is not possible any more. According to Article 1126 NAFTA, no such time limits exist. Nonetheless, in practice, the more advanced the separate proceedings instituted under Article 1120 NAFTA are, the less likely it will be that consolidation will be ordered. At some point it will simply not be feasible and efficient any more to consolidate the separate proceedings. It is highly unlikely that all arbitral proceedings that are potentially to be consolidated will be at the exact same stage of the process. Thus, consolidation might be more time efficient for one investor than for another investor or for a state party. It would make consolidation nearly impossible if a consolidation tribunal had to deny consolidation just because it might be more time consuming for certain disputing parties to the separate proceedings than to others. Rather, it will be the certainly not always easy task of a consolidation tribunal to weigh the interests of the parties involved and to determine on a case by case basis if overall the efficiency requirement is still met despite a potential time delay for one of the parties'. Knahr, above n. 4, 10, 11. Footnotes omitted.

[867] Pryles, above n. 1, 464; Hanotiau, above n. 274, 379.

[868] Shany, above n. 4, 141.

[869] See para. 203 *supra*; *Lauder*, above n. 390, para. 178; *CME*, above n. 396, paras 426-428.

[870] Shany, above n. 4, 144; Partial consolidation, however, can be less desirable from the perspective of efficiency given that, instead of minimizing the number of arbitrations, it practically results in the additional 'spin-off' arbitration whereas the 'original' arbitration continues to proceed in parallel: '[…] it appears reasonable to argue that total consolidation should prevail over partial consolidation. The reason is that partial consolidation does not serve procedural efficiency as well as total consolidation, since, with partial consolidation, different proceedings continue to run in parallel even after the consolidation'. Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 98.

separately on matters that do not relate to the common question of fact or law'.[871] Moreover, NAFTA permits a new party (that was not named in the initial request for consolidation) to be included in the consolidation order,[872] which also may secure flexibility and a case-tailored approach to coordination of parallel proceedings.[873]

473. A flexible NAFTA approach to commonality can be contrasted with the proposed consolidation provision in the ICSID Rules, which introduces the mechanism of '*coordination*' of parallel proceedings that do not reach the threshold of commonality required for full consolidation. 'Case coordination' is understood as '[…] any form of case alignment short of consolidation, which would allow the parties to benefit from synergies in presentation of closely related proceedings'.[874] Consolidation *per se* clearly requires a higher degree of commonality in that it 'joins all aspects of arbitrations pending under the same rules (for example cases instituted under the ICSID Arbitration Rules), resulting in a single proceeding and one Award'.[875] Thus, claims based on different legal instruments are exempt from the scope of consolidation given that 'cases subject to different arbitration rules (for example cases instituted under ICSID Convention Arbitration Rules and cases instituted under UNCITRAL Arbitration Rules)' fall within the scope of 'case coordination'.[876]

474. To summarise the practice of the NAFTA tribunals on commonality, the minimum standard implemented in *Canfor* is a more appropriate test in the context of NAFTA consolidation. Lack of the quantitative threshold allows to consolidate parallel proceedings at an early stage when consolidation has more chances to secure efficiency. A qualitative test – that all the concurrent arbitrations have *common disputed issues* that must be resolved in the consolidated proceeding – should be in the centre of the reasoning on commonality.

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[871] Kinnear, above n. 439, 1126-14; Alvarez, above n. 122, 405.

[872] Article 1126(6) NAFTA

[873] Alvarez, above n. 122, 414.

[874] 2018 Proposals for Amendment of the ICSID Rules, above n. 27, 209; Under Rule 46(3) of the ICSID Arbitration Rules of the 2021 Proposals for Amendment of the ICSID Rules, coordination 'aligns specific procedural aspects of two or more pending arbitrations, but the arbitrations remain separate proceedings and result in separate Awards' and under Rule 46(2), consolidation 'joins all aspects of the arbitrations sought to be consolidated and results in one Award'. Above n. 31, 49.

[875] 2021 Proposals for Amendment of the ICSID Rules, ibid.

[876] 2019 Proposals for Amendment of the ICSID Rules, above n. 138, 209.

475. Such a minimum standard of commonality is closely related to the question of how advanced the proceedings should be in order to be mature for establishing commonality. The 'cut-off' point in this regard should be the end of the jurisdictional phase when proceedings are sufficiently advanced to provide the material for comparison but, at the same time, have not progressed so far that consolidation might be counterproductive. This is also the reason why a party seeking consolidation should not be required to prematurely disclose its legal arguments on merits for a single purpose of making them 'available' for comparison.

3.3.3 Efficiency and Fairness as the Prerequisites for Consolidation: Balancing Confidentiality as an Expression of Party Autonomy against Avoidance of Inconsistent Awards as an Expression of Procedural Economy and Public Policy

476. Efficiency and fairness – two other prerequisites for consolidation in addition to commonality – were understood differently by the two NAFTA tribunals and were an expression of the preferences towards party autonomy or policy considerations.[877] Although both tribunals declared that the interests of states and investors must be balanced in deciding on consolidation,[878] for the *Canfor* tribunal, the ultimate goal of this exercise was to factor fairness 'in determining what is the procedural economy in the given situation'. However, 'procedural economy that will redound to the benefit of a disputing State Party'[879] had more weight for the tribunal compared to the claimants' interests related to confidentiality.

477. It was observed that the *Canfor* reasoning is novel, in that it manifests preference of systemic considerations over 'cumulative interests' of the parties. Within this approach, avoidance of conflicting awards serves the purpose of maintaining '[…] *perceived* legitimacy of the system of adjudication [as opposed to] practical considerations, such as the material ability of a respondent State to comply with conflicting judgments'.[880]

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[877] Knahr, above n. 4, 6-8, 10-12; Shany, above n. 4, 146-149; Kinnear, above n. 439, 1126-12-1126-14; Romero, above n. 1, 606.

[878] See paras 241, 256 *et seq. supra*.

[879] *Canfor*, above n. 455, para. 125.

[880] Shany, above n. 4, 147.

478. However, the ultimate practical implication of this seemingly objective approach in a concrete dispute serves the interest of saving the resources of a *respondent state*.[881] Such preference is open for criticism as far as due process is concerned, given that confidentiality is inevitably compromised where direct competitors are compelled to consolidate their claims against their will.[882] This inequality can be reconciled by accepting the paradigm of systemic considerations as the primary rationale for consolidation.[883]

479. On the contrary, in *Corn Products*, balancing fairness against efficiency resulted in the conclusion that the cumbersome measures necessary to protect the claimants' business secrets will undermine efficiency to such an extent that the risk for the state to be confronted with inconsistent awards is a lesser concern.[884] In other words, where the measures necessary to protect party autonomy in the consolidated proceeding may undermine efficiency, then the requirement of efficiency cannot be met.[885]

480. In principle, efficiency accomplished through consolidation is understood in literature as saving time and costs and is perceived as one of the main advantages of consolidation as a mechanism to avoid parallel proceedings.[886] Consolidation is viewed as particularly beneficial for respondents[887] both in the context of a concrete dispute and in terms of

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[881] Romero points to the prevalence of state's interests in this context: 'Canfor consolidation tribunal determined that the objective of the consolidation provision in NAFTA was the guarantee of procedural economy, which it understood as the "goal of alleviating the resources of the State Parties in defending against multiple claims, as opposed to conserving the resources of the Article 1120 Tribunals empanelled to hear the individual disputes." Romero, above n. 1, 606.

[882] Yannaca-Small, 'Consolidation of Claims: A Promising Avenue for Investment Arbitration?', above n. 1, 237, 238; Yannaca-Small, 'Parallel Proceedings', above n. 1, 1043-1044; Knahr, above n. 4, 13-15; Mair, above n. 735, 39, 40; Schreuer, above n. 2, 384; Low, above n. 4, 153.

[883] Shany, above n. 4, 146, 147: '[…] it is perhaps interesting to appreciate what considerations the tribunal was not willing to factor in, that is the consent of the parties and due process implications of consolidation (which also incorporate requirements of confidentiality). I believe that the tribunal's decision to include and exclude certain factors reveals a particular choice between values. In particular, the inclusion of the third consideration—avoidance of conflicting judgments—seems to derive more from the need to protect the perceived legitimacy of the system of adjudication than from practical considerations, such as the material ability of a respondent State to comply with conflicting judgments. Hence, it symbolizes the introduction of systemic considerations at the expense of the cumulative interests of the immediate parties to the case'.

[884] Kinnear, above n. 439, 1126-12, 1126-13; Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 258; Knahr, above n. 4, 13, 14; Romero, above n. 1, 604; Yannaca-Small, 'Consolidation of Claims: A Promising Avenue for Investment Arbitration?', above n. 1, 232, 237, 238; Yannaca-Small, 'Parallel Proceedings', above n. 1, 1044, 1045; Low, above n. 4, 153; Dugan, above n. 437, 193.

[885] Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 247.

[886] Ibid., 246; Shany, above n. 4, 136; Zarra, above n. 1, 79.

[887] Schreuer, above n. 2, 384; Knahr, above n. 4, 6; Kinnear, above n. 439, 1126-4, 1126-5.

predictability in the application of investment law in general[888] for which reason consolidation requests '[…] are usually initiated by the respondent State and opposed by the claimants'.[889]

481. At the same time, '[…] mandatory consolidation can deprive a party of various attributes of arbitration and may be perceived by both claimants and respondents as disadvantageous'.[890] For example, while *CME/Lauder* demonstrated the reasons behind the respondent's reluctance to consolidation,[891] in the NAFTA cases, consolidation was against the claimants' preferences.[892]

482. Therefore, despite the objective benefits of efficiency, 'policy considerations […] may or may not coincide with the cumulative interests of the immediate parties to the dispute'.[893] In particular, Kinnear gives examples of various tactical and strategic considerations that may prompt a party to oppose consolidation:

> 'Some parties believe that consolidation places them at a strategic disadvantage. For example, in a consolidated case, co-claimants must agree on a common strategy, the selection of arbitrators, the schedule, identification of witnesses, the presentation of evidence, and the legal argument to be made. They also risk the presentation of the case being weakened by the factual circumstances of co-claimants. […] Respondents may also dislike consolidation, preferring that each claimant individually meet the case presented. Claimants and respondents may also worry that consolidation will adversely affect their freedom to pursue review of a tribunal award and their freedom to select applicable rules'.[894]

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[888] Shany, above n. 4, 147: 'repeat players, such as States, would feel a greater need for the introduction of order and predictability in international arbitration than one-time players, such as investors. Furthermore, States which are often, if not always, the defendants in international investment arbitrations disputes are also expected to benefit from the procedural advantages of concentrating all claims brought against them before one forum (for instance, reduction of litigation costs). Hence, one can also, perhaps, describe the choice of a broad or narrow consolidation rules in international investment arbitration cases as a choice between according the right of the way to the interests of States or to those of private investors'.

[889] Schreuer, above n. 2, 384.

[890] Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 246.

[891] Waibel, above n. 1, 500. Footnote omitted.

[892] Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 247.

[893] Shany, above n. 4, 136.

[894] Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 247. Footnotes omitted.

483. Furthermore, although the issue of costs can be crucial for the promotion of due process and access to justice from the claimants' perspective,[895] for respondents, parallel proceedings '[…] are likely to result in increased costs'[896] but might be mitigated by substantial financial resources the state can dispose of in comparison with private parties.[897]

484. From the claimants' perspective, the purpose of saving resources can be trumped by the tactical advantage of parallel proceedings as a tool for claimants to '[…] increase their possibility to be successful in the dispute',[898] which is an undesirable phenomenon on policy level.[899] Moreover, 'investor may have small or indirect claims, the determination of which is likely to take longer and be more expensive in a consolidated arbitration than it would in a purely bilateral resolution of the dispute'.[900]

485. Waibel expands on the incentives that may prevail over cost-related concerns of the claimants if – contrary to investors lacking substantial financial resources – they can afford investing massively in multiple parallel proceedings as a tool for hedging the risks and maximizing the chances of winning:

> 'Determined investors, especially those with deep pockets, are incentivized to try their luck in multiple forums, both at the adjudication and at the enforcement stage. They will shop for the forum in which they can maximize their compensation or other favourable outcome, such as putting most pressure on the host state to agree to a generous settlement. Conversely, smaller investors are less likely to forum shop, and likely to perceive greater advantages in economies of scale by bundling their claims with other investors, as in the case of mass claims. Mass claims can provide investors with substantial economies of scale, as the *Abaclat* arbitration shows. The cost of arbitration will typically be more important to this group than to deep-pocketed investors, third-party funders, or host states'.[901]

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[895] Di Brozolo, above n. 4, 129.

[896] Schreuer, above n. 2, 384.

[897] Cuniberti, above n. 708, 414.

[898] Zarra, above n. 1, 68.

[899] Wehland, 'The Regulation of Parallel Proceedings in Investor-State Disputes', above n. 1, 578.

[900] Crivellaro, above n. 15, 410.

[901] Waibel, above n. 1, 517. Footnotes omitted.

486. In addition to the issue of costs, Schreuer elaborates on the rationale behind the claimants' reluctance to consolidate separate proceedings:

'Misgivings of the claimants against consolidation in these cases concerned the protection of confidential information from competitors in consolidated proceedings, full participation of claimants in the composition of the consolidated tribunal and the opportunity of individual claimants to present their case fully'.[902]

487. As for the risk of conflicting awards for the respondent, it is true that if parallel adjudication persists, '[…] the State is exposed to the risk of two conflicting awards, both valid and enforceable, without any possible judicial revision'.[903] However, even for states, consistency in decision-making can be a minor concern from the pragmatic tactical perspective:

'Host states, much more than investors, are likely to be repeat players in investment arbitration. States care little about whether investment arbitration is a 'regime' or whether it delivers consistent outcomes. Instead, they focus on the outcome of the cases in which they are currently involved, and potential future cases. Like investors, consistent outcomes in similarly situated disputes have no value to host states per se. What matters most is that the decision outcomes are favourable to the state. Inconsistent decisions may even have some value to host states, or a lack of coordination may undermine the legitimacy of international investment arbitration – a result which some states might regard as a welcome by-product of decisional fragmentation – or increase the host state's chance of success in annulment proceedings or challenges before national courts. […] Parallel proceedings can be more preferable for respondents than faster but negative outcome of the case'.[904]

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[902] Schreuer, above n. 2, 384.

[903] Crivellaro, above n. 15, 417.

[904] Waibel, above n. 1, 518, 519: 'Host states may also be happy for disputes to linger on, whereas investors are likely to attach greater importance to their dispute being settled or resolved. Investors often file cases only after they have made a decision to exit a particular country, or not to invest in that host country in the future. That the dispute remains wholly or partly unresolved may not be a major concern for the host country. Host states may have little to gain from the resolution of the dispute. The upside of successful dispute resolution may be limited, whereas the downside – in the form of compensation payments – could be considerable. Nevertheless, host state interests are likely to differ if pending disputes worsen the investment climate as perceived by other investors; if they negatively affect the country's reputation for the rule of law, good governance, and compliance with its international legal obligations; if they expose the country to litigation in other forums; and particularly, if the host country is exposed to enforcement action'. Footnotes omitted.

488. Thus, depending on the circumstances, interests of any party can be better served in separate proceedings concerning essentially the same dispute:

'The focus in investment arbitration on providing financial compensation to one investor at a time, coupled with the strong emphasis on party consent, can be an obstacle to the effective coordination of proceedings. In addition, investors and host states do not necessarily favour coordination, and the same applies to arbitrators and the lawyers acting for either side. In at least some cases, the interests of all stakeholders may be better aligned with a fragmented adjudicatory process'.[905]

489. The above discussed issue of desynchronisation[906] also correlates with efficiency and fairness, in that the tribunals were split on whether it is a relative or independent standard, *i.e.,* whether consolidation would be the most efficient and fair solution *per se* in comparison to separate proceedings:

'A different type of question raised in the *Canfor* proceedings involves the methodology of applying the relevant considerations, namely, should one measure fairness and effectiveness independently or comparatively in the light of the comparative advantages for the parties of consolidation over separate proceedings, focusing on time, costs, and conflicting judgments. Indeed, the consolidation tribunal in *Corn Products* noted the slower pace of consolidated proceedings, especially in the light of the uneven pace of the two proceedings, as a factor militating against consolidation. By contrast, the *Canfor* tribunal held that the test of fairness and effectiveness is an independent test, which appertains to the consolidated proceedings *per se*'.[907]

490. However, it is unrealistic to undertake a sufficiently detailed analysis of whether consolidation will indeed serve efficiency and fairness without resorting to the comparative method as the *Canfor* tribunal demonstrated itself. Shany pointed that this contradiction could be simply another expression of the *Canfor* tribunal's pro-consolidation position:

'It is not clear what is the import of this distinction, as even the *Canfor* tribunal was willing to consider the comparative advantages of separate proceedings as a "guiding test"

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[905] Waibel, above n. 1, 529.

[906] See paras 258 *et seq. supra*.

[907] Shany, above n. 4, 148.

in deciding the fairness and effectiveness of the consolidated procedure. Still, the refusal of the tribunal to explicitly introduce a comparative test is perhaps indicative of its general pro-consolidation inclination […]'.[908]

491. The factors of efficiency and fairness (consistency of awards, confidentiality, appointment of arbitrators) warrant a separate analysis which can be relevant not only in the NAFTA context.

3.3.3.1 Avoidance of Inconsistent Awards as an Objective Advantage of Consolidation

492. Avoidance of inconsistent awards is arguably, the only efficiency-related factor that is relevant in every case of consolidation given that, as explained above, individual parties' interests are not necessarily best served through consolidation. Maintaining consistency is not as much in the subjective interest of the respondent in a concrete dispute (as literature seem to suggest[909]) as an objective advantage of consolidation on public policy level.[910] As for claimants, especially if they initiate related proceedings separately, public policy factors clearly do not fall within their priorities:

'Investors, who are often one-shot players in IIL, are likely to care primarily about the outcome in their particular case, rather than about coherence, either at the level of outcomes in investment arbitrations or the legal reasoning adopted by investment tribunals'.[911]

493. When public interest is weighed against party autonomy, a specific nature of treaty arbitration – as opposed to commercial arbitration – must be considered also in the context of consolidation *stricto sensu*:

'[…] the challenges it poses are, in part, drawn from the realm of commercial arbitration (insofar as they relate to issues of party consent) and, in part, reminiscent of judicial

[908] Ibid., 148, 149. Footnote omitted.

[909] Crivellaro, above n. 15, 402, 403, 410; Schreuer, above n. 2, 384; Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 246; Knahr, above n. 4, 6; Yannaca-Small, 'Parallel Proceedings', above n. 1, 1040.

[910] Parra, above n. 1, 132.

[911] Waibel, above n. 1, 517.

proceedings in the civil law world (insofar as they call for the establishment of a set of adequate procedural rules)'.[912]

494. In particular, private arbitration is focused solely on the parties' individual interests whereby systemic considerations are not supposed to be accommodated by either the arbitral institutions or by the parties:

'[…] international arbitration institutions are typically entrusted with limited powers of oversight over specific arbitral procedures. Their basis of authority is based on the consent of the parties and they depend, to a large extent, upon private funding (in the form of administrative costs charged from the parties to disputes). Hence, their ability, or even need to consider systemic considerations which conflict with the interests and wishes of the disputing parties might be rather limited. As an example, the need to promote judicial economy seems less pressing in privately-funded proceedings than in publicly-funded ones'.[913]

495. Furthermore, the NAFTA regime can be distinguished not only from commercial arbitration but also from the ICSID system, which is closer to commercial arbitration in that both are more service-oriented and focused on the resolution of a specific dispute rather than on liberalization of trade and harmonization of trade rules.[914]

496. However, the ICSID case law has a certain public policy dimension as well. Despite the absence of the law of binding precedents in investment arbitration, it is common practice for tribunals to refer to the reasoning in the earlier awards discussing the same legal issues.[915]

497. Investment arbitration is particularly prone to lose credibility because of the inconsistent application of treaty provisions due to the lack of detailed legal norms that must be applied

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[912] Romero, above n. 1, 609.

[913] Shany, above n. 4, 136.

[914] Ibid., 136, 137: 'what might work for specific legal regimes such as the WTO or NAFTA, which were created to promote a specific public agenda towards liberalization of trade and harmonization of trade rules, might not work for regimes that are less goal-oriented such as ICSID or commercial arbitration under UNCITRAL or ICC Rules. This is because arbitration institutions such as ICSID or the ICC tend to be "service-oriented." They focus more on the very need to resolve disputes in a fair and efficient manner and less on the systemic implications of the substantive outcomes of the arbitration proceedings they administer'.

[915] Knahr, above n. 4, 2.

in a particular dispute.[916] As Kinnear puts it, '[…] too many conflicting decisions arising from like circumstances could defeat the overall predictability, credibility, and effectiveness of investment dispute settlement'.[917]

498. Furthermore, the grounds for setting aside arbitral awards, whether under the ICSID Convention or under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'), are mostly limited to violations of due process whereas questions of fact and law are exempt from re-examination. Hence, contradictory or conflicting awards cannot be rectified in the course of post-award scrutiny.[918] Annulment of conflicting ICSID awards under Article 52 of the ICSID Convention '[…] seems to be purely theoretical, and this is due in part to the fact that it would be very difficult to establish which of the two awards should be annulled'.[919]

499. Along the same lines, Kinnear describes the benefits of consistency policy level as follows:

'The quest for consistency and predictability is particularly important in a system where issues of public importance may be at stake and the demand for finality permits little or no review of questions of law or fact. Consolidation, therefore, may increase the predictability and consistency of arbitral awards, and thus increase overall confidence in investment arbitration'.[920]

500. At the same time, scepticism was expressed about the negative implications of inconsistency in investment arbitration. For example, Wälde pointed to the lack of indication that investment tribunals are less coherent than other international or national adjudication systems. Inconsistency as a serious issue in investor-state arbitration is highlighted through public availability of large amount of investment awards and critical attention that they receive as a result. In the meantime, it should not be a concern that

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[916] L. Wells, 'Backlash to Investment Arbitration: Three Causes', in Waibel, *The Backlash against Investment Arbitration*, above n. 1, 342: 'These agreements and ''international law'' provide only the most general guidance to arbitration panels. The lack of detailed legislation stands in contrast to the basic agreements and the national commitments of the World Trade Organization (WTO), which govern trade. In the absence of deep legislation and a review process, each panel is free to interpret the vague legislation as it sees fit. The arbitration decisions lead claimants or respondents to lose trust in a system when other claimants or respondents in similar situations appear to receive quite different treatment'.

[917] Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 243.

[918] Yannaca-Small, 'Parallel Proceedings', above n. 1, 1040; Crivellaro, above n. 15, 417.

[919] Crivellaro, ibid., 417.

[920] Kinnear, 'Consolidation of Cases at ICSID', above n. 1, 246. Footnotes omitted.

'[…] novel issues for which there is no settled jurisprudence will be decided differently at times by different tribunals […]' or else one could speak of "arbitrator clones".[921]

501. Romero contrasts inconsistency as public policy concern in treaty-based arbitration with the consensual nature of arbitration, which sets certain limits to any dispute resolution:

'Inconsistencies and contradictions between investment arbitration awards may simply be a fact of life. We should live with them as we must live with the limits of any dispute resolution mechanism based on consent. This, however, is a significant issue, particularly in light of the absence of a rule of *stare decisis* in international arbitration and in the context of inherent fragmentation of treaty-based protections. What, in the end, is at stake is the legitimacy of the investment arbitration system'.[922]

502. Waibel even observed that a '[…] healthy level of competition […] may improve the quality of rulings and shorten the duration of proceedings [and that] tribunals keeping a watchful eye over other tribunals can encourage discipline and enhance the system's legitimacy'.[923] For example, 'the seemingly inconsistent outcome' in *CME/Lauder*[924] does not necessarily '[…] strike […] a blow to the investment regime's legitimacy and undermines legal certainty for foreign investors and host states alike'. Rather, '[t]he effect of the *Lauder* award was to prevent double recovery by the controlling shareholder, on top of compensation obtained by the corporation' as an expression of the principle of domestic corporate law that '[…] the controlling shareholder is unable to successfully bring a claim for reflective loss, in addition to a direct action by the company'.[925]

503. Along the same lines, Crivellaro observed that '[…] a careful analysis of the reasoning behind the two decisions reveals that they are not truly in conflict, at least not on issues of principle'.[926] Both tribunals found the respondent liable for the violation of treaty

[921] T. Wälde, 'Improving the Mechanisms for Treaty Negotiation and Investment Disputes. Competition and Choice as the Path to Quality and Legitimacy', in K. Sauvant (ed), *Yearbook on International Investment Law & Policy* (2009) 522.

[922] Romero, above n. 1, 601.

[923] Waibel, above n. 1, 517. Footnote omitted.

[924] Ibid., 530.

[925] Ibid., 500.

[926] Crivellaro, above n. 15, 412.

provisions with the difference that only CME 'had proven and substantiated the losses incurred as an effect of the interference'.[927]

504. Another critic against consolidation as a tool for avoiding inconsistency in the law-making process is that, in the absence of *stare decisis*, tribunals will not necessarily feel bound by the duty to contribute to the harmonization of investment law:

'The risk of inconsistent awards rendered by parallel tribunals is also affected by the fact that tribunals are either party-oriented or policy-oriented and, accordingly, conceive of their task and their allegiance in various ways'.[928]

505. Finally, irrespective of the hierarchical value of promoting consistency amongst other arguments in favour of consolidation, the risk of inconsistent awards should be approached cautiously and weighed against other implications of consolidation,[929] such as additional procedural arrangements that increase the costs and duration of the process, as also illustrated by the NAFTA consolidation tribunals.

3.3.3.2 Preserving Confidentiality amongst Co-claimants as a Preference of Party Autonomy over Procedural Economy

506. Adjudication of related claims in one proceeding can jeopardise confidentiality as one of the main incentives for parties to opt for arbitration[930] instead of state courts.[931] Where the same state measure is the ground of a dispute, naturally, the probability that claimants

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[927] Ibid.

[928] Waibel, above n. 1, 502: 'How arbitral tribunals conceive of their own function is an important determinant of whether they will exercise their jurisdiction in scenarios where two or more tribunals prima facie enjoy jurisdiction. We can think of two extreme positions. Some tribunals regard themselves as part of a self-contained regime and as an autonomous entity within the regime. Or they see themselves as part of a system of many interconnected tribunals whose duty it is to collaborate. For tribunals adopting the first perspective, coherence is an immaterial consideration. Conversely, system-conscious tribunals are more likely to regard inconsistent rulings as a threat to the legitimacy of the 'system', and may be prepared to take this factor into account in determining whether to exercise jurisdiction in particular cases'. Footnotes omitted.

[929] Knahr, above n. 4, 3.

[930] Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 84, 85; Lamm, above n. 1, 72; Zarra, above n. 1, 79, 80.

[931] Yannaca-Small, 'Parallel Proceedings', above n. 1, 1044.

will be competitors in the same industry is high, hence, they are particularly concerned about the risk of disclosing business secrets amongst themselves.[932]

507. Different approaches to the weight of party autonomy may affect a tribunal's findings in relation to the claimants' objection that they would be compelled to disclose confidential information to their competitors should consolidation be ordered. Contrary to *Corn Products*, the *Canfor* tribunal did not see confidentiality as one of the components of efficiency and favoured '[…] systemic considerations at the expense of the cumulative interests of the immediate parties to the case'.[933]

508. The arguments of the *Canfor* tribunal (the trend towards transparency in NAFTA arbitration,[934] range of proceedings involving direct competitors as claimants in NAFTA arbitration,[935] and availability of procedural mechanisms to protect confidentiality[936]) were criticized as 'problematic' as they disregarded confidentiality as an expression of party autonomy.[937] In particular, promoting transparency jeopardises the attractiveness of arbitration as a method that is traditionally preferred over state courts precisely for its susceptibility of confidentiality issues and demonstrates 'hostility' towards autonomy.[938]

509. However, certain limitations to the principle of confidentiality can be justified, especially, if sensitive information is disclosed only to the participants of arbitration. Indeed, it is a common understanding that parties, along with their counsel, tribunal, and administering institution belong to the 'inner circle' entitled to be familiar with all aspects of the case.[939] Furthermore, the mechanism of partial consolidation allows to refer only non-sensitive issues to a consolidated arbitration: 'a consolidating tribunal might choose to determine whether a State measure is a breach of its obligations and leave to the nonconsolidated

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[932] Knahr, above n. 4, 13.

[933] Shany, above n. 4, 147. Footnote omitted.

[934] *Canfor*, above n. 455, paras 139.

[935] Ibid., 141.

[936] Ibid., 143.

[937] Ibid., 148.

[938] Shany, above n. 4, 148: 'The reference to the need to promote transparency in private claims is problematic, since arbitration might be attractive in the eyes of business enterprises, and preferable to court proceedings, precisely for the limited degree of publication given to its procedures. In fact, the tribunal's entire line of reasoning appears hostile to the need to respect the autonomy of the parties in regard to their decision on whether or not to bring a claim that involves their direct competitors, and to insist or not to insist upon confidentiality protecting measures'.

[939] M. Hwang and K. Chung, 'Defining the Indefinable: Practical Problems of Confidentiality in Arbitration', 26 *Journal of International Arbitration* (2009) 610.

tribunal the determination of *quantum* matters in accordance with compensation principles established in the consolidated proceedings'.[940]

510. Moreover, NAFTA provides for certain measures that secure transparency of arbitration, signalling that confidentiality plays a relatively minor role in NAFTA and that the investors agree thereto by opting for NAFTA arbitration. Alvarez describes certain restrictions of confidentiality envisaged in NAFTA as follows:

'Chapter 11 of NAFTA seriously dilutes the confidentiality of proceedings. In addition to the potential effects of consolidation, there are a series of other provisions which provide rights of notice and access to arbitral proceedings by State Parties not involved in the dispute'.[941]

511. Indeed, transparency under NAFTA is maintained at a more advanced level compared to the ICSID system with broad rights of the states to obtain information about the ongoing cases that they are even not parties to.[942] The fact that investors are not accorded a symmetrical right of access to information speaks for the prevalence of a state's interests under NAFTA also with regard to confidentiality.

512. However, it should be emphasised that confidentiality is a legitimate concern of investors related to party autonomy and must be considered by a tribunal through balancing it with the risk of inconsistent awards for a respondent. In particular, even the *Canfor* tribunal did address confidentiality by listing procedural measures that can be implemented to preserve the claimants' business secrets.[943] On the contrary, in *Corn Products* the tribunal did not explain how the risk of conflicting awards imposed upon the respondent can be mitigated, *i.e.*, balanced, against confidentiality issues. To this extent, the *Canfor* approach should not necessarily be characterised as '[…] brushing aside […] of the link

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[940] Crivellaro, above n. 15, 409.

[941] Alvarez, above n. 122, 415.

[942] 'State Parties are required to provide copies of requests for arbitration and requests for consolidation to the NAFTA Secretariat, which maintains these documents in a public register. In addition, State Parties are required to deliver copies of all pleadings to the other Parties. Upon request, a Party is entitled to receive from a disputing Party copies of evidence that has been tendered and written argument presented by disputing parties. A State Party is then entitled to participate in arbitral proceedings, although it is not a disputing party, to make submissions to a tribunal on a question of interpretation of the NAFTA'. Alvarez, above n. 122, 415; see Articles 1127-1129 NAFTA.

[943] See para. 252 *supra*.

between confidentiality and due process' given that the 'cumulative interests of the parties' were the factors, albeit not decisive, evaluated by the tribunal.[944]

3.3.3.3 Appointment of Arbitrators for the Consolidated Arbitration: (In)equality in Appointment of Arbitrators and Avoiding Prejudice Based on Prior Familiarity with the Dispute

513. The issues with party autonomy related to the appointment of arbitrators are commonly viewed as another potential downside of consolidation,[945] which may '[…] dilute the influence of the claimants upon the composition of the tribunal and could thus adversely affect the equality of arms among the different parties'.[946] The deviation from the institutional nomination in favour of the appointment by the parties in *Corn Products* addressed this concern and can be assessed positively as a mechanism to preserve party autonomy and due process.[947]

514. Indeed, excluding parties from the nomination of arbitrators undermine the due process rights of the parties. An arbitrator involved in one of the underlying parallel proceedings and later appointed as arbitrator in the consolidated arbitration may have formed conclusive opinions about certain aspects of the case which conflicts with the duty of impartiality. Furthermore, that arbitrator would be put in a 'delicate and awkward situation' when the disclosure of information and documents obtained in the previous proceedings is in conflict with the duty of confidentiality.[948]

515. In contrast to the appointment of arbitrators by the parties in *Corn Products*, in *Canfor*, the US requested the ICSID Secretary General to establish a consolidation tribunal in accordance with the procedure foreseen under NAFTA[949] which resulted in the

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[944] Shany, above n. 4, 146, 147.

[945] Kaufmann-Kohler, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?: Final Report on the Geneva Colloquium held on 22 April 2006', above n. 1, 85; On appointment of arbitrators in multiparty arbitration, see also Born, above n. 114, 2810-2815; Mair, above n. 735, 37, 38; Schreuer, above n. 2, 384.

[946] Shany, above n. 4, 148; On equality of the parties in the appointment of the tribunal in multiparty situations see: Hanotiau, above n. 274, 200-207.

[947] See para. 226 *supra*.

[948] Hanotiau, above n. 274, 219.

[949] *Canfor*, above n. 455, para. 4.

(unsuccessful) challenge of an arbitrator by one of the claimants.[950] This approach can be criticized as it'[…] deprives the parties of their preferred means of constituting the arbitral tribunal'.[951] At the same time, it also protects due process by ensuring equal treatment of the parties. In the context of consolidation, each of the multiple claimants (or respondents) is deprived of an opportunity to appoint an arbitrator on its own behalf and is bound to agree upon a common nomination, whereas an opposing single party can 'truly' make its own choice.

516. Such inherent inequality can be further aggravated if parties have unaligned procedural strategies or conflicting interests and, nevertheless, are compelled to make the joint nomination.[952] Hence, it is not as much non-participation in the appointment *per se* as the unequal treatment of the parties in composition of the tribunal that jeopardises due process, which can be mitigated by institutional appointment of all three arbitrators.[953]

517. However, if parties agreed to the arbitration rules with a consolidation provision excluding them from the nomination process, such an 'advance waiver' would not raise due process issues in case of institutional appointment.[954] This method, according to Born, '[…] appears to do least violence to principles of equal treatment and the parties' expectations regarding the arbitral process'.[955] Yet, the risk remains that advance waivers will not be accepted as enforceable for falling outside the scope of an arbitration agreement in the context of set aside proceedings under the New York Convention.[956]

518. One of the ways to minimize the risk of challenge of an award on this ground is to give parties an opportunity to appoint a tribunal upon their agreement (even in deviation from the rules as exemplified by *Corn Products*), and only if they fail to do so the institution

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[950] Ibid., para 8.

[951] Born, above n. 114, 2811.

[952] Ibid., 2810, 2811.

[953] '[…] non-participation in the appointment process may not necessarily prove fatal to consolidations, since what is important is equality of treatment between the parties. This could, for instance, be effectuated through the appointment of all the arbitrators by an appointing authority, *e.g.* the Secretary General in the case of ICSID for instance'. Yannaca-Small, 'Consolidation of Claims: A Promising Avenue for Investment Arbitration?', above n. 1, 237. Footnote omitted; see also: Born, above n. 114, 2814; Hanotiau, above n. 274, 200-207; Mair, above n. 735, 37-39; J. Fry, B. Moss, F. Mazza, and S. Greenberg, *The Secretariat's Guide to ICC Arbitration: A Practical Commentary on the 2012 ICC Rules of Arbitration From the Secretariat of the ICC International Court of Arbitration* (2012), 147-149.

[954] Born, ibid., 2812.

[955] Ibid., 2811.

[956] Ibid., 2608, 2609.

may take over the task. Such a two-step nomination process in multiparty scenarios is foreseen, for example, under the ICC Rules where multiple claimants (or respondents) should jointly appoint one arbitrator and only if they fail to do so, all three arbitrators shall be appointed by the ICC Court.[957] A similar procedure is foreseen under the Arbitration Rules of the Vienna International Arbitral Centre.[958]

519. The complexity of mandatory consolidation and important policy implications discussed above account for the modest perspectives of this procedural tool to be implemented within the ICSID system. Although consolidation by order was foreseen under the 2018 Proposals for Amendment of the ICSID Rules, it was removed from the subsequent versions and only voluntary consolidation and coordination upon the parties' agreement was kept.[959] The NAFTA-model, whereby the ICSID Secretary General could appoint a 'single Consolidating Arbitrator'[960] was also rejected so that the terms of consolidation are left for the parties to agree upon. The ICSID Secretariat shall be entrusted with an advisory authority for the parties in drafting the terms of reference by 'providing parties with templates of terms of reference for coordinated or consolidated cases; suggesting modalities for the joint presentation of cases; or raising potential bars to coordination for consideration by the parties'.[961]

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[957] Articles 12(6)-12(8) ICC Arbitration Rules (2021); Under Article 12(8): 'In the absence of a joint nomination pursuant to Articles 12(6) or 12(7) and where all parties are unable to agree to a method for the constitution of the arbitral tribunal, the Court may appoint each member of the arbitral tribunal and shall designate one of them to act as president. In such cases, the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator, applying Article 13 when it considers this appropriate'; See also Fry, above n. 953, 148, 149.

[958] Article 18 Vienna Rules (2021); See also S. Riegler and A. Petsche, 'Constitution of the Arbitral Tribunal in Multi-Party Proceedings', in Vienna International Arbitral Center, *Handbook Vienna Rules: A Practitioner's Guide* (2014) 108-110.

[959] 2018 Proposals for Amendment of the ICSID Rules, above n. 27, 193-195; 2019 Proposals for Amendment of the ICSID Rules, above n. 138, 210: '[…] While some States expressed an interest in mandatory consolidation, many expressed reservations. Most concluded that a State wishing to provide for mandatory consolidation of claims should do so in its investment treaties. Others that supported mandatory consolidation suggested that only States should be able to trigger such provisions.

[…] Given the comments received, the proposal on mandatory consolidation has been deleted. The Secretariat would be pleased to study this possibility in the future if States wish to do so'.

[960] Rule 38BIS of the 2018 Proposals for Amendment of the ICSID Rules provided as follows: '[…] The request for consolidation shall be decided by a single Consolidating Arbitrator who shall: […] be selected by the Secretary-General from the ICSID Panel of Arbitrators, after consulting as far as possible with the parties named in the request for consolidation'. above n. 27, 853.

[961] 2019 Proposals for Amendment of the ICSID Rules, above n. 138, 210; Rule 46(4) of the ICSID Arbitration Rules of the 2021 Proposals for Amendment of the ICSID Rules stipulates as follows: 'The parties […] shall jointly provide the Secretary-General with proposed terms for the conduct of the consolidated or coordinated arbitrations and consult with the Secretary-General to ensure that the proposed terms are capable of being implemented'. Above n. 31, 50.

520. The ICSID is planning '[…] to issue a practice note with examples of terms of consolidation or coordination and suggestions as to how parties can take advantage of [case coordination] mechanisms', for example: 'constituting Tribunals comprising the same arbitrators; establishing common procedural calendars between two or more cases; providing for a single and common set of pleadings; holding joint hearings on common issues of law or fact; or simplifying the presentation of evidence'.[962] Such emphasis on the soft law instruments in regulating consolidation was earlier suggested in literature as one of the methods for coordination of parallel proceedings within the ICSID system.[963]

[962] 2018 Proposals for Amendment of the ICSID Rules, above n. 27, 842.

[963] Puig, above n. 437, 134: 'ICSID might also consider publishing guidelines, or even just an authoritative review of the experience to date, in regard to the registration of requests of multiple claimants, the filing of additional and incidental claims, and the constitution of tribunals with identical or overlapping memberships for proceedings involving the same or similar issues, events or circumstances. ICSID has been quite effective in these respects and its effectiveness might be enhanced by such published guidelines or review'.

SUMMARY

521. In contrast with multiparty cases *ab initio* in which consent was addressed from the jurisdictional perspective, a NAFTA consolidation order is of procedural nature as stipulated in the NAFTA rules of procedure. Another distinction from the earlier multiparty cases, where respondents opposed the joint dispute resolution, is that objections to consolidation under NAFTA were raised by the claimants and consolidation was requested by the respondents.

522. Consolidation provision in NAFTA is foremost remarkable for permitting consolidation of separate proceedings *without parties' consent* within procedural discretion of the consolidation tribunal. On the textual level, the choice of the NAFTA rules by the claimants is an implied consent that the ruling on consolidation shall be rendered by the consolidation tribunal as a procedural matter. Hence, if the respondent seeks consolidation of the pending parallel proceedings, a specific consent of the claimants to consolidation is not required.

523. Nevertheless, despite the possibility of non-consensual consolidation, in practice, NAFTA consolidation tribunals still addressed the issue of consent as an indispensable element of party autonomy, which had to be balanced against the interests of efficiency.[964] However, the tribunals were split as a result of their inclination towards the primacy of party autonomy or efficiency. Respectively, the request for consolidation was rejected in *Corn Products* and granted in *Canfor*.

524. In particular, as far as the role of consent is concerned, in *Canfor*, it was sufficient to establish an implied general consent to consolidation expressed through the choice of NAFTA.[965]

525. On the contrary, in *Corn Products*, the threshold for consent was set higher so that specific consent (after the disputes have arisen) was also factored in the decision on consolidation. As a result, the claimants' objection to consolidation on the ground that consolidation will

[964] See paras 246 *et seq*., 409 *et seq*. *supra*

[965] See paras 249, 418 *et seq*. *supra*.

compromise confidentiality was the deciding factor for rejecting the state's request for consolidation.[966]

526. Interpretation of the prerequisites for consolidation (factual and legal commonality of parallel arbitrations as well as efficiency and fairness accomplished through consolidation) was also predetermined by the tribunals' standing on the hierarchical interplay between party autonomy and efficiency.

527. Regarding ***commonality***, the *Corn Products* tribunal insisted that the respondent had to prove that it will present common legal defences against *all* claims at the merits stage.[967] On the contrary, in *Canfor*, the tribunal was satisfied that only *one anticipated* common defence is sufficient.[968]

528. In relation to ***efficiency***, an important preliminary question was whether it is a *relative* or an *absolute* standard. Under the former, adjudication of related claims in the consolidated proceeding must be more efficient compared to separate adjudication (*Corn Products*).[969] Under the latter, consolidation must be *objectively* the most efficient method of dispute resolution in a particular case, even if separate arbitrations would be more efficient for some parties (*Canfor*).[970]

529. In line with such preferences, in *Corn Products*, adopting additional measures to prevent the disclosure of confidential information amongst the co-claimants after consolidation was viewed as more detrimental for efficiency compared to separate proceedings.[971] In opposition to this approach, in *Canfor*, procedural economy as the ultimate and objective purpose of consolidation under NAFTA prevailed. As a result, the individual inefficiencies for the parties (such as, delays and increased costs necessary for adopting preserving confidentiality) were of secondary importance.[972]

530. The preference of procedural economy in *Canfor* was also explained by the regulatory rationale for including a consolidation provision in NAFTA – protecting the member

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[966] See paras 246, 247, 251, 256, 440 *supra*.

[967] See para. 231, 463 *supra*.

[968] See paras 232-234, 463, 467 *supra*.

[969] See para. 489 *supra*.

[970] See paras 241-244, 489 *supra*.

[971] See paras 238, 239, 476, 479 *supra*.

[972] See paras 252, 477 *supra*.

states from procedural harassment *via* multiplication of disputes concerning the same state conduct.[973]

531. Promoting coherency in the application of investment law as a policy consideration (which is relevant for investment arbitration in general) in *Canfor* also had an impact on according less weight to party autonomy.[974]

532. Another factor of efficiency is the stage of the proceedings at which consolidation would be an adequate solution for minimizing the drawbacks of parallel arbitrations. The NAFTA tribunals concurred that the more advanced and desynchronised parallel proceedings are, the less likely it is that consolidation will promote efficiency.[975]

533. ***Fairness*** was also assessed by the tribunals through balancing the risk of disclosing confidential information amongst the claimants and the respondent's risk of being confronted with contradictory awards as the result of consolidation.[976]

534. The approach to the decision-making on fairness of both tribunals overlapped with the reasoning on efficiency. For the *Corn Products* tribunal, disregarding the claimants' concerns on confidentiality would amount to violation of the due process which outweighs the potential unfairness to the respondent should separate tribunals issue inconsistent awards.[977]

535. On the contrary, the *Canfor* tribunal exercised a pro-state approach justified by the right to procedural protection of the NAFTA states against multiplication of proceedings. Procedural economy, thus, carried more weight in the tribunal's reasoning on fairness than confidentiality interests (that can be secured through standard protective measures) which, indeed, complies with the public nature of the NAFTA arbitration.[978]

536. In general, the most important conclusion with respect to the role and approach to the reasoning on consent in consolidation under NAFTA is that NAFTA – contrary to the ICSID Convention – in addition to protection of investments, fulfils also a certain a

[973] See paras 240, 241, 426 *et seq*. *supra*.

[974] See para. 257 *supra*.

[975] See paras 259, 260 *supra*.

[976] See paras 238 *et seq*., 407 *et seq*. *supra*.

[977] See paras 238, 256, 440, 441 *supra*.

[978] See paras 240-242, 510, 511 *supra*.

regulatory function.[979] Thus, the respondent states are entitled under the treaty and the consolidation provision, in particular, to protection against repetitive claims and potential contradictory awards.

537. Given this specific shift in favour of the respondent's interests, factoring consent of the claimants in deciding on consolidation in a particular case (in addition to the pre-dispute consent to NAFTA arbitration) would be at odds with the text and purpose of the NAFTA consolidation provision.

538. It must also be emphasised that a minor role of the claimants' consent in consolidation under NAFTA is unique and possible only due to the respective direct instructions in the applicable procedural rules. Hence, for example, in the absence of the parties' explicit consent, consolidation of the NAFTA proceeding(s) with the related non-NAFTA proceeding(s) under the treaty without an identical provision cannot be ordered by a procedural ruling. Otherwise, consolidation would go beyond the scope of an arbitration agreement governing a non-NAFTA arbitration. For the same reason, the NAFTA approach to consolidation cannot be used by analogy in non-NAFTA arbitrations where, in the absence of clear instructions to the opposite in the applicable treaties,[980] an objection to the joint resolution of claims must be addressed as a matter of jurisdiction.

[979] See paras 426 *et seq*. *supra*.

[980] See paras 400-402 *supra*

3.4 Mass Claims: De-Individualized Treatment of the Claimants Allowed within Procedural Discretion as a Matter of Admissibility

539. *Abaclat* introduced a novel approach to consent in multiparty proceedings designed to cater for the unique characteristics of mass claims, the most significant of which is treating the *mass* element as a matter of *admissibility* instead of jurisdiction, which allowed the Majority to determine that:

(i) The respondent's explicit consent to mass claims is not required since the necessary procedural adaptations can be ordered within procedural discretion of the tribunal, meaning that mass claims are admissible and, as such, are covered by the respondent's general consent under the BIT;[981]

(ii) The claimants can be treated as a group for establishing jurisdiction and for deciding on the admissibility of indirect participation of the claimants through a representative.[982]

540. Based on these two main conclusions from the case overview regarding consent, this section will first outline the conditions for treating a multiparty claim as a mass proceeding and will focus on how they differ from those applied in the earlier discussed multiparty scenarios.

541. Second, it will be analysed whether, in light of the curtailment of the due process rights of the parties that is not foreseen under the BIT, consent to mass claims can be established.

542. Third, it is necessary to look at the group treatment of the claimants for determining jurisdiction from the perspective of the tribunal's competence and jurisdictional requirements under the ICSID Convention.

[981] See paras 289, 290 *supra*.

[982] See paras 289-292 *supra*.

3.4.1 Conditions for Treatment of a Multiparty Proceeding as a Mass Proceeding

543. Whether the investment dispute can be treated as a mass arbitration was decided not under the quantitative (*i.e.*, based on the number of the claimants) but under the qualitative test, whereby mass claims are permitted if individual arbitrations would be cost prohibitive for the claimants with small claims but otherwise fall within the ICSID jurisdiction.[983] The connectivity standard with regard to mass claims is less rigid compared to the 'normal' multiparty proceedings, as explained further in more detail.

3.4.1.1 Qualitative *vs* Quantitative Test for Mass Claims

544. All types of collective proceedings, by definition, are characterised by the multitude of claimants, including the earlier discussed multiparty and consolidation cases, from which mass claims proceedings are no different.[984] However, separating *mass* from other types of collective arbitration is not just a matter of terminology, whereby the numeric test alone could transform a 'mere' multiparty arbitration into 'something else'.[985] Rosenfeld points to the non-numeric test to distinguish mass claims through comparison of *Abaclat* with large-scale reparation programs for victims of an armed conflict:

'There is no exact number of claims, which makes an ordinary procedure a mass claims process. However, the claims must reach such a high number that it would be senseless or even impossible to process these claims in an individualized procedure given the limited resources available'.[986]

545. Obadia compares *Abaclat* mass proceeding with the US class actions:

'[…] mass arbitration is derived from the American concept of class action litigation which is defined as a lawsuit that allows a large number of people with a common interest in a matter to sue or be sued as a group. It is a vehicle generally used when a number of

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[983] See paras 286, 287 *supra*.

[984] Di Brozolo, above n. 4, 127.

[985] Strong, above n. 5, 113; On distinction between mass and multiparty claims in the ICSID practice see: Obadia, above n. 7, 107, 108.

[986] F. Rosenfeld, 'Mass Claims in International Law', 4 *Journal of International Dispute Settlement* (2013) 161.

people have suffered the same or similar injuries, but the injuries being relatively minor, they might not pursue legal redress on their own'.[987]

546. In the context of collective remedy within national legal systems, as defined by the International Bar Association, '[a]n action for collective redress is simply a procedure designed to allow a group of individuals with similar claims to combine their claims in a single action, rather than require each individual to file his or her own lawsuit'.[988]

547. The Majority concurred with the above definitions, observing that '[…] collective proceedings emerged where they constituted the only way to ensure an effective remedy in protection of a substantive right provided by contract or law'.[989] Hence, a high number of claimants is relevant as the unique characteristic of mass claims only in conjunction with small amounts of claims, which makes mass or class proceeding the only available remedy for claimants.

548. In order to illustrate the qualitative threshold for mass claims, it would be useful to compare this aspect of *Abaclat* with two other 'Italian bondholder' arbitrations. In *Ambiente* with initially 119 claimants, the tribunal compared this case with *Abaclat* based on the above criteria for the differentiation between mass and multiparty proceedings and concluded that *Ambiente* is a 'normal' multiparty case:[990]

'[…] the dimension of the Claimants in the case to be decided by the present Tribunal can in no way be compared to the *Abaclat* case, being merely one thousandth of the latter. Especially insofar as the use of the term "mass claim" or "mass proceedings" might convey the connotation that already the sheer number of claimants in itself calls for modifications or adaptations of the procedural arrangements to guarantee the manageability or fairness of the case, the Tribunal strongly insists that it does not see any such implications arising from the number of initially 119 and now 90 Claimants as such'.[991]

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[987] Obadia, above n. 7, 105.

[988] IBA Legal Practice Division Guidelines for Recognising and Enforcing Foreign Judgments for Collective Redress (2008) para. 2; Lamm, above n. 2, 115.

[989] *Abaclat*, above n. 38, para. 484.

[990] S. Strong, 'Ambiente Ufficio SpA and others v Argentine Republic: Heir of Abaclat? Mass and Multiparty Proceedings', 29 *ICSID Review – Foreign Investment Law Journal* (2014) 150; Lamm, above n. 2, 116.

[991] *Ambiente*, above n. 221, para. 120.

549. In *Alemanni* with 183 claimants,[992] the tribunal found that discussing terminology would be superfluous and simply approached the multiparty aspect as the question of the scope of the respondent's consent:

'The present Tribunal sees no advantage whatsoever in entering into a battle of terminology. None of the terms that have been bandied about in argument is to be found in the two treaties that govern this Arbitration or in the applicable procedural rules, and none of them has a recognized and defined technical meaning in international law. […] In a BIT case, therefore, where the consent of the respondent State is in issue, the question for consideration remains simply: on the proper interpretation of the BIT, has the respondent, or has it not, given a consent which is wide enough in scope to cover the proceedings brought (as in this case) by the multiple group of co-claimants?'[993]

550. Thus, in two of *Abaclat's* 'sister cases', a high number of the claimants alone did not change the nature of arbitration, as long as it did not require modification of procedure.[994] Rather, multiparty element was seen as a jurisdictional question of the respondent's consent, which is a standard practice in 'normal' multiparty cases whereby general consent to ICSID arbitration encompasses consent to multi-party claims.[995] Insofar as the multitude of claimants alone is concerned, *Abaclat* falls within this category of cases in that mass element was not seen by the Majority as requiring a different standard for the respondent's consent in comparison to 'normal' multiparty cases. Obadia comments to this effect:

'[…] the number of claimants is irrelevant to the pivotal question of whether the tribunal can hear the claims brought on a joint or collective basis. The issue arises as soon as there is an unrelated second claimant. Therefore, this 'mass' level does not need to be clearly defined'.[996]

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[992] *Alemanni*, above n. 227, para. 31.

[993] Ibid., paras 267, 269.

[994] Lamm contrasted *Abaclat* with *Alemanni* and *Ambiente* pointing to the lack of precise definition of mass claims that would distinguish those from multiparty proceedings in the two latter cases: 'By contrast, the *Ambiente* and *Alemanni* tribunals considered that the significantly lower number of claimants before them did not warrant characterizing their claims as mass claims, regardless of where one might draw the line between mass claims and 'ordinary' multi-party claims'. Above n. 2, 116.

[995] Di Brozolo, above n. 4, 131; Lamm, above n. 2, 116, 118; Obadia, above n. 7, 108, 109.

[996] Obadia, ibid., 107.

551. Rather, the mass element necessitates de-individualized treatment of claimants and their claims as an adjustment of procedure that would enable processing such multitude of claims. Indeed, mass proceedings – as opposed to multiparty cases – entail inevitable procedural adaptations after a critical number of claimants is reached and it becomes '[…] difficult to imagine a proceeding where each individual claimant would have to be consulted for the appointment of the arbitrators, or the procedural strategic choices, or the review of the draft pleadings'.[997]

552. Rosenfeld mentions this aspect suggesting applying a 'functional analysis', given the lack of '[…] uniform understanding of what constitutes an international mass claims process':[998]

'Three elements are considered as being characteristic of such mass claims processes. These are a streamlined procedure […], which allows processing a high number of claims arising from a violation of international law […] that raise common factual and/or legal questions […]'.

553. In mass proceedings, such a 'streamlined procedure' is the most problematic aspect in terms of maintaining the due process standard because given '[…] a lack of resources, it is often senseless or even impossible to process these claims in an individualized procedure applying stringent standards of due process'.[999]

554. Although the Majority rejected policy-related objections of the respondent as irrelevant,[1000] the limitations of due process were justified by a policy consideration, which is 'raison d'être' of all collective proceedings that '[…] the absence of such mechanism would *de facto* have resulted in depriving the claimants of their substantive rights due to the lack of appropriate mechanism'.[1001]

555. Indeed, compared to other types of multiparty cases, access to justice as the factor in deciding whether to allow a mass proceeding at the expense of the parties' individual procedural rights has more merit, as commented by Di Brozolo:

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[997] Ibid., 106.

[998] Rosenfeld, above n. 986, 160.

[999] Ibid., 159; see also Di Brozolo, above n. 4, 137; Obadia, above n. 7, 107.

[1000] *Abaclat*, above n. 38, 548-550.

[1001] Ibid., 484.

'[…] the argument of access to justice is likely to be more compelling in situations such as the Argentine bondholder cases where, given the amounts of the individual claims, most of the claimants would not have been in a position to bring claims on their own, than in cases where there the claimants are sophisticated investors and the amounts at stake are high'.[1002]

556. This approach is coherent with the view that the lack of a collective mechanism would infringe fair and equitable treatment and the right to effective remedy under assumption that dispute resolution provisions, given their importance, fall within the ambit of substantive guarantees under investment treaties.[1003]

557. At the same time, linking mass claims as a special type of collective remedy to a small amount of claims, can be in conflict with the objective requirement that 'the amount of capital committed' should be 'relatively substantial' in order to qualify as an investment under the ICSID Convention according to '*Salini* criteria'.[1004] The Majority recognised 'the value'[1005] of the *Salini* test in general, observing that it can be 'one approach' to answer one of the jurisdictional questions:

'Under Article 25 ICSID Convention, the relevant question is whether the bonds and the security entitlements therein were generated by a contribution that is in line with the spirit and aim of Article 25 ICSID Convention'.[1006]

558. Yet, the Majority refused to follow the *Salini* test because not giving procedural protection to the claimants for failing to meet the *Salini* criteria '[…] would be contradictory to the ICSID Convention's aim, which is to encourage private investment while giving the Parties the tools to further define what kind of investment they want to promote'.[1007] The Majority was also influenced by the fact that '[…] these criteria were never included in the ICSID Convention, while being controversial having been applied

[1002] Di Brozolo, above n. 4, 129.

[1003] Strong, above n. 5, 278.

[1004] *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, para. 43, referenced in the discussion of '*Salini* criteria' for protected investment under the ICSID Convention in: R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2012) 66 *et seq*.; Schreuer, above n. 2, 128 *et seq*.

[1005] J. Beess und Chrostin, 'Sovereign Debt Restructuring and Mass Claims Arbitration before ICSID, the *Abaclat* Case' 53 *Harvard International Law Journal* (2012) 510.

[1006] *Abaclat*, above n. 38, para. 362.

[1007] Ibid., para. 364.

by tribunals in varying manners and degrees […]'.[1008] The *Salini* test should not exempt certain investors from the treaty protection and, thus, '[…] create a limit, which the Convention itself nor the Contracting Parties to a specific BIT intended to create'.[1009]

559. Although the *Salini* test is not consistently upheld by ICSID tribunals,[1010] it can be viewed as one of the 'cumulative mandatory requirements' for the contribution to be recognised as a qualified investment.[1011] Therefore, in principle, the risk of failure under the *Salini* criteria is a substantial weakness of mass proceedings compared to other types of collective redress, if a tribunal decides to adopt the *Salini* test and reject the policy argument of access to justice.

560. States that are not willing to confer treaty protection to minor investments may prevent the interpretation of the scope of consent in favour of mass proceedings '[…] by including in their investment treaties specific limitations, ie by limiting their offers, eg through minimum thresholds on the investment's value'.[1012]

561. On the other hand, should states follow this 'advice' to protect themselves from mass claims, such a reservation would exempt investors with small contributions from the treaty protection even if their claims would not be mass in nature. Hence, what could be seen as a pro-investor public policy consideration in favour of small claims promoted in *Abaclat*, may prove to have the opposite long-term effect, must be taken into account should mass claims be systemically accepted in investor-state arbitration.

3.4.1.2 Homogeneity of the Claims as the Test of Connectivity in Mass Proceedings

562. The test of connectivity as the prerequisite for joint treatment of claims in *Abaclat* differs from the practice developed by previous multiparty tribunals, both in terms of its substance and function. First, the sufficient degree of commonality was set lower than in previous multiparty cases. Second, it was applied as one of the 'preconditions for group

[1008] Ibid.

[1009] Ibid.

[1010] Dolzer, above n. 1004, 74-76.

[1011] Ibid., 66.

[1012] Steingruber, 'Abaclat and Others v Argentine Republic: Consent in Large-scale Arbitration Proceedings', above n. 6, 246.

treatment'[1013] and not to decide whether claims can be heard together in a single arbitration.

563. Contrary to multiparty disputes *ab initio*, 'mass arbitrations involve unrelated claimants with distinct investments'.[1014] The Majority assessed commonality based on the *homogeneity test* understood as claimants having '[…] homogeneous rights of compensation for a homogeneous damage caused to them by potential homogeneous breaches by Argentina of homogeneous obligations provided for in the BIT'.[1015] Thus, the common elements that the Majority viewed as sufficient to satisfy the test were the *same state measures* that were allegedly in breach of the *same provisions of the same BIT*.[1016]

564. One can argue, as it was formulated in the Dissent, that '[…] homogeneity is in the eyes of the beholder' and it is always possible '[…] to reach a sufficient level of homogeneity, *i.e.* common denominators, by climbing up the ladder of abstraction and/or by weeding out all the specificities of the claims that appear inconvenient'.[1017]

565. Along the same lines, Obadia points to the ambiguous interpretations of the commonality test in three 'Italian bondholder' cases:

> 'Given the disparities in the different approaches, it is difficult to draw clear conclusions on the question of whether a tribunal can hear multiple claims in a single proceeding when the claimants are unrelated, when there is no unity of investment and when the respondent objects to this setting'.[1018]

566. It should be noted in this regard that in previous multiparty cases, investment tribunals established certain criteria and limitations for commonality test, which do provide for some guidance in *Abaclat*-like scenarios where 'claimants are unrelated, when there is no

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[1013] Lamm, above n. 2, 121; Di Brozolo, above n. 4, 133; *Abaclat*, above n. 38, paras 539, 540.

[1014] Obadia, above n. 7, 107.

[1015] *Abaclat*, above n. 38, para. 541.

[1016] The Majority expanded on the homogeneity test as follows: 'The rights deriving from Claimants' investment and Argentina's obligations to protect these rights are the same with regard to all Claimants to the extent that they derive from the same BIT and the same provisions. […] The events leading to the alleged disregard of such rights and obligations, i.e. to the breach by Argentina of the relevant provisions, are the same towards all Claimants. […] The legislation and regulations promulgated and implemented by Argengina, together with the implementation of its Exchange Offer 2005, affected all Claimants in the same way'. Ibid., para. 543; Lamm, above n. 2, 121.

[1017] *Abaclat*, above n. 38, para. 142.

[1018] Obadia, above n. 7, 109.

unity of investment and when the respondent objects to this setting' and which *Abaclat* did not follow. For example, from the perspective of the link between the claimants whose collective claim was authorised to proceed as such, investors were connected[1019] through some sort of contractual relationship underlying the same investment or adherence to the same corporate structure.

567. Importantly, from the temporal perspective, in the earlier cases, such a link existed before and irrespective of the dispute which speaks in favour of the parties' initial intent to resolve potential disputes related to their investment(s) within a single arbitration. In contrast, the Majority determined homogeneity based on the dispute-related criteria, so that the investments were merely of the same nature (sovereign bonds) but not a part of the same investment operation. Connection through a single contractual relationship was seen by the Majority as irrelevant in the context of treaty claims:[1020]

'[…] the identity or homogeneity requirement applies to the investment and the rights and obligations deriving therefrom based on the BIT and not to any potential contractual claims. In other words, in the present case, it is irrelevant whether Claimants have or do not have homogeneous contractual rights to repayment by Argentina of the amount paid for the purchase of the security entitlements'.[1021]

568. Moreover, where the claimants were unrelated and, like in *Abaclat*, the only common elements between them were the same state measure and the same treaty, it satisfied the commonality requirement only in the NAFTA cases.[1022] In these cases, however, arbitration rules permitted consolidation without parties' consent and consolidation was requested by the respondent itself. Hence, in contrast to *Abaclat*, the respondent's consent was established according to the most rigid standard (an implied pre-dispute consent corroborated with an explicit post-dispute consent). A lower degree of connection required for consolidation is justified given this substantial difference.

569. Although in ICSID multiparty cases tribunals indeed allowed (and even invited the parties) to pursue related claims jointly (*de facto* consolidation) under a 'looser'

[1019] Ibid., 107, 108.

[1020] Di Brozolo, above n. 4, 133.

[1021] *Abaclat*, above n. 38, paras 541, 542.

[1022] See para. 401 *supra*.

commonality standard, it was only possible where all parties agreed thereto.[1023] However, in *Abaclat*, the respondent's post-dispute consent was not 'available' for the Majority to 'loosen' the threshold of commonality.

570. Yet, the homogeneity test in *Abaclat* for a mass procedure to be 'even remotely possible' when compared to other types of collective proceedings was characterised by Strong as 'quite high'[1024] and even beneficial for the host state. Given that the '[…] respondent is presented with what is effectively a single substantive claim, respondents might see certain tactical benefits to consenting to large-scale arbitration'.[1025] This observation is in line with the Majority's position that defending itself against one aggregate claim is more fair and efficient for the respondent than the alternative of dealing with thousands of separate claims.[1026]

571. It should be noted, though, that this assumption was factored in *designing* procedural rules permitting consolidation in the absence of consent (*e.g.* in NAFTA[1027]), in which the parties agreed to in their arbitration agreement. This difference was crucial for the interpretation of consent after the dispute has arisen but was not relevant in *Abaclat*.

572. The issue of unrelated claimants was similarly tackled in *Ambiente*,[1028] although the tribunal was of the view that it is not '[…] necessary or useful to elaborate on the question *in abstracto* whether it is required that the claims be "homogeneous" or whether it suffices that they are "sufficiently comparable", etc. and to try to devise a general standard or threshold in that regard'.[1029] Without entering into the reasoning on terminology, the tribunal established that the same treaty and the same state measure prove to be a sufficient connection between the claimants:

'[…] Claimants are correct in arguing that the necessary link among them exists in terms of the treaty claim they jointly submit in the present arbitration. Thus, they are right to

[1023] See paras 96 *et seq. supra*.

[1024] Strong, above n. 5, 83, 342.

[1025] Ibid., 342. Footnote omitted.

[1026] See para. 295 *supra*.

[1027] See para. 240 *supra*.

[1028] Di Brozolo, above n. 4, 133; Strong, above n. 990, 150, 151.

[1029] *Ambiente*, above n. 221, para. 154.

point out that they complain about the same illegality which the Respondent is said to have committed against them all'.[1030]

573. A 'single claim'[1031] approach in *Abaclat* as the test for homogeneity can be contrasted with a 'single dispute' as a factor of connectivity introduced in *Alemanni*. The tribunal pointed to the lack of a link between the claimants and their investments, which distinguishes the case from previous multiparty cases in terms of the standard of connectivity and creates an impediment for establishing connectivity in accordance with the standard ICSID practice.[1032] In such circumstances, '[…] an element that more satisfactorily defines the link that must exist between a group of claimants and between their claims, in the absence of consent by the respondent to the hearing of their claims together […] lies in the notion of a 'dispute'.[1033] However, the question of existence of one dispute can be answered affirmatively if '[…] the actual rights of all of the Claimants […] and the actual effect […] on those rights […] of Argentina's conduct were sufficiently the same […]'.[1034]

574. The ambiguity of this formulation raises doubts as to whether a '[…] 'dispute' criterion is of itself capable of overcoming all the questions that can arise when it comes to assessing the nature and the intensity of the link between the different claims that is required to allow their aggregation in a single proceeding'.[1035] In contrast, a higher

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[1030] Ibid., para. 161.

[1031] Strong, above n. 5, 342.

[1032] The *Alemanni* tribunal summarised the problematic aspects of connectivity in the context of 'Italian bondholder' disputes compared to the earlier line of multiparty arbitrations: 'The Tribunal has already indicated that it is perfectly possible, in its opinion, for 'a dispute' to have more than one party on the claimant's side. But the interest represented on each side of the dispute has to be in all essential respects identical for all of those involved on that side of the dispute. In most cases hitherto, that question has virtually answered itself. One reason is that there has normally been a single investment, even though more than one person or entity may have participated in that investment's making or in its management. Another reason is that there has in most cases been some form of pre-arbitration discussion or negotiation with the respondent party, which has served the purpose of establishing with greater or lesser precision what the 'dispute' is, and therefore who are party to it. The problem in the present case is that neither of those factors is present: on the one hand, it is in contention between the Parties both whether the individual Claimants should be regarded as investors in their own right or as participants in an original investment or investments in Argentina, and also whether those rights of the individual Claimants that are relevant to this Arbitration, are effectively the same irrespective of which particular investment they bought into and of the terms of their individual purchase;'. Above n. 227, para. 292.

[1033] Ibid., para. 292.

[1034] Ibid., para. 293.

[1035] Di Brozolo, above n. 4, 134. Di Brozolo outlines the potential problematic questions that have to be answered in order to establish whether the 'dispute' criterion is met:

'[…] is it necessary that all the claims arise from the same allegedly illegal measure of the host State? This in turn leads to other questions. For example, in what sense can a measure affecting one investor be considered the 'same one' as a measure that affects another investor? Does it have to be exactly the same measure? Or can measures sharing some

standard of *connectivity* developed in the previous multiparty arbitrations is a more efficient test, insofar as it renders a definite answer to the question whether a sufficient link between the claims exists. The *Alemanni* tribunal itself confirmed this proposition by commenting the respective cases: 'In most cases hitherto, that question has virtually answered itself'.[1036]

575. As far as the functional dimension of the homogeneity test is concerned, the Majority was criticized in the Dissent for using the commonality test not as the criterion for aggregation (which is a common practice in collective proceedings) but rather for the group treatment of claims:

'[…] crisis [in Argentina] constitutes "the same fact pattern" […] which is the criterion used for resorting to "aggregate proceedings" […]. But as the award itself states, this aggregation takes place only at the pre-trial, or pre-judicial phase. By contrast, during the judicial phase, the claims are treated individually. In other words, the "level of homogeneity" resulting from the circumstance that the claims arose "out of the same fact pattern", is sufficient for […] rationalizing their funneling towards the tribunals that will ultimately examine them as individual claims; but not sufficient for […] "group examination" […] as if they are one claim (as in a class action or a representative proceedings) […]'.[1037]

576. Such an innovative application of the commonality test was criticized as an *ultra vires* infringement of the respondent's due process right to defend itself against every aspect of each claim, given that the claims were not identical even though they arose out of the same facts.[1038] Indeed, in previous multiparty cases, neither the parties nor the tribunals suggested that connectivity can justify not only aggregation of claims but also disregard of their individual aspects. On the contrary, the tribunals emphasised that each claim must be decided separately based on its individual legal and factual background.[1039] Moreover,

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common features qualify as well? For example, expropriatory measures with similar characteristics (for example targeting different assets, but of the same kind, say two or more oil concessions) arising from distinct, but in some way similar, administrative measures of the host State. Another example could be measures of the same type, but enacted at different times, such as a reiteration or an extension of the same law, or measures that target the same investment'.

[1036] *Alemanni*, above n. 227, 292.

[1037] *Abaclat*, above n. 542, para. 144.

[1038] Ibid., paras 232-244.

[1039] See paras 186-188 *supra*.

as discussed further, under procedural rules governing other types of mass or class arbitration, claims must be adjudicated individually at some point in the proceeding.

577. A relatively low test of commonality raises questions regarding different scenarios of potential future mass claims based on the same state measure. For example, as Van Houtte observes, a country-wide economic crisis may affect investors from different countries and result in a mass claim by thousands of investors initiated under multiple BITs.[1040] Although multiplicity of BITs was not an issue in most of the previously discussed disputes,[1041] in this case, the tribunal would probably have to deal with dozens, if not hundreds of treaties. Establishing consent to mass claims under each treaty would be hardly manageable, especially, if the respondent raises an objection against multiplicity and the only common element between the claimants will be the state measure.

578. Furthermore, multiple BITs constitute 'different written consents', which theoretically allows the respondent to appoint different arbitrators for each claim, thus rejecting the joinder of claims.[1042] Hence, at least a common BIT should be viewed as the mandatory pre-condition for admissibility of *Abaclat*-like mass claims. In general, *Abaclat* should not be perceived as a precedent for future similar cases, given that the test of connectivity can fail due to subtle difference in the underlying legal and factual background. As the result, group treatment as a *sine qua non* condition for manageability of mass claims will not be possible.[1043]

[1040] Van Houtte, above n. 64, 232: 'Putting aside other concerns such as jurisdiction, it may well be that in purely practical and logistical terms, the *Abaclat* proceeding will be workable because of the high level of coordination undertaken by counsel and TFA, and their expansive powers of attorney. But what if the scenario in future large-scale litigation before ICSID were different – what if, for example, there were multiple counsel representing multiple groups of claimants in one proceeding? What if cooperation between counsel was non-existent or broke down after a determination on jurisdiction had been made? What if the claimants had common legal representation initially but splinter groups were formed with different counsel representing each group? How should an ICSID tribunal deal with such scenarios, if indeed it even has the capacity to? Other questions of a practical *and* legal nature also arise: could there be a situation whereby claimants of multiple nationalities could claim in the same proceeding? If this meant that the arbitrators had to examine multiple BITs in a single proceeding, could this be accommodated?' Footnote omitted.

[1041] See paras 168 *et seq. supra*.

[1042] Obadia, above n. 7, 110.

[1043] Lamm, above n. 2, 122.

3.4.2 Novel Approach to Interpreting Consent to Mass Proceedings: Group Examination as a Matter of Procedural Discretion in the Absence of Specialized Rules

579. Although the admissibility approach to 'mass' aspect in *Abaclat* was characterised as 'unorthodox as this is not how the concepts of "jurisdiction" and "admissibility" are usually distinguished',[1044] it simplified the task of establishing jurisdiction and consent both in relation to the respondent and the claimants. From the perspective of the respondent's consent, the Majority arrived at the conclusion that the de-individualized treatment of mass claims is admissible under the ICSID Convention, as it requires *only* procedural adaptations for which specific consent of the respondent is not needed.[1045] From the claimants' perspective, the Majority established jurisdiction over investors as a group instead of individual examination in relation to each claimant.[1046]

580. Furthermore, characterisation of mass claims as a 'hybrid' type of arbitration in the admissibility allowed the Majority to establish consent as if it was a bi-partite arbitration:

> 'The distinction made by the Majority between '(*aggregated*) Claimants' consent' and '*individual* Claimant's consent' – ie consent of 'each Claimant' – permitted the Majority at that stage to deal – to a certain extent – with consent as if it was a bilateral proceeding'.[1047]

581. This approach is novel compared to establishing consent in other types of class or mass proceedings, on the one hand, and in the context of the notions of jurisdiction and admissibility under the ICSID Convention, on the other. The most problematic consequence of adopting the admissibility approach is the group examination of claims. It '[…] can at best deliver rough or approximate justice [and] may satisfy the due process requirements of an emergency mass claims program or an administrative compensation commission' but '[…] definitely falls well below the stringent due process standard of

[1044] Heiskanen, above n. 1, 616.

[1045] See paras 289-292 *supra*.

[1046] See para. 539 *supra*.

[1047] Steingruber, 'Abaclat and Others v Argentine Republic: Consent in Large-scale Arbitration Proceedings', above n. 6, 242.

judicial or arbitral proceedings'.[1048] Remarkably, a 'compression of due process rights of the parties'[1049] affects both the claimants and the respondent.

582. For this reason, other comparable types of collective arbitration are conducted under specialized rules that provide for certain guarantees to mitigate the implications for due process. It is useful to outline the respective mechanisms applied in mass claims processes and in the US class arbitration, which are the closest analogies to *Abaclat* as far as de-individualization of claims is concerned. It will be demonstrated that, contrary to the Majority's reasoning, the lack of such rules in the ICSID legal framework must be factored in the reasoning on consent to mass claims.

583. Aside from the consent-related issues, the admissibility approach is problematic from the perspective of the earlier described interrelation between the concepts of admissibility and jurisdiction in investment arbitration.[1050] In particular, the tribunal must first establish its competence (which includes jurisdiction) to resolve a specific dispute in order to have the authority to decide on admissibility.[1051]

584. Furthermore, obstacles for admissibility are considered temporary in that the claim can be rectified and submitted a new.[1052] However, the test for admissibility adopted in *Abaclat* – whether procedural modifications are within the power of an ICSID tribunal – does not leave the room for such rectification after potential failure to meet this test: The decision on (non)admissibility would have a *jurisdictional* consequence, that claimants cannot re-submit their claims to the same tribunal in the form of a mass proceeding, as the only available mechanism for pursuit of their treaty claims.

585. Another deviation from the customary interpretation of admissibility is that '[t]ribunals will in principle refrain from acting *proprio motu*' in deciding the issues of admissibility (in contrast to the issues of jurisdiction[1053]) and objections on admissibility would be normally raised by a respondent.[1054] On the contrary, the Majority preferred to approach

[1048] *Abaclat*, above n. 542, paras 238, 239.

[1049] Di Brozolo, above n. 4, 137.

[1050] See paras 57 et *seq. supra*.

[1051] Steingruber, above n. 72, 681.

[1052] See para. 331 *supra*.

[1053] Waibel, above n. 65, 1275, 1276.

[1054] Steingruber, above n. 72, 681, 682.

consent-related issues as matters of admissibility instead of jurisdiction upon its own initiative.

586. Escaping the task of stipulating jurisdiction can be viewed not as 'filling a gap' but as a violation of the 'fundamental rule of procedure' and, thus, as the ground for annulment under Article 52(d) of the ICSID Convention:

'On its own analysis, in devising rules to fill the gaps, the Tribunal will need to determine whether and to what extent each specific procedure genuinely fills a gap and, therefore, ensure that the procedure does not contravene any provision of the Convention or Rules. The importance of that determination is evident, as a violation of a 'fundamental rule of procedure' provides a ground for annulment under Article 52(d) of the Convention'.[1055]

587. In general, '[a] failure by an ICSID tribunal to exercise its jurisdiction may be regarded as a manifest excess of the tribunal's powers, and the award could be susceptible to annulment under Article 52(1)(b) of the ICSID Convention'.[1056]

588. Classifying the scope of jurisdiction as admissibility can be an impediment for challenge of a tribunal's wrongful decisions but will not safeguard it from annulment. Waibel comments on *Abaclat* in this regard as follows:

'Whereas decisions by arbitral tribunals on jurisdiction are reviewable in principle either by national courts in non-ICSID arbitrations or by ICSID annulment committees in ICSID arbitrations, determinations of admissibility, cannot, as a general rule, be reviewed. For example, given that the Majority in *Abaclat* found that the issue of mass claims concerned the admissibility of claims advanced by the holder of security entitlements rather than its jurisdiction, it is difficult to see how an eventual annulment committee in that case could annul the award on the ground of an erroneous determination on admissibility. However, annulment committees have the option of reclassifying an issue that the tribunal considered concerned admissibility as one affecting the tribunal's jurisdiction, and provided the requirements under the Convention for annulment are met, annul the award on that basis'.[1057]

[1055] Donovan, above n. 658, 262. Footnotes omitted.

[1056] Schreuer, above n. 2, 947.

[1057] Waibel, above n. 65, 1277.

3.4.3 The Respondent's Consent: Deindividualized Treatment of Claims Permitted under Applicable Arbitration Rules as the Prerequisite for Admissibility

589. According to the Majority, the mass aspect does not change the long-established practice of multiparty tribunals, according to which the respondent's general consent to ICSID arbitration includes, in principle, consent to multiparty arbitration. Yet, as explained further, the modifications of procedure required to accommodate a mass aspect are of such magnitude that they cannot be simply implied into the scope of consent and, for that reason, must be explicitly mentioned in the applicable rules.

590. In the Dissent, it was stated that '[…] the rule of "secondary consent" was consistently upheld in multi-party arbitration in that [it] cannot be simply implied'.[1058] However, as discussed earlier, tribunals elaborated a more nuanced approach to the requirement of secondary consent, so that different principles were applied depending on the type of consent (general or specific).[1059] The need for secondary consent – at least in an explicit form – was not confirmed by tribunals both in multiparty and consolidation cases. Steingruber noted in this regard that *Abaclat* is one of multiparty investment arbitrations where – in contrast with multiparty commercial arbitration – secondary consent is not necessary '[…] when multiple investors decide to claim jointly [which] is also a consequence of what has been considered from the very beginning as 'arbitration without privity'.[1060]

591. The Majority's approach to mass element as a matter of admissibility instead of secondary consent is, rather, comparable to the theory of implied consent[1061] insofar as, according to the Majority's logic, admissibility of mass claims under the ICSID Convention implies that the respondent's consent covers such claims.[1062]

592. In deciding whether implied consent to mass claims is present, one must account for the special procedure that substantially limits the parties' procedural rights but is necessary

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[1058] *Abalcat*, above n. 542, paras 173-175.

[1059] See paras 82 *et seq*., 133 *et seq. supra*.

[1060] Steingruber, 'Abaclat and Others v Argentine Republic: Consent in Large-scale Arbitration Proceedings', above n. 6, 245. Footnote omitted.

[1061] See paras 123 *et seq. supra*.

[1062] *Abaclat*, above n. 38, para. 491; See paras 279, 280 *supra*.

to cater for the aspects of mass claims that distinguish them from the 'normal' multiparty proceedings: deindividualized treatment of claims and non-participation of claimants in the proceeding.[1063] To the extent that the rules and general principles developed in previous multiparty cases did not feature these aspects, they are not apt as points of reference that can be used as a guidance for interpreting consent in mass proceedings.

593. The Majority's approach should also be assessed through the prism of balancing the two conflicting values as a factor in interpreting the scope of an arbitration agreement with regard to multiparty claims: providing effective remedy for investors and due process rights of the parties (party autonomy). In principle, factoring efficiency in determination of consent can be criticized for diminishing the importance of the consensual nature of arbitration.[1064] However, as discussed earlier, various policy considerations shift the balance towards giving more weight to efficiency: Aggregation of claims promotes consistency in the application of substantive treaty norms and, in case of NAFTA, mandatory consolidation is also a safeguard for states against proliferation of identical claims as a *quid pro quo* for protection of foreign investments under the treaty.[1065]

594. Although avoidance of inconsistent awards was mentioned as an argument in favour of *Abaclat*-like mass arbitrations by contrasting them with the *CME/Lauder* conflicting awards,[1066] this consideration is not of practical relevance in *Abaclat*. Rather, in balancing the interests of the parties, the Majority promoted access to justice for the claimants at the expense of the respondent's right to defend itself against each claim individually.[1067] To this effect, *Abaclat* has more similarities with the US class arbitration which seeks '[…] more than mere efficiency goals […]' and is premised on two public policy considerations:'[…] whether and to what extent the benefits of the group proceeding inure to society as a whole' and whether class actions create '[…] a financial disincentive for corporations to engage in risky or socially unacceptable behavior'.[1068] To draw the analogy, availability of mass claims in investment arbitration could be seen as an

[1063] Di Brozolo, above n. 4, 136; Donovan, above n. 658, 264, 265; Van Houtte, above n. 64, 232.

[1064] Strong, above n. 5, 178, 179.

[1065] See paras 240-243, 410 *supra.*

[1066] Strong, above n. 5, 274, 275.

[1067] See paras 287, 288, 292 *supra*.

[1068] Strong, above n. 5, 137-139.

extension of remedies available for investors, in response to the state's hostile conduct and as a deterrent factor against anti-investor state policy.

595. In the inter-state mass claims programs, efficiency and fairness have to be balanced in a similar way:

'Striking the right balance between the interests of the individual and the interests of the claimant community as a whole in the different areas of programme implementation represents the main challenge for policy makers and programme implementers striving for a fair and efficient process'.[1069]

596. The lack of an alternative forum as a policy argument for permitting mass claims under the rules without provisions on mass arbitration, was seen as 'a reasoning-by-necessity argument' by analogy with American class arbitration.[1070] This argument can be linked to the notion of 'regulatory litigation' as a 'legal remedy or the settlement equivalent in order to influence future, risk-producing behaviors' which is 'structured either by a party or by the judge with the intent of altering future behavior'.[1071] In particular, Strong observed that '[…] *Abaclat* has brought regulatory litigation techniques into the world of investment arbitration',[1072] which is a positive development that extends treaty protection to mass claims as a remedy under international public law.[1073]

[1069] N. Wühler and H. Niebergall (*eds*), *Property Restitution and Compensation: Practices and Experiences of Claims Programmes* (2008) 2, available at: https://publications.iom.int/system/files/pdf/property_restitution_compensation.pdf (last visited 23 December 2021).

[1070] Nakajima, above n. 6, 220, 221: 'Problems arise, however, when the arbitration rules are reticent as to whether class or mass proceedings should be allowed. Strong surveyed institutional arbitration rules and concluded that most of them – as in the case of ICSID and UNCITRAL arbitration rules – are silent in this regard. When this 'silence' is interpreted, therefore, justifications other than the consent of the parties need to be explored. Otherwise, the rejection of a mass arbitral proceedings may result.

A relatively common rationale that can be found in US legal discourse is probably a reasoning-by-necessity argument for class arbitration. In *Keating v Superior Court*, in which the arbitration clauses in the standardised contracts between the franchisor of a convenience food store and the franchised operators provide for arbitration on an individual basis, the Supreme Court of California remanded the case to the trial court and ordered it to compare the advantages and disadvantages of class arbitration and its alternatives, thereby opening the door for class arbitration when a gross unfairness would result from the denial of it'. Footnotes omitted.

[1071] P. Luff, 'Risk Regulation and Regulatory Litigation', 73 *Rutgers University Law Review* (2011) 113, in Nakajima, ibid., 221, 222.

[1072] S. Strong, 'Mass Procedures as a Form of "Regulatory Arbitration" – *Abaclat v. Argentine Republic* and the International Investment Regime', 38 *Journal of Corporation Law* (2013) 263.

[1073] Strong, ibid., 321: '[…] although issues relating to novelty and silence create a number of significant concerns under the third prong of the test for regulatory litigation and arbitration, *Abaclat* appears to fulfill the necessary requirements. This determination is based on, among other things, the vital importance of the right to an effective dispute resolution mechanism in the investment context and the virtual inability of claimants to seek recovery through other means. The

597. However, aside from the limited value of the concepts originating in domestic litigation and private arbitration,[1074] stretching the notions of regulatory litigation to ICSID mass proceedings seems to be far-fetched insofar as access to justice is the only argument in favour of permitting deindividualized arbitration. As long as this argument is not corroborated with the provisions permitting mass claims, which forms a part of an arbitration agreement (as elaborated further[1075]), it is not sufficient for extending the scope of consent to mass claims.

598. Thus, as long as group examination is the main aspect that distinguishes *Abaclat* from other types of multiparty investment cases, comparison with the 'normal' multiparty arbitration in the domain of investor-state arbitration is of limited value for evaluating the Majority's approach to the respondent's consent. Rather, for this purpose, it would be more useful to focus on whether the limitations on due process rights and party autonomy as the result of group treatment can be justified by the need to secure access to justice for investors within the ICSID legal framework.

599. Although *Abaclat* was referred to as a new *sui generis* type of collective arbitration and the only form of mass arbitration that currently exists,[1076] it can be compared to the US class arbitration[1077] and mass claims processes in the form of international mass claims tribunals or commissions.[1078] By means of comparative analysis, it is appropriate to look at how the procedural limitations are regulated in these two domains that will allow to ascertain whether they can be viewed as falling within the ambit of admissibility (or procedural discretion of the tribunal)even in the absence of specialized rules as suggested by the Majority.

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conclusion is further bolstered by the rapid increase over the last ten years in the number and diversity of mechanisms for collective redress in judicial and arbitral fora around the world. Given these developments, it is difficult to argue that a similar mechanism could not have been expected to arise in the investment arena. Indeed, the fact that class, mass, and collective redress has become so prevalent in such a short amount of time strongly suggests that society is currently undergoing something of a quantum shift with respect to the type of legal injuries that are being experienced domestically and internationally. As the types of harm evolve, so, too, must the legal responses, both as a matter of public and private law'. Nakajima, above n. 6, 221, 222. Footnotes omitted.

[1074] See paras 352 *et seq. supra*.

[1075] See paras 601 *et seq. infra*.

[1076] Strong, above n. 5, 84, 262.

[1077] On *Abaclat* as an example of class-type arbitration being spread outside the U.S. see S. Strong, 'From Class to Collective: The De-Americanization of Class Arbitration', 26 *Arbitration International* (2010) 494, 495; Donovan, above n. 658, 262; Steingruber, 'Abaclat and Others v Argentine Republic: Consent in Large-scale Arbitration Proceedings', above n. 6, 239, 240.

[1078] Donovan, above n. 658, 264; 231, Van Houtte, above n. 64, 232; Steingruber, ibid., 238, 239.

600. In applying a comparative method, it should be accounted for '[…] different way in which consent operates in commercial and in investment arbitration'[1079] and in inter-state mass claims processes[1080] in that the decision on jurisdiction of an ICSID tribunal is a question to be answered on the basis of international law and '[…] having regard to the specific features of investor-State arbitration'.[1081]

3.4.3.1 Specialized Rules for Mass Claims Processes and Class Arbitration Incorporated in the Arbitration Agreement as an Expression of Consent

601. The fundamental difference between *Abaclat* and other types of mass arbitration is that, in one form or the other, the latter are conducted under the rules designed specifically for administration of such claims. Mass claims processes were historically organised as *ad hoc* state-to-state arbitrations[1082] based on the direct agreements between the state parties involved [1083] for resolving a concrete conflict under the case-specific rules of procedure.[1084] A mass claims process is defined as '[…] a vehicle generally used when a number of people have suffered the same or similar injuries, but the injuries being relatively minor, they might not pursue legal redress on their own'.[1085] For example, '[…] the Iran-U.S. Claims Tribunal was the direct and intended result of the agreement negotiated between Iran and the United States'.[1086]

602. Along the same lines, Abi-Saab expressed critic that traditional mass claims tribunals, from the outset, applied the rules of procedure tailored specifically for mass claims and were not authorised to 'invent' their own procedures 'from scratch'.[1087] Hence, setting up

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[1079] Di Brozolo, above n. 4, 128, 129.

[1080] See para. 604604 *et seq*. *infra*.

[1081] Di Brozolo, above n. 4, 128, 129.

[1082] Heiskanen, above n. 1, 668, 613.

[1083] H. Holtzmann and E. Kristjánsdóttir (*eds*), *International Mass Claims Processes: Legal and Practical Perspectives* (2007) 17.

[1084] Ibid., 17 *et seq*.; Van Houtte, above n. 64, 232; Donovan, above n. 658, 262; Lamm, above n. 2, 115.

[1085] Obadia, above n. 7, 105.

[1086] A. Carillo and J. Palmer, 'Transnational Mass Claims Processes (TMCPS) in International Law and Practice', 28 *Berkeley* Journal of *International Law* (2010) 351.

[1087] *Abaclat*, above n. 542, para. 188.

specific regulations and procedure for mass claims is outside of the tribunal's discretion and instead, should be specified in the consent.[1088]

603. The relevance of mass claims processes to *Abaclat* can be questioned, though, and the fact that the Majority 'does not refer explicitly to [mass claims process]' as an element of a 'hybrid nature' of *Abaclat*[1089] signals that. Strong noted to this effect that mass claims are administered by the Permanent Court of Arbitration and, as such, '[…] are typically heard on a bilateral, rather than multilateral, basis […]'.[1090] However, mass claims processes are not necessarily organised under the auspices of a permanent arbitral forum under its institutional rules but may also operate under the rules designated for a specific claims program.[1091] Moreover, mass claims processes can be conducted by means of administrative procedure instead of arbitration that was largely designated for resolution of single claims and may not suit for managing claims by thousands individuals 'with urgent personal needs'.[1092]

604. Furthermore, contrary to the circumstances in *Abaclat*, consent to mass proceedings was a part of an arbitration agreement,[1093] especially given that such commissions were established after the emergence of the dispute.[1094] Hence, interpretation of silence in order to determine whether secondary consent is required or whether a tribunal can 'fill the gaps' on its own was not an issue. Moreover, given the *ad hoc* and largely deinstitutionalized character of inter-state mass claims commissions,[1095] there could be simply no *institutional* rules to interpret.

605. Van Houtte observes that this 'obvious distinction' was, arguably, the reason why the Majority preferred to distance itself from comparing *Abaclat* with mass claims commissions and used the term 'large-scale litigation' instead.[1096] The Majority only

[1088] Ibid., para. 189.

[1089] Van Houtte, above n. 64, 232.

[1090] Strong, above n. 5, 5.

[1091] Holtzmann, above n. 1083, Chapter 5.

[1092] Ibid., 97.

[1093] Strong, above n. 5, 191-202.

[1094] Steingruber, 'Abaclat and Others v Argentine Republic: Consent in Large-scale Arbitration Proceedings', above n. 6, 239.

[1095] Heiskanen, above n. 534, 299; Rosenfeld, above n. 986, 162, 163.

[1096] Van Houtte, above n. 64, 232.

mentioned some of the case management techniques used in inter-state mass claims processes[1097] but '[…] remained relatively vague stating that it needed to know more about the facts of the case before it could decide how best to proceed' so that it was '[…] unclear whether such mechanisms will ultimately be used'.[1098]

606. Contrary to the ICSID legal framework, constituent rules of mass claims commissions provided for a detailed description of the procedure. If the rules were relatively scarce, it was a deliberate choice of the parties, with a view to cater for specific circumstances of the underlying conflict where urgency was of essence and drafting the detailed rules would be counter-productive. [1099] Occasionally, the existing arbitration rules (*e.g.,* UNCITRAL Arbitration Rules) can be incorporated into constituent documents governing mass claims processes or used as a guidance subject to modifications related to mass nature of the underlying dispute.[1100]

607. As to the power to 'fill the gap' in order to accommodate the mass aspect, it was criticized in the Dissent for falling outside the scope of adaptations that the tribunal can adopt on an *ad hoc* basis.[1101] The tribunal's power in this regard is limited to filling a "technical gap" to regulate '[…] a small missing element or cog of a rule necessary for its implementation […]'. The Majority, arguably, acted *ultra vires* as such adaptations concerned '[…] whole sets or chapters of rules that cover complete segments of procedure (such as the administration of proof or the role and due process rights of the parties in the proceedings)'.[1102]

608. Indeed, in mass claims processes, the power of a tribunal to exercise procedural discretion was envisaged in the constituent documents[1103] whereas *structural* changes to the claims

[1097] *Abaclat*, above n. 38, para. 669.

[1098] Strong, above n. 1072, 287, 288.

[1099] Holtzmann, above n. 1083, 38.

[1100] Ibid., 205.

[1101] *Abaclat*, above n. 38, paras 522-526; *Abaclat*, above n. 542, paras 196-220.

[1102] *Abaclat*, above n. 542, paras 197, 202.

[1103] Holtzmann, above n. 1083, 46, 47; By way of example, according to the Algiers Accords, an agreement between the United States and Iran providing a legal framework for the Iran-U.S. Claims Tribunal, including the procedure for modification of the selected arbitration rules: 'The Algiers Accords specified that the UNCITRAL Arbitration Rules would govern procedural matters. In addition, the Algiers Accords provided that the UNCITRAL Rules could be modified by the Tribunal or the Parties. Once appointed, the arbitrators undertook extensive deliberations to determine the necessary modifications, such as the publication of decisions. The Tribunal accepted the modifications to the Rules by majority vote, after consultation with the Agent of the United States and the Agent of the Islamic Republic of Iran, and

process could only be authorised by the governments.[1104] Thus, the power to 'fill the gap' cannot be relied on to 'create' the procedure if it is not originally foreseen under the rules of a specific mass claims process.

609. This and other necessary adjustments, including various special techniques for group examination, require complex and costly infrastructure which falls short of establishing a full-fledged administrating facility [1105] with substantial funding provided by the governments.[1106] It does not seem to be realistic under the ICSID framework to create a similar administrative infrastructure, especially, upon a tribunal's procedural initiative on 'filling the gaps', as it would at least significantly increase the costs of arbitration.

610. The Majority also mentioned similarities between the *Abaclat* mass proceeding and the US class action arbitration with the difference that in the latter '[…] a representative initiates a proceeding in the name of a class composed of an undetermined number of unidentified claimants [and in *Abaclat*] the number of Claimants is established and so is their identity'.[1107]

611. According to the Dissent, when discussing the requirement of separate consent to deindividualized adjudication, class arbitration should be distinguished from bi-partite arbitration given the risks for defendants when the alleged damages to thousands of claimants are decided in aggregate manner without possibility of review.[1108] In particular, the need for separate consent was also explained by the fundamental difference between commercial and investment arbitration, whereby the latter is not subject to the judicial review and is regulated by international law which is '[…] much more strict and exacting as regards the requirement of consent […]'.[1109] In this logic, secondary consent is even more relevant in the ICSID context than in commercial arbitration, since a '[…] mere

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then issued its "Tribunal Rules," which were modified as required by continuing circumstances'. Carillo, above n. 1086, 352, 353, 355. Footnotes omitted.

[1104] Holtzmann, ibid., 47.

[1105] Ibid., 311 *et seq*.

[1106] Ibid., 347 *et seq.*; Carillo, above n. 1086, 355.

[1107] *Abaclat*, above n. 38, para. 486.

[1108] *Abaclat*, above n. 542, paras 149-153, 171, 172.

[1109] Ibid., para. 176.

"consent to arbitrate" does not cover the fundamentally different and atypical proceedings of collective mass claims actions […]'.[1110]

612. In opposition, the Majority mentioned that the issue of whether *specific* consent to mass arbitration is required in addition to consent to arbitration in general arises in the context of the US class actions but was not relevant in *Abaclat*.[1111] Indeed, the power of a tribunal to interpret silence with regard to class actions in the arbitration agreement remains a controversial subject.[1112] Thus, in *Green Tree Financial Corp v Bazzle*, the US Supreme Court allowed a class action in arbitration and, with regard to the question whether it is within the scope of the arbitration agreement, ruled that '[…] the arbitrator, not a judge, would answer the relevant question'. [1113] On the contrary, in *Stolt-Nielsen SA v AnimalFeeds International Corp.*,[1114] the US Supreme Court ruled that silence excludes class arbitration and a party cannot be compelled to this form of dispute resolution unless the contract allows to do so.[1115]

613. In contrast to ambiguities associated with the interpretation of silence, explicit waivers of class arbitration are, in principle, consistently upheld as contractual provisions excluding class actions from arbitration agreements.[1116] Strong mentioned waivers of mass claims in treaty-based arbitration as a possible future development[1117] which, indeed, could be considered in the newly negotiated BITs as a safeguard for states against mass claims.

614. Regardless of the uncertainties concerning the requirement of secondary (explicit) consent to class actions, class arbitration hinges upon a specialized set of rules enshrined both in national law and in procedural rules of arbitral institutions,[1118] such as the Supplementary Rules for Class Arbitration of the American Arbitration Association

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[1110] Ibid., para. 177.

[1111] *Abaclat*, above n. 38, paras 485-488.

[1112] Strong, above n. 5, 31.

[1113] *Green Tree Financial Corp v Bazzle*, 539 U.S. 444 (2003), 451, 452; Strong, ibid,, 30; *E. Tuchmann*, 'The Administration of Class Action Arbitrations', in PCA, above n. 20, 328; C. Drahozal, 'Class Arbitration in the United States', in Hanotiau, above n. 2, 24; J. Carter, 'Class Arbitration In the United States: Life After Death?', in Hanotiau, above n. 2, 13.

[1114] *Stolt-Nielsen SA v AnimalFeeds International Corp*., 559 U.S. 662 (2010).

[1115] Carter, above n. 11131113, 14.

[1116] Ibid., 14, 15; Drahozal, above n. 11131113, 24, 25; Strong, above n. 5, 36.

[1117] Strong, ibid., 214.

[1118] Ibid., 35; Di Brozolo, above n. 4, 127.

('AAA Class Rules'). Hence, in contrast to ICSID arbitration, by contracting for the AAA arbitration, parties implicitly give their consent to class arbitration which is commonly accepted as a proper expression of consent.[1119] The fact that the AAA can administer arbitrations even if the arbitration agreement is silent with respect to class claims,[1120] is another indication that consent can be implied in such case.[1121]

615. It was argued that the existence of institutional rules should not necessarily be factored in deciding on consent to mass claims because class arbitration was allowed in the US even before it was institutionalized in the rules.[1122] The AAA Class Rules are 'content-neutral' in that their mere existence cannot be interpreted in favour of or against permitting class arbitration and only provides a guidance for deciding whether class arbitration can proceed based on the interpretation of an arbitration agreement and governing law.[1123]

616. The ICSID practice is more ambiguous and does not allow to draw a decisive conclusion on the interpretative value of a state's domestic laws in multiparty arbitration. In *Ambiente*, availability of multiparty arbitration in national laws of the state parties to the applicable BIT at the time of acceding to the ICSID Convention was considered relevant for ascertaining the respondent's intent to arbitrate with multiple investors.[1124] Hence, logically, the lack of collective proceedings in domestic laws of the concerned states points to the lack of an implied consent to mass arbitration.

617. However, in *Abaclat*, the Majority disregarded Argentina's argument that '[a]t the time of the conclusion of ICSID Convention and BIT, collective claims were allowed neither in Italy nor in Argentina, and could therefore not have been envisaged by Argentina'.[1125] The Majority tackled this argument in line with its concern about access to justice for the claimants as a prevailing consideration in permitting mass claims, which is indeed relevant for the ICSID arbitration: An important hallmark of class arbitration under institutional rules is that claimants can seek remedy in domestic courts or in the bi-partite

[1119] Strong, above n. 5, 191.

[1120] Ibid., 36.

[1121] Ibid., 44.

[1122] Ibid., 276, 277.

[1123] Under Rule 3 AAA Class Rules, 'In construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis'; Strong, above n. 5, 47.

[1124] *Ambiente*, above n. 221, para. 133.

[1125] *Abaclat*, above n. 38, para. 471.

arbitration as an alternative to collective recourse. On the contrary, in the context of ICSID arbitration, investors do not have access to any other forum where they can pursue their *treaty* claims, especially, if the costs of arbitration are prohibitive due to small amounts of their investments.[1126]

618. It was even suggested that the possibility of mandatory consolidation would be an adequate (albeit with little prospects of implementing) tool to cater for mass claims at ICSID:

'[T]he best solution to deal with the challenge posed by mass investor claims to the ICSID system would be an amendment of the ICSID Convention that would enable the compulsory consolidation of all claims arising out of the same extraordinary event or circumstance'.[1127]

619. The opposite logic, though, is enshrined in the Proposals for Amendment of the ICSID Rules which do not include mass claims because '[…] class actions are not available in the domestic jurisdictions of many ICSID member States'.[1128] Indeed, contrary to class arbitration regulated on the national level, inter-state instruments require an agreement of the negotiating states, which depends on the existence of similar procedures in their national laws.[1129] Hence, although rules to this effect '[…] would reduce the debate about the jurisdiction of the tribunal and the admissibility of the claims in ICSID proceedings and would therefore save the parties time and money',[1130] they are not likely to be adopted in the near future.

[1126] Di Brozolo, above n. 4, 140.

[1127] V. Heiskanen, above n. 1, 623, 624: 'This would not only ensure consistency in decision-making, which in turn would protect and promote the legitimacy of the system as it would preclude different tribunals from reaching different conclusions on the basis of what are essentially the same facts. It would also result in considerable procedural and economic efficiencies, in particular by allowing the respondent State to consolidate the legal and evidentiary basis of its defense, as well as by ensuring that the consolidation tribunal would be fully familiar with the relevant factual circumstances, without having to be educated effectively from scratch in the context of each individual case. However, for the time being the prospect that the ICSID Convention will be amended any time soon to accommodate mass claims processing seems highly unlikely. Not only is the amendment of the Convention exceedingly difficult as it would require a consent of each Contracting State; there does not appear to be much policy support for such an outcome in the first place, judged by the lack of any debate on the issue. In the meantime, as the challenge is unlikely to go away, ICSID tribunals and the ICSID Secretariat will have to make the best out of the current legal framework, regardless of its flaws'.

[1128] 2018 Proposals for Amendment of the ICSID Rules, above n. 27, 854.

[1129] On this point, in the context of implementing the mechanism of collective redress in the EU, see E. Kleiman, 'The Future of Class, Collective and Mass Arbitrations in Europe: A European Approach to Collective Redress', in Hanotiau, above n. 2, 192.

[1130] Strong, above n. 719, 161.

620. Given the above discussed implications of conducting an ICSID arbitration in the form of a mass proceeding, it can hardly be seen as falling within procedural discretion of a tribunal and, instead, would require an insertion of a respective provision into the ICSID Rules. Di Brozolo expressed scepticism along the same lines:

'It is generally felt that proceedings of this type require specific rules which, at least in the current phase, are not available for investor-State arbitration'.[1131]

3.4.3.2 Implied Consent to the Deindividualized Treatment of Claims and Curtailment of the State's Right to Respond to Each Claim Individually under Procedural Rules

621. As the Majority observed on TFA, the high number of claimants makes it '[…] impossible for the representative to take into account individual interests of individual Claimants, and rather limits the proceedings to the defence of interests common to the entire group of Claimants'.[1132]

622. One of the grounds for criticism in the Dissent was that in traditional mass claims and representative proceedings, at some point, claims are addressed individually in one form or the other.[1133] Representative proceedings and class actions are initiated by a member of the class or a representative agent which then ultimately becomes one claim, so that every aspect can be examined without prejudice to due process rights of the parties.[1134]

623. Indeed, in mass claims processes, arbitral tribunals can '[…] decide legal issues of liability of the party against which the claims are made, before determining individual claimants' eligibility for payment and the value of the claims'.[1135] Importing this approach into the ICSID framework would amount to a paradoxical bifurcation so that merits would precede jurisdiction, which is not only outside of a tribunal's competence, but is barely feasible as a potential modification of the ICSID Rules.

[1131] Ibid., 127.

[1132] *Abaclat*, above n. 38, para. 487.

[1133] *Abaclat*, ibid., paras 131-135, 139, 140; Van Houtte, above n. 64, 232.

[1134] *Abaclat*, ibid., paras 134, 135.

[1135] Holtzmann, above n. 1083, 53.

624. The Majority also noted that responding to thousands of claims individually would be more burdensome for Argentina. It was even observed that this point can be factored by states in '[…] considering whether to consent to large-scale proceedings as a tactical matter'[1136] and a '[…] pragmatic reason why respondent should consider agreeing to large-scale proceedings'.[1137]

625. It is unusual, though, that the Majority relied on this 'incentive' as a factor in interpreting the scope of consent thus practically deciding for the respondent what would be a better tactic to pursue. Aside from the question of whether this approach was within the tribunal's authority, it is worth reminding that it can also be a tactical and legitimate choice of the respondent to defend itself in separate proceedings.[1138] This alleged positive effect upon the respondent is perhaps relevant if the host state gave consent to mass proceedings (in the BIT or in relation to the concrete claims). However, if applicable instruments are silent on mass claims, '[…] the choice made by the respondent […] is a strategic question that varies from one situation to another'.[1139]

3.4.4 The Claimants' Consent: Waiver of the Right to Individual Participation in the Proceeding and Deindividualized Determination of Jurisdiction *Ratione Personae*

626. The aspects of consent related to the claimants in *Abaclat* were novel, in that jurisdiction was determined on the collective basis, which is at odds with the basic requirement *ratione personae* under the ICSID Convention. Furthermore, from the very outset of the proceeding, individual participation of the claimants was excluded, which raised due process concerns as discussed further.

[1136] Strong, above n. 5, 341.

[1137] Ibid.

[1138] See paras 482, 483, 487, 488 *supra*.

[1139] Obadia, above n. 7, 110, 111.

3.4.4.1 Participation of the Claimants in the Proceeding through Representative and Establishing Jurisdiction over the Claimants as a Group

627. The mechanism of initiating arbitration through TFA was characterised as 'the simplest procedure of all to initiate' compared to other types of collective arbitration.[1140] It also resolves, albeit radically, the problem of '[…] how to maintain the unity of strategy, of the degree of control that each individual claimant can maintain over the conduct of the proceedings and of the proper level of information of the claimants'.[1141] In this respect, TFA is a novel and unique representation mechanism combining some elements of representative claimants in class arbitration and legal representative but with substantial deviations from both: TFA's mandate is obviously different from the standard terms of a counsel engagement in that TFA had its own interest in the dispute. It also cannot be compared to the role of representative claimants in class arbitration because TFA is not one of the claimants acting on behalf of other unidentified members of the class.[1142]

628. This hybrid nature of TFA is a problematic novel issue also because a representative action '[…] is usually not considered possible in ICSID or investor-State arbitration in general […]'.[1143] For example, as discussed earlier,[1144] the *Impregilo* tribunal rejected an attempt of one claimant to act on behalf of the joint venture that did not meet the jurisdictional test of the ICSID Convention. The scenario in *Impregilo* was reversed compared to *Abaclat*: In the former, the entity that had a status of an eligible claimant purported to represent the entity that had not.[1145] Besides, TFA acted as a representative in the sense of Rule 18 of the ICSID Arbitration Rules which, as it is clear from its wording,[1146] is intended to regulate legal representation. Yet, reminding the concern

[1140] Strong, above n. 5, 37.

[1141] Di Brozolo, above n. 4, 136.

[1142] Obadia, above n. 7, 106.

[1143] Di Brozolo, above n. 4, 127.

[1144] See paras 165-167, 356-358 *supra*.

[1145] See paras 162, 163 *supra*.

[1146] Rule 10 ICSID Arbitration Rules: '(1) Each party may be represented or assisted by agents, counsel or advocates whose names and authority shall be notified by that party to the Secretary-General, who shall promptly inform the Commission and the other party. (2) For the purposes of these Rules, the expression "party" includes, where the context so admits, an agent, counsel or advocate authorized to represent that party'.

expressed by the *Impregilo* tribunal – that relying on 'representation' as a disguise for jurisdictional flaws is unacceptable – is noteworthy in the context of the TFA's role:

'If this were permissible, it would constitute a simple and effective means of evading the limitations in Article 25 of the Convention, and expanding the scope of the BIT. Indeed, on this basis, any party could bring itself within the ambit of the Convention and the BIT by simply appointing a representative'.[1147]

629. The most problematic legal aspect of the claimants' participation in the dispute through TFA is non-examination of jurisdiction over each claimant individually. The Majority deliberately – though being 'at pains to explain' its decision[1148] – ruled that '[w]ith regard to the issue relating to the investor status of Claimants, the present decision will not address the individual investor status of each Claimant'[1149] and was satisfied that it has jurisdiction over claimants 'from a general perspective' and 'as a matter of principle':[1150]

'With regard to the jurisdiction *rationae personae* and without making a determination with respect to any individual Claimant […] the Tribunal has jurisdiction *rationae personae* […]'.[1151]

630. Yet, the Majority reserved a possibility to decide on some aspects of jurisdiction on the individual basis later, thus ambiguously indicating that it intends to have a second jurisdictional phase[1152] (albeit seemingly limited to the allegations of the fraudulently obtained signatures of the claimants on the Power of Attorney).[1153] Thus, over a year after the issuance of the decision on jurisdiction, the Majority decided to set up a 'Database

[1147] *Impregilo*, above n. 303, para. 135. Footnote omitted.

[1148] Donovan, above n. 658, 261.

[1149] *Abaclat*, above n. 38, paras 390, 422.

[1150] Ibid., paras 390, 504.

[1151] Ibid., paras 501, 502.

[1152] 'To the extent that the Tribunal considers that the general requirements for its jurisdiction and for the admissibility of Claimants' claims are fulfilled, it will determine how to address relevant jurisdictional issues touching specifically upon individual Claimants. These issues will then be dealt with in a later decision according to a procedure to be further determined'. Ibid., para. 227; See also: Ibid., paras 226, 454, 668, 669; Van Houtte, above n. 64, 234.

[1153] *Abaclat*, ibid., para. 501.

Verification' process[1154] by appointing an expert for examining the documents related to each claimant, including the evidence of nationality.[1155]

631. At the same time, the Majority stated in the decision on jurisdiction that '[…] the number of Claimants is established and so is their identity'.[1156] This observation was made in order to highlight the distinction between the US class actions and *Abaclat* but, as the above citations demonstrate, not to the actual fulfilment of this requirement in a concrete case.

632. Given that the Majority factually 'by-passed' individual determination of jurisdiction at the jurisdictional stage, it would not be accurate to make statements that the task of establishing jurisdiction in *Abaclat* was completed, such as: 'Issues of admissibility were thus decided at the same time as issue of jurisdiction, and combined in a single award on jurisdiction and admissibility'.[1157] Arguably, because of the unclarity whether the stipulation on jurisdiction over the claimants was final, other commentators also reproduced the Majority's point that the number and identity of the claimants was established.[1158] Against the same background, *Abaclat* cannot be presented as '[…] the first time that individualized consent has been sought in class, mass, or collective arbitration […]'[1159] so that '[…] all of these individuals could have brought their claims

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[1154] Lamm, above n. 2, 121.

[1155] '[…] The Arbitral Tribunal has already decided that it may handle the claims in a collective manner under the conditions prescribed in its Decision, that individual circumstances of purchase of the security entitlements are irrelevant to the present dispute and that the Declaration of Consent signed by the Claimants is in principle valid. […]

With regard to issues which require an individual consideration, such as potential falsification of signatures and the scope of each Claimant's individual investment, these issues will be addressed by the Arbitral Tribunal in due time. At this stage, the aim of the Database Verification is to verify the information available with regard to facts of nationality/incorporation, residence and date of purchase of the security entitlements, which are relevant to determine the Arbitral Tribunal's jurisdiction over the case […]. While this process will allow to spot inconsistencies and irregularities in the information and documents submitted (such as inconsistencies in signatures), if any, it will be the Arbitral Tribunal's task to determine how to deal with such inconsistencies and irregularities, if any. The purpose of the Database Verification is not to proceed with an overall analysis of the circumstances surrounding the Claimants' consent or the validity of the documents on which such consent is based. This is and will remain the task of the Arbitral Tribunal. It, therefore, only constitutes a starting point for the Arbitral Tribunal to decide to what extent an individualized review of claims or documents will be necessary and how to best address such review'. *Abaclat*, above n. 38, Procedural Order No. 17, 8 February 2013, para. 21.

[1156] *Abaclat*, ibid., para. 486.

[1157] Waibel, above n. 65, 1276.

[1158] For example, see Steingruber, 'Abaclat and Others v Argentine Republic: Consent in Large-scale Arbitration Proceedings', above n. 6, 240: 'The distinctive feature of the *Abaclat* case lies […] in the fact that the Claimants are 'a *determined* number and *identified*'.; See also Reinisch, above n. 64, 37.

[1159] Strong, above n. 5, 335. Footnotes omitted.

in bilateral proceedings' and, hence, '[…] the identity of the various claimants cannot be problematic […]'.[1160]

633. A more accurate formulation seems to be that '[…] the Tribunal *assumed* that it had jurisdiction over each of the individual claims and reasoned that it would be difficult to justify losing its jurisdiction simply because the number of Claimants was unusually high'.[1161]

634. As some commentators observed, by addressing the offer of consent in the BIT to an unidentified and unlimited multitude of investors from a certain state, the respondent accepts the possibility that it will be confronted with collective claims.[1162] Di Brozolo explains this point by contrasting the interpretation of consent regarding the acceptable number of claimants in commercial and in investment treaty arbitration:

'[…] there is one difference between the two that could militate in favor of a less strict interpretation of the number of addressees of the offer to arbitrate that can be permitted to bring claims jointly. This is the fact that, while in commercial arbitration, the parties to the arbitration agreement are, at least in principle, identified or identifiable from the beginning, in investment arbitration the offer to arbitrate is very broad and directed to an undetermined number of potential parties'.[1163]

635. However, this aspect of the respondent's consent refers to the possibility for the claimants to pursue their claims collectively *as a matter of principle* but does not exempt them from meeting the jurisdictional requirement that *each* claimant should satisfy the test of *ratione personae*. For the same reason, only if jurisdiction is established on an individual basis, it would be accurate to say that an offer to arbitrate '[…] resolves one potential problem (the question of "with whom" respondents are required to arbitrate) […]'.[1164]

636. Furthermore, justifying the deindividualized determination of jurisdiction *ratione personae* by opting for the admissibility approach is also problematic from the

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[1160] Ibid., 268. Footnote omitted.

[1161] Beess, above n. 1005, 513. Emphasis added.

[1162] Steingruber, 'Abaclat and Others v Argentine Republic: Consent in Large-scale Arbitration Proceedings', above n. 6, 241; Strong, above n. 5, 268; Heiskanen, above n. 1, 618.

[1163] Di Brozolo, above n. 4, 130.

[1164] Strong, above n. 5, 268. Footnote omitted.

perspective of the dichotomy of jurisdiction and admissibility, both of which are the elements of an ICSID tribunal's competence in a particular arbitration.[1165]

637. Paradoxically, had the respondent not raised the 'mass' aspect as an argument against jurisdiction, the Majority would, arguably, have had no option to approach numerosity of the claimants, but to focus on establishing jurisdiction over each claimant. This would be in accordance with the critical comment that mass aspect should not be approached as a stand-alone issue of admissibility or jurisdiction and secondary consent (as both the Majority and the Dissent did). As Van Houtte commented, mass aspect is neither a matter of jurisdiction nor of admissibility and, therefore, the tribunal should have stayed within the ICSID jurisdictional framework:

'[T]here are simply many Claimants within one case and however difficult the task, they must each be dealt with as any claimant in an ordinary ICSID proceeding would be. […] The time spent dealing with the 'mass' element as a stand-alone issue may have been better spent on the no doubt difficult but necessary task of looking at whether each and every one of the 60,000 Claimants meets the jurisdictional requirements of nationality, domicile and consent. Instead, the Majority settles abstract criteria, to be applied at a later, unspecified date and in an unspecified manner'.[1166]

638. On the contrary, Heiskanen is of the view that it was within the Majority's discretion to establish jurisdiction over the claimants in general and the decision whether to allow mass claims given the high number of claimants is a '[…] matter of judgment rather than a decision dictated by hard and fast jurisdictional rules'.[1167]

[1165] *Abaclat*, above n. 542, para 12: 'In international law, because of its consensual basis, jurisdiction as an ambit is analysed and scrutinized at two different levels, where adjudication is not intended for one case only, but takes place within an institutional setting, either of a standing organ (such as the International Court of Justice (ICJ) or a framework within which ad hoc tribunals are established (such as the Permanent Court of Arbitration and the ICSID):

(a) 'general jurisdiction' which defines the objective range and outer limits of the ambit for all cases, according to the constitutive instrument of the organ (e.g. the ICJ Statute), or the framework convention (e.g. the ICSID Convention);

(b) 'special jurisdiction' which defines the subjective range and limits of the ambit of jurisdiction of the organ in a particular case, according to the specific jurisdictional title bearing the consent of the parties, on the basis of which the case is brought before the organ'. Steingruber, above n. 72, 678 (footnote omitted), 681.

[1166] Van Houtte, above n. 64, 233, 234.

[1167] Heiskanen, above n. 1, 615, 616: 'This is a novel approach in that it links the distinction between jurisdiction and admissibility to the mass nature of the claims; indeed, Professor Abi-Saab in his dissenting opinion went so far as to attack the Majority's approach as being "conceptually wrong." While the Majority's approach indeed seems unorthodox as this is not how the concepts of "jurisdiction" and "admissibility" are usually distinguished, the Majority appears to have sought to make a conceptual distinction that is in and of itself entirely valid – preliminary issues that were related to the

639. In fact, theoretically, a more diligent approach in terms of jurisdiction and manageability would be for TFA banks to act as claimants in their own right and then distribute compensation amongst the bondholders on a contractual basis. The right to claim compensation by the bondholders could be contractually conditioned upon the same waivers that were imposed on the claimants in the Mandate Package. However, in practice, this strategy would be unattractive for tactical reasons as it might result in the postponement of the bondholders' waiver obligation towards TFA to refrain from suing its members, pending the ICSID arbitration.

3.4.4.2 Choice of the Procedural Rules Permitting Indirect Participation of the Claimants in the Proceeding as a Valid Expression of Consent to Waive the Individual Procedural Rights

640. Non-participation of the claimants in the proceeding as the pre-condition for representation by TFA suggests that procedural rights are perceived as secondary to substantive rights, as argued in the Decent. However, the curtailment of procedural rights being a 'back-up' for substantive rights amounts to infringement of the latter.[1168]

641. Indeed, collective proceedings, as follows from the notion, are '[…] at odds with the ability for each claimant to have its say and to make its own decisions and adopt its own strategy' which results in the limitation of due process rights.[1169] Exactly for this reason, such limitations are specifically addressed in the rules governing collective proceedings comparable with *Abaclat* in terms of the magnitude of claimants. For example, under the rules of the Iran-US Claims Tribunal, the parties had the right to receive copies of the

mass nature of the claims, and those that were not. While it might have been technically more appropriate to refer to the issue in different terms – for instance, as an issue of judicial or (more accurately) arbitral propriety rather than admissibility – not much turns in the end on how the issue is conceptualized. Whether the Tribunal's decisions on the issues raised by the mass nature of the claims are characterized as decisions on admissibility or as determinations on arbitral propriety (*i.e.*, whether it is proper or appropriate for an ICSID tribunal to deal with mass claims, in the absence of any guidance in the ICSID Convention or in the ICSID Arbitration Rules on how to deal with them), the fact remains that in either case the decision would be a matter of discretion or exercise of judgment rather than a strict binary test of yes or no. Once the Majority had determined that the claims before it fell, as a matter of general principle, within the field of its jurisdiction *ratione personae* and *ratione materiae*, its decision on whether to deal with the claims because of their mass nature can only be matter of judgment rather than a decision dictated by hard and fast jurisdictional rules'. Footnotes omitted.

[1168] *Abaclat*, above n. 542, paras 225, 226.

[1169] Di Brozolo, above n. 4, 136, 137.

submissions, to be notified about the upcoming hearings and about identity of the witnesses who the parties were given an opportunity to question.[1170]

642. Moreover, giving thousands of claimants their 'voice' in addition to representation by lawyers or non-governmental organisations was recognised as a guarantee for claimants to be adequately represented despite the inability to physically appear before a deciding authority. An independent official ('ombudsman') can be appointed to assist individual claimants in this regard, such as, a Claimant Query Response Team of the Commission for Real Property Claims of Displaced Persons and Refugees in Bosnia and Herzegovina.[1171]

643. Although, as a general principle, claimants are not involved in the organisation of proceedings, in some cases, claimants participated in the negotiation of the terms of procedure.[1172] By accepting TFA as the claimants' agent subject to the waivers set forth in the Mandate Package, the Majority deviated from this principle being another due process guarantee.

644. Waiver of the right to pursue claims in national courts as a precondition for obtaining access to international arbitration was also a standard provision in the rules of mass claims commissions ('exclusivity of process').[1173] Occasionally, claimants were given a choice between individualized and collective remedies.[1174] Again, though, this limitation was foreseen under the rules and was not a pre-condition for pursuit of the claims by a representative agent, such as TFA.

645. The AAA Class Rules are also drafted with special regard to fairness and due process, given that an award has a binding effect on class members who were not personally appearing or participating in the proceeding.[1175] In particular, one of the prerequisites for certifying a class is that '[…] each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class

[1170] Holtzmann, above n. 1083, 264, 265.

[1171] Ibid., 272 *et seq.*

[1172] Ibid., 91 *et seq.*

[1173] Ibid., 103 *et seq.*

[1174] Rosenfeld, above n. 986, 172.

[1175] Tuchmann, above n. 1113, 325, 326, 329-331, 349.

representative(s) and each of the other class members'.[1176] Hence, the problem with non-signatories[1177] as well as the uncertainties about the validity of claimants' consent are addressed in the rules.

646. Furthermore, class arbitration is subject to certain procedures which permit or require a court involvement.[1178] In particular, the tribunal's ruling on whether the arbitration agreement envisages class arbitration ('clause construction award') is followed by a thirty-day stay period during which parties can challenge this partial award in court. Afterwards, the tribunal decides whether a particular matter can proceed as class arbitration ('class determination award'), which is followed by another thirty-day stay for the eventual appeal in court.[1179] Only at this second stage, the tribunal decides whether the circumstances of the case warrant class treatment and if the prerequisites for class examination are met.[1180] Although the thirty-day stays represent a departure from the principle of limited involvement of state courts in the arbitration process, a judicial review at the key points of the procedure was implemented in light of the unique nature of class actions.[1181]

647. Moreover, all members of the class receive the Notice of Class Determination ('Notice') with factual information about the case and their procedural rights.[1182] For example, the

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[1176] Rule 4(a)(6) AAA Class Rules.

[1177] Strong, above n. 5, 52.

[1178] Ibid., 116.

[1179] Rule 3, Rule 5 AAA Class Rules; Tuchmann, above n. 1113, 345-347; Strong, above n. 5, 47.

[1180] Strong, ibid., 50.

[1181] Tuchmann, above n. 1113, 331.

[1182] Rule 6(b) AAA Rules stipulates the content of the Notice as follows: '[…]

1) the nature of the action;

(2) the definition of the class certified;

(3) the class claims, issues, or defenses;

(4) that a class member may enter an appearance through counsel if the member so desires, and that any class member may attend the hearings;

(5) that the arbitrator will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded;

(6) the binding effect of a class judgment on class members;

(7) the identity and biographical information about the arbitrator, the class representative(s) and class counsel that have been approved by the arbitrator to represent the class; and

(8) how and to whom a class member may communicate about the class arbitration, including information about the AAA Class Arbitration Docket […]'; Strong, above n. 5, 58-61.

Notice must state *inter alia* that '[…] a class member may enter an appearance through counsel if the member so desires, and that any class member may attend the hearings'[1183] and contain information about '[…] the class representative(s) and class counsel that have been approved by the arbitrator to represent the class'.[1184] The latter provision is understood as providing class members with an opportunity to object to the lead claimant and legal counsel.[1185]

648. In order to enable access to information about the case for non-participating class members, the public Class Arbitration Docker was launched on the AAA's web-page,[1186] which resembles the ICSID practice on publishing information about registered cases.[1187] It is at odds with the principle of confidentiality of arbitration (although an opposite view was also expressed[1188]) but necessary for mitigating limitations of claimants' procedural rights and for promoting the 'quasi-public interest nature' of a class action.[1189] Class members and their individual counsel can in no event be excluded from arbitration hearings, which is another derogation from the principle of confidentiality.[1190]

649. The limitation of procedural rights due to passive participation of claimants can be also looked at from the perspective of differentiation between 'opt-in' and 'opt-out' mechanisms of consent to collective actions. In the context of the US class arbitration, issues with the procedural rights of claimants are relevant for the 'opt-out' mechanism as it interferes with the right to decide how to pursue their claims. On the contrary, *Abaclat* represents an 'opt-in' mechanism in that the claimants were supposed to provide explicit and individualized consent through TFA.[1191]

[1183] Rule 6(b)(4) AAA Supplementary Rules.

[1184] Rule 6(b)(7) AAA Supplementary Rules.

[1185] Strong, above n. 5, 62.

[1186] Pursuant to Rule 9 AAA Class Rules Class Arbitration Docker contains the following information about the case: '(1) a copy of the demand for arbitration;(2) the identities of the parties; (3) the names and contact information of counsel for each party;(4) a list of awards made in the arbitration by the arbitrator; and (5) the date, time and place of any scheduled hearings'.

[1187] Strong, above n. 5, 65.

[1188] Ibid., 65: 'Although the AAA's approach appear unusual, it does not contravene any arbitral requirements, since most national and international laws do not provide for privacy or confidentiality in arbitration'. Footnote omitted.

[1189] See also Tuchmann, above n. 1113, 331, 350.

[1190] Strong, above n. 5, 65.

[1191] Ibid., 279, 333, 334; On differences between opt-out and opt-in mechanisms in the context of *Abaclat*, see Lamm, above n. 2, 115.

650. The analogy with 'opt-in/opt-out' types of claimants' consent should be interpreted cautiously and with due regard to the specific mechanism of constructing consent to ICSID arbitration. The scope of consent is defined by the scope of a *respondent's* offer of consent expressed in the BIT, which can only be accepted by claimants as it is. If claimants accept the offer by filing the claim under their own terms (such as, through a TFA-like representative), this will amount to a counteroffer which cannot be accommodated within the ICSID system, as explained by Steingruber:

'Limitations on the scope of consent are set by the contracting States (host States). In fact, it is the offeror (host State) who sets the limitations and determines how far-reaching the offer is. The investor cannot set limitations, because this would amount to a counteroffer – the investor can only accept or reject the host State's offer. Therefore, the Majority rightly spoke of the scope of Argentina's consent'.[1192]

651. Hence, claimants' consent in treaty-based arbitration should not be replaced or confused with jurisdiction over claimants through the 'opt-in' mechanism in other types of arbitration. Non-participation of the claimants in defining the scope of consent under arbitration agreement is another unique characteristic of investment arbitration as 'arbitration without privity'. This could be seen as an expression of the *quid pro quo* nature of investment arbitration whereby not only states confer guarantees upon investors 'in exchange' for in-flow of investments[1193] but also investors reciprocally accept and comply with the constraints of a respondent's offer of consent.

652. Against this background, the claimants' choice of representative relief can be viewed by analogy as 'opting-in', only if the Majority's novel determination – that the respondent's consent entails mass claims – is accepted. But if an opposite approach to jurisdiction is upheld – that mass claims cannot be read into the scope of consent – the 'opt-in' mechanism cannot be applied in the ICSID context to justify a tribunal's competence over mass claims. Otherwise, this analogy would suggest that claimants can amend a respondent's consent by 'opting-in' to a mass proceeding under the terms developed by their representative.

[1192] Steingruber, 'Abaclat and Others v Argentine Republic: Consent in Large-scale Arbitration Proceedings', above n. 6, 243, 244. Footnotes omitted.

[1193] Ibid., 239.

653. In this regard, a fundamental difference between the US class arbitration and treaty-based arbitration should be kept in mind. The former focuses on the claimants' specific consent with regard to a specific dispute. In the latter, the respondent's general pre-dispute consent subjected to the rules of treaty interpretation carries more weight in deciding whether claims can proceed in the form of multiparty or mass arbitration.[1194]

654. To summarise, the deindividualized pursuit of claims cannot be adopted by an ICSID tribunal by means of procedural discretion. The need to establish jurisdiction over each claimant and the magnitude of restrictions to due process rights warrant jurisdictional solution, such as, enactment of the mass claims procedure either in the ICSID legal framework or in investment treaties which is unforeseeable in the nearest future.[1195]

655. However, the analysis of the lessons learned from *Abaclat* should not end with this observation, given that the lack of mass claims procedure in the ICSID system exempts a large category of investors from treaty protection. Collective recourse, being an emerging trend of investor-state dispute settlement,[1196] requires some sort of procedural guidance tailored for investment arbitration. A more feasible alternative with higher prospects of acceptance by states could be soft-law instruments developed by UNCITRAL or the arbitral institutions administering investment arbitrations (such as ICSID and PCA)[1197]

[1194] Strong, above n. 5, 340, 341.

[1195] 2018 Proposals for Amendment of the ICSID Rules, above n. 27, 854: '[…] class actions are not available in the domestic jurisdictions of many ICSID member States. As a result, the proposed amendments to the Rules do not currently address this possibility'.

[1196] For example, the decision on admissibility of mass claims in *Abaclat* triggered the discussion about possibility of resorting to the mechanism of mass claims in the aftermath of the economic crisis in Greece. See, for example: K. Karadelis, 'Greece: a new Argentina?', *Global Arbitration Review* (12 June 2012), available at https://globalarbitrationreview.com/article/1031397/greece-a-new-argentina (last visited 23 December 2021); J. Chaise, 'Greek Debt Restructuring, *Abaclat v. Argentina* and Investment Treaty Commitments: The Impact of International Investment Agreements on the Greek Default', in C. L. Lim and B. Mercurio, *International Economic Law after the Global Crisis: A Tale of Fragmented Disciplines* (2015), Chapter 13.

[1197] For example, along with an option of developing the rules on mass claims within ICSID procedure, Strong elaborates on the alternative solutions as follows: 'Public entities might also become involved in this discussion. While it is likely too early to ask UNCITRAL to develop a set of rules, since UNCITRAL works by international consensus and there is quite likely no consensus at the interstate level regarding the need for or form of international large-scale arbitration, the Permanent Court of Arbitration (PCA) might be amenable to developing a set of procedures that could be used in international disputes. In many ways, the PCA appears to be an ideal choice, since the PCA not only has the trust of the international community but also has significant experience in administering mass claims through various claims tribunals. Indeed, the PCA has already assisted with the resolution of a large-scale international claim that was originally filed as a US class action. Although the PCA's mass claims procedures are somewhat different from what is at issue in this discussion, in that the PCA procedures typically do not attempt to resolve all claims at a single time, in a single forum, there may nevertheless be some overlap between the two processes. Additional rules for large-scale matters might also be developed by the International Centre for Settlement of Investment Disputes (ICSID), particularly given the increasing incidence of such disputes in the investment context. Such an initiative would reduce the debate about the jurisdiction of the tribunal and the admissibility of the claims in ICSID proceedings and would therefore save the parties time and money'. Above n. 719, 161. Footnotes omitted.

that can be incorporated in the newly negotiated BITs or applied by the parties to a dispute on the ‘opt-in’ basis.

SUMMARY

656. *Abaclat* is so far an exceptional and unique example of multiparty investment arbitration which, due to the enormously high number of claimants, is known as the first ***mass*** arbitration in the ICSID practice. It is not a numerical threshold that transforms a 'normal' multiparty arbitration *ab initio* into a 'mass' arbitration. Rather, it is the deindividualized (group) treatment of claims through representative as the only technically feasible method of dispute resolution in this particular case.[1198]

657. The Majority approached the question of consent to mass claims as a matter of admissibility instead of jurisdiction, which allowed mass claims to proceed as such in one arbitration within procedural discretion of the tribunal despite the respondent's objection.

658. The Majority arrived at this conclusion through an assumption that, under the ICSID framework, the scope of the respondent's general consent under the BIT covers mass claims as long as procedural adaptations necessary for adjudication of mass claims can be adopted by the tribunal without amending the ICSID Convention.[1199] Whether this condition is met is the question of admissibility.[1200] The Majority decided that such adaptations are within the tribunal's procedural powers, meaning that mass claims are admissible under the ICSID Convention and, as such, fall within the scope of the respondent's general (pre-dispute) consent.[1201] For this reason, specific ('secondary') consent of the respondent to arbitration of mass claims is not required.[1202]

659. Admissibility of indirect participation of the claimants in the proceedings and group treatment of claims in one arbitration was seen as the only feasible mechanism for thousands of investors to resort to the ICSID arbitration. According to this logic, rejecting mass claims would amount to denial of justice, as the investors do not have resources for pursuit of their treaty claims individually which would be against the spirit and object of the ICSID Convention.[1203]

[1198] See paras 547, 548, 550-552 *supra*.

[1199] See paras 283, 551 *supra*.

[1200] See paras 289, 290, 579-581 *supra*.

[1201] See paras 289-296 *supra.*

[1202] See paras 289 *et seq*., 579 *supra*.

[1203] See paras 287, 292, 310, 554, 555 *supra.*

660. The most problematic implication of this approach is that it requires de-individualized treatment of claimants also at the jurisdictional stage. This allows to circumvent the indispensable jurisdictional requirement under the ICSID Convention that jurisdiction in relation to *each* individual claimant (*ratione personae*) must be established.[1204] By-passing this jurisdictional requirement through invocation of procedural discretion of the tribunal clearly goes beyond the scope of the respondent's consent as an element of jurisdiction.[1205]

661. The non-participation of claimants in the proceedings by way of authorising a representative to act on their behalf can also be criticized for falling outside the scope of consent to ICSID arbitration under the BIT. This procedural tool not only violates due process rights of the claimants (which they yet agreed to)[1206] but also exempts the respondent of its treaty right to defend itself against each claim individually.[1207]

662. The Majority justified the de-individualized treatment of claims also by analogy with other types of representative arbitration and litigation, which allow the respective procedural adaptations for the same reason – providing access to justice for claimants with small claims.

663. However, this analogy is yet another indication that group treatment cannot be simply read into the scope of consent under the BIT: The comparable dispute resolution mechanisms (US class arbitration and inter-state arbitration of mass claims) operate under procedural rules which permit indirect participation of claimants in the proceedings through a representative. Thus, the respondent's consent to procedural adaptations (and, hence, to mass claims) only exists if they are foreseen under the rules to which the respondent consented.[1208]

664. Accordingly, within this analogy, the lack of such a representative mechanism in the ICSID legal instruments is another indication that appointing a representative is outside the scope of consent to ICSID arbitration. Within the ICSID framework, the function of

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[1204] See paras 539, 629 *et seq. supra.*

[1205] See paras 589 *et seq. supra.*

[1206] See paras 297 *et seq. supra.*

[1207] See paras 295, 623, 624 *supra.*

[1208] See paras 601 *et seq. supra.*

a representative is conferred upon *legal* representative (counsel).[1209] In the ICSID practice, participation of a representative with its own interest in the dispute (as it was the case in *Abaclat*) is only admissible if such 'representative' itself acts as a co-claimant and, hence, meets the ICSID jurisdictional requirements.[1210]

665. It is also a relevant observation with respect to the representative mechanism chosen by the claimants, that the scope of consent in treaty arbitration is defined exclusively by a state in the BIT, so that the claimants can only accept it as it is.[1211] Initiating a de-individualized arbitration which is not stipulated in the applicable procedural rules can be seen as an attempt of the claimants to change the scope of the respondent's consent (*i.e.*, as a counter-offer).[1212]

[1209] See paras 641 *et seq*. *supra.*

[1210] See paras 297 *et seq*. *supra.*

[1211] See paras 650, 651 *supra.*

[1212] See para. 650 *supra.*

CONCLUSIONS

667. The overview and evaluation of the arbitration practice and law on multiparty investment arbitration allowed to identify the methods and approaches to the interpretation of the scope of consent regarding the joint adjudication of related claims and the pertaining issues. By differentiating between the three types of multiparty proceedings, this research suggests a more nuanced approach to establishing consent compared to the earlier academic research on coordination of parallel proceedings in investment arbitration.

668. In line with the research questions, the conclusions can be summarised as follows:

A. Nature of the decision on the joint adjudication of related claims and its effect on the interpretation of consent, subject to the type of multiparty investment arbitration

669. The approach to the nature of the decision on the joint adjudication of claims largely predetermines the modalities of establishing the scope of consent. Depending on the tribunal's preferences or direct instructions in the applicable rules, it can be a matter of jurisdiction, procedure, or admissibility. The jurisdictional approach is predominant in practice and is the most adequate given that consent is one of the elements of jurisdiction.[1213]

670. However, under NAFTA consolidation provision, consolidation order is a matter of procedure and in *Abaclat* consent to mass claims was approached as a matter of admissibility within procedural discretion of the tribunal.

671. Procedural approach *per se* in NAFTA does not raise any particular issues given that consolidation order is a procedural decision under the rules. The only considerable consent-related issue was that one consolidation tribunal (*Corn Products*) factored the lack of the claimants' consent in rejecting the state's request for consolidation contrary to the clear instructions in the consolidation provision.

672. On the contrary, the admissibility approach in *Abaclat* can be seen as an attempt to circumvent the unmanageable process of determining ICSID jurisdiction in relation to

[1213] See paras 46 *et seq*.

each of the thousands of claimants individually, which is beyond the scope of consent under the BIT.

673. The above approaches to determining consent in the respective types of multiparty arbitration and related issues will be summarised below in more detail.

B. Methods and approaches to the interpretation of consent and related issues depending on the type of multiparty investment arbitration

674. It should be emphasised that the research was mostly focused on multiparty cases where a party (or parties) object to the collective arbitration and the tribunal had to apply various approaches to the interpretation of consent. In contrast, the lack of objections[1214] and agreement to appoint identical tribunals for separate proceedings (*de facto* consolidation)[1215] are sufficient to establish consent so that no issues arise in relation to a multiparty aspect. However, the latter types of cases were also presented in the research for the completeness of analysis and contextual relevance.

Multiparty arbitration *ab initio*

675. In the earliest line of cases where claims were resolved jointly by the same tribunal from the outset (***multiparty arbitration ab initio***), the multiparty element was seen as a matter of jurisdiction. As consent is an element of jurisdiction, if the respondent raised a jurisdictional objection against multiplicity of claimants, the tribunal had to determine whether the respondent's consent under the BIT covers multiparty arbitration in a particular case.

676. This line of cases introduced the basic concepts, methods, and issues that are relevant in the process of establishing consent in multiparty proceedings, as outlined below.

677. In addition to the tribunal's approach to the nature of the respective decision, another factor that affects determining the scope of consent, is the ***type of consent – general*** or ***specific*** and ***explicit*** or ***implied***:

[1214] See paras 118 *et seq. supra*.

[1215] See paras 96 *et seq.*, 337 *et seq. supra*.

678. ***General consent*** refers to the respondent's consent given in the BIT and addressed to all unidentified investors of certain nationality. ***Specific consent*** is related to a specific investment and investors who initiated investment arbitration of a particular dispute.[1216]

679. This differentiation accounts for the temporal asymmetry of effectuating an arbitration agreement (consent) in investment arbitration so that two points in time are relevant – before and after the dispute has arisen.

680. The differentiation between explicit and implied consent refers to the form of expression. ***Explicit consent*** can be given before or after outbreak of the dispute. Respectively, parties may agree in their investment agreement that claims arising out of the underlying investment(s) can be resolved through multiparty arbitration or that a concrete arbitration shall involve multiple parties. In practice, explicit consent only exists in the form of ***de facto consolidation*** when the parties to parallel proceedings agree to appoint the same tribunal for their disputes.

681. ***Implied consent*** can be, firstly, deconstructed from the general consent under the BIT which is silent on multiparty arbitration or from the fact that the applicable procedural rules designated in the treaty as a source of consent allow multiparty arbitration (***implied general consent***). Secondly, it can be established through determining whether the contractual structure of a specific investment and conduct of the investors prove the parties' intent to decide all disputes arising out of this investment jointly (***implied specific consent***).

682. Tribunals in the first line of cases consistently confirmed that ***implied general consent*** exists if parties consented to ICSID arbitration, even though the ICSID Convention and the applicable BIT are silent on the possibility of multiparty disputes.[1217]

683. In relation to ***specific implied consent***, the basic criterion is ***connectivity*** between the claimants through involvement in the ***same investment*** or/and the ***same state measure*** that affected all the claimants.[1218]

[1216] See paras 82 *et seq. supra*.

[1217] See paras 35 *et seq*., 123 *et seq. supra*.

[1218] See paras 133 *et seq*., 348 *et seq. supra*.

684. In relation to connectivity in the form of the ***same investment***, tribunals had to establish whether the claimants may invoke an arbitration agreement providing for treaty arbitration in the investment contract which they did not sign. The deciding factor will be the intensity of their involvement in the planning and implementation of the investment project, including affiliation of the claimants with the same group of companies.[1219]

685. This analysis resembles the interpretative tools applied in international commercial arbitration or national laws regulating multiparty disputes (such as, group of companies, incorporation by reference, *etc*).[1220] However, the application of these tools is limited with the public nature of investment arbitration, entailing that the rules on determining consent in public law prevail.[1221] Thus, if the investors do not fulfil jurisdictional requirements under the BIT and the ICSID Convention, they cannot act as claimants despite their involvement in the same investment.

686. For example, the absence of a written consent between the investors and the host state to treat local companies as foreign investors under the ICSID Convention excludes them from the jurisdiction of a tribunal despite their involvement in the investment project which is the subject of the respective ICSID arbitration.[1222]

687. Furthermore, appointing one of the investors of the joint venture as a representative of other investors does not exempt such a representative from the fulfilment of the nationality requirements for claimants under the ICSID Convention.[1223]

688. Another type of connectivity (***multiplicity of BITs***) can compound to the complexity of multiparty disputes. In addition to the multiplicity of investors and contracts, one state measure can affect investors from different states and, hence, one claim can be based on several BITs.[1224]

689. Since each BIT represents *separate consent*, a tribunal must deal with ***compatibility*** of the BITs to establish whether the scope of consent under one BIT does not exclude claims

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[1219] See paras 142 *et seq. supra*.

[1220] See paras 350, 351 *supra*.

[1221] See paras 352 *et seq. supra*.

[1222] See paras 158 *et seq*., 355 *supra*.

[1223] See paras 162 *et seq*., 356-358 *supra*.

[1224] See paras 168 *et seq. supra*.

based on the other. Tribunals adopted a rather pro-investor approach so that discrepancies in the BITs were not considered as proofs of incompatibility, as long as tribunals considered that it was manageable to comply with the rules of all treaties in one proceeding.[1225]

690. In one instance, the tribunal even found it legitimate to extend the jurisdictional provision on foreign control from one BIT to investors acting under another BIT on the ground that both held shares in the same companies.[1226] Different procedural rules were neither an obstacle for another tribunal to accept jurisdiction under respective BITs.[1227] This seems to demonstrate an extremely low standard of compatibility, given that arbitration of disputes under different procedural rules is normally unfeasible in international arbitration.[1228]

691. Furthermore, even if a tribunal is convinced that compatibility exists, different procedural rules may cause procedural difficulties and disagreements between the parties, despite the initial consent of all parties that their arbitration will be governed by different rules.[1229]

692. Importantly, arbitration under multiple BITs is only possible if claimants are connected. Thus, if the same state measure affected unrelated investors of different nationalities with separate investments, the tribunal or administering institution will not allow the claims to proceed in one arbitration as it would violate consent of the respondent under each treaty. For this reason, both ICSID and non-ICSID tribunals upheld the respondent's respective jurisdictional objections.[1230]

Mandatory consolidation under NAFTA

693. Consolidation under NAFTA is ordered in the form of a procedural ruling as set forth in the rules and – contrary to *de facto* consolidation – does not require parties' consent and, hence, can be ordered despite a party's objection. Another distinction from *de facto*

[1225] See paras 188 *et seq*., 365 *et seq*. *supra*.

[1226] See paras 172 *et seq*., 366, 367 *et seq*. *supra*.

[1227] See paras 196 *et seq*., 374, 375 *supra*.

[1228] See paras 376 *et seq*. *supra*.

[1229] See paras 100, 106, 189 *et seq*., 340, 341 *supra*.

[1230] See paras 181 *et seq*., 369 *et seq*. *supra*.

consolidation is that NAFTA consolidation can be ordered also in relation to the already pending proceedings with separate tribunals (*stricto sensu* consolidation).

694. Although this mechanism deviates from the traditional jurisdictional approach to the joinder of claims, it does not raise any issues as it is directly stipulated in the applicable procedural rules. Hence, at least an implied general consent exists and, supposedly, the parties' intent was to decide their disputes in a consolidated proceeding.

695. However, the NAFTA consolidation tribunals did address the claimants' arguments against consolidation as requested by the respondent and – to a certain extent – consent as a matter of party autonomy. Thus, by relying on the rule of party autonomy, for one tribunal (*Corn Products*), the claimants' concerns regarding the risk of disclosing confidential information amongst the co-claimants was a sufficient ground to reject the respondent's consolidation request.[1231]

696. The problem with this approach is that it conflicts with the consolidation provision not only on the textual level, since the only prerequisites for consolidation are *factual and legal commonality* together with *efficiency and fairness* of dispute resolution accomplished through consolidation.

697. In addition, in applying these prerequisites, the alleged risks for the claimants had priority over the state's risks, which is at odds with the policy dimension of NAFTA consolidation. Its primary purpose is to protect the member states from the risk of having to defend themselves repeatedly against separate multiple claims for the same state conduct.[1232] Indeed, claimants may insist on a separate resolution of related disputes for tactical or other subjective reasons that do not cater for efficiency of the entire arbitration process.[1233]

698. Fairness and efficiency must be determined through the prism of this purpose, as another consolidation tribunal in *Canfor* confirmed and criticized the ruling of the previous tribunal. Although the tribunal did address the identical objections of the claimants

[1231] See paras 246 *et seq*., 433 *et seq*. *supra*.

[1232] See paras 240, 241, 410, 418, 426 *et seq*. *supra*.

[1233] See paras 481 *et seq*. *supra*.

regarding confidentiality, considerations of *efficiency* and *fairness* to the respondent prevailed.[1234]

699. The priority of procedural economy also affected the interpretation of the other prerequisites for consolidation – *legal and factual commonality*. Only one common disputed legal issue and the same state measure in the parallel proceedings as the cause of action are sufficient to satisfy this condition.[1235]

700. These contradictory rulings indicate that, although the rules on consolidation allow for consolidation without parties' consent, parties still cannot count on a definite solution in case they encounter parallel proceedings.

701. Yet, the *Canfor* approach is more in line with the NAFTA legal framework also because NAFTA – contrary to investment treaties – carries a certain regulatory function which justifies the prevalence of efficiency over party autonomy and tendency towards protecting the respondent's interests.[1236]

702. However, although a minor weight of the party autonomy in NAFTA consolidation can be rationalized by the interests of procedural economy, it must be noted that efficiency of consolidation is not absolute:

703. One of the advantages of consolidation is that it is a tool for promoting coherency in the application of treaty provisions. However, the lack of coherency does not necessarily undermine the integrity of treaty arbitration since different outcomes of parallel arbitrations can be explained by different factual circumstances.[1237]

704. Given that consolidation *stricto sensu* – contrary to *de facto* consolidation – is applied to already pending proceedings, the concurrent arbitrations can be at different procedural stages. Such desynchronisation means that, in case of consolidation, the claimants in a more advanced arbitration would have to repeatedly invest their resources in the same procedural stages, which is obviously counter-productive for efficiency.[1238]

[1234] See paras 238 *et seq*., 476 *et seq*. *supra*.

[1235] See paras 232 *et seq*., 467 *et seq*. *supra*.

[1236] See paras 426 *et seq*. *supra*.

[1237] See paras 500-503 *supra.*

[1238] See paras 258, 262, 469-471 *supra.*

705. In addition to efficiency, *mandatory* consolidation may also undermine party autonomy, and must be mentioned amongst its deficiencies as well since, as the NAFTA practice illustrates, it may also play a deciding role in the decision-making on consolidation:

706. The institutional appointment of the tribunal deciding on consolidation under NAFTA deprives parties from the right to appoint arbitrators, thus undermining the due process standards of arbitration. However, due process will also be compromised in case of party appointment given that each of the multiple claimants – in contrast with the respondent – will not be able to make an independent nomination and so the parties will not be treated with equality.[1239]

707. In case the same arbitrator who was involved in one of the concurrent arbitrations will be appointed also in the consolidated proceeding, impartiality can be compromised given the knowledge obtained by that arbitrator earlier in the separate arbitration.[1240]

708. In general, it should be stressed that the NAFTA consolidation provision is unique for permitting consolidation as a matter of procedural discretion of the tribunal without the agreement of the parties. Therefore, it cannot be invoked by analogy or otherwise in deciding on the joint resolution of investment claims under other treaties. Taking inspiration from the rules of consolidation (albeit as a generic term without reference to any specific rules) by analogy in one of the multiparty cases *ab initio* at ICSID is questionable given that consolidation was not even mentioned in the relevant instruments of consent.[1241]

709. Likewise, consolidation of the proceedings under NAFTA with related proceedings under BIT without an identical provision cannot be authorised *via* mandatory consolidation in the absence of the parties' consent.

Mass claims in investment arbitration

710. *Abaclat* as the first mass claims arbitration at ICSID was an attempt to approach multiparty element as a matter of admissibility instead of jurisdiction, which justified

[1239] See paras 513-516 *supra.*

[1240] See para. 514 *supra.*

[1241] See paras 51 *et seq.*, 397 *et seq. supra*.

adopting procedural adaptations necessary for administering mass claims. The Majority allowed the de-individualized group treatment of the claimants and their indirect participation the proceedings through a representative. According to the Majority, it was the only method of providing access to justice for claimants with small claims, which is only affordable for them in the form of mass arbitration.[1242]

711. For the Majority, the criterion for deciding whether consent under the treaty covers mass claims was if ICSID arbitration can 'be conducted in the form of 'mass proceeding' which is a matter of *admissibility.* Admissibility of mass claims was established, since the procedural adaptations necessary for conducting a mass arbitration (indirect participation and group treatment of the claimants) could be implemented by the tribunal within its procedural discretion.[1243]

712. Consequently, the respective adaptations must not be included in the ICSID Convention (which could be seen as an implied general consent) for mass claims to be allowed by the tribunal. Secondary (specific) consent of the respondent after outbreak of the dispute is also not a prerequisite for the tribunal's jurisdiction. Rather, it is implicit in the ICSID Convention that the tribunal has the power to adopt procedural measures necessary for managing mass claims. In other words, by consenting to the ICSID arbitration through the BIT, the state also gives an implied consent to the respective procedural adaptations and to mass arbitration in general.[1244]

713. The Majority also applied a 'loser' standard of connectivity between the claimants ('homogeneity') compared to the test applied within the jurisdictional approach: The investors in *Abaclat* were unrelated through a common investment so that the same state measure was the only element of connectivity.[1245]

714. However – contrary to the NAFTA consolidation – the deviation from the jurisdictional approach was not foreseen under applicable arbitration rules. This substantial distinction indicates that the tribunal does not have the power to invoke procedural discretion for addressing an objection to jurisdiction over mass claims:

[1242] See paras 284 *et seq*., 544 *et seq*. *supra*.

[1243] See paras 58, 279, 280, 289 *et seq*. *supra*.

[1244] See paras 289, 591 *et seq*. *supra*.

[1245] See paras 286 *et seq*., 562 *et seq*. *supra*.

715. First, as the comparison with the other types of collective arbitration demonstrated, group treatment of claims represents such an extraordinary departure from the due process standard in international arbitration, that it can only be conducted under specialized rules. If an arbitration agreement contains reference to such rules, it can be interpreted as an *implied consent* to mass proceedings, so that the respondent's secondary consent is not required. Furthermore, the very existence of such rules, as long as they are viewed as a part of an arbitration agreement, speaks in favour of the jurisdictional approach.[1246]

716. Second, the existing specialized rules stipulate a number of procedural guarantees mitigating the due process restrictions for all parties, which is another indication that such restrictions cannot be implemented within procedural discretion.[1247]

717. Third, a policy consideration of providing remedy against treaty violations for investors with small claims, arguably, does not raise issues as long as it is applied for loosening the requirement of connectivity.[1248] However, insofar as it is invoked as the fundamental justification for stretching the scope of the respondent's consent to mass claims, it is yet another problematic aspect of dealing with consent to mass claims. This policy consideration is the reason for *designing* respective specialized rules but not a method of determining the scope of an arbitration agreement after the dispute has arisen.[1249]

718. Furthermore, focusing on the small amount of investments as a rationale for the procedural restrictions may be in conflict with the *Salini* test, which is applied by many ICSID tribunals and stipulates that a contribution must be *substantial* to meet the test of *ratione personae*.[1250] If tribunals may invoke the 'access to justice' argument as a matter of procedural discretion, states may react by limiting the scope of protection under BITs to substantial contributions so that access to justice would be jeopardised the most as the result.[1251]

719. Fourth, the innovative representation mechanism which is subject to the waiver of the claimants' procedural right to participation in the proceeding cannot be factored in the

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[1246] See paras 597 *et seq*. *supra*.

[1247] See paras 641 *et seq*. *supra*.

[1248] See paras 547, 554, 556, 594, 596 *supra*.

[1249] See paras 596, 597, 601, 602, 606 *supra*.

[1250] See paras 557, 558 *supra*.

[1251] See para. 560, 561 *supra*.

reasoning on the scope of consent. Should this be accepted as a valid mechanism for the group treatment of claimants, it will allow escaping the task of establishing jurisdiction *ratione personae* over *each* claimant as a precondition for the ICSID jurisdiction. This would change the scope of the respondent's consent, which encompasses the ICSID jurisdictional requirements. Contrary to commercial arbitration, the scope of the arbitration agreement in treaty arbitration is defined only by *the respondent's offer of consent* made in the BIT. Investors can only accept this offer as it is by initiating arbitration but not amend its scope by introducing a new representation mechanism.[1252]

720. Fifth, attributing mass aspect to admissibility instead of jurisdiction is also problematic from the perspective of how the concepts of jurisdiction and admissibility are distinguished in investment arbitration and international law in general. Given that jurisdiction is a pillar of the tribunal's competence to decide on admissibility, ruling on admissibility before establishing jurisdiction[1253] may expose an award to the risk of annulment for excess of powers by the tribunal.

721. In general, the above analysis demonstrates that, in the absence of the provision permitting mass claims in the ICSID legal framework or in the applicable BIT, arbitration of mass claims at ICSID falls outside the scope of consent to arbitration. Introducing a mass claims mechanism into the ICSID Convention does not have realistic prospects of acceptance as it is unlikely that all member states will approve the respective amendments.[1254] For this reason, soft law instruments (such as, model rules and recommendations on the administration of mass claims) are more feasible alternatives from the practical perspective.[1255]

[1252] See paras 650, 651 *supra*.

[1253] See paras 326, 586-588, 326 *supra*.

[1254] See paras 335, 654, *supra*.

[1255] See paras 655 *supra*.

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